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6

WEEKLY NOTES OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

VOLUME XIV.

DECEMBER, 1883, TO AUGUST, 1884.

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Supreme Court (*Middle District*).

Messrs. Fred. M. Ott, Paul Charlton, and Percival C. Kauffman (Harrisburg).

Supreme Court (*Western District*).

Messrs. Thomas W. Bakewell, William R. Blair, David Q. Ewing, George P. Hamilton, George R. Lawrence, John D. McKennan, J. T. Myler, William S. Pier, W. R. Sewell, and J. M. Swearingen.

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N. B. Admiralty Cases revised by Mr. Morton P. Henry.

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ERRATA.

QUICK *v.* MILLER, p. 1. Col. ii., line 26, for "apply," read "repeal."

SCHOTT *v.* HARVEY, p. 263. For "Error to the Common Pleas No. 4," etc., read "Error to the Common Pleas No. 2," etc.

JONES'S APPEAL, p. 313. In third clause of syllabus, for "share of her land," read "share of her dower."

WINTON *v.* FREEMAN, p. 325. Col. ii., line 7 from bottom of page, for "as agreed," read "or agreed."

LANCE *v.* BONNELL, p. 385. In third paragraph of syllabus, strike out the words "for the motion."

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, DEC. 13, 1883.* [NO. 1.

Supreme Court.

Jan. '83, 80. March 16, 1883.

Quick v. Miller.

Pleadings—Omission in, cured by verdict—Married women—Husband's liability for torts of wife—Construction of Act of April 11, 1848—Practice—Recognizance in error—Construction of Act of June 8, 1881.

Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by the common law.

After verdict it will be presumed everything was done at the trial which was necessary to support the action, unless the contrary appears on the record.

Weinberger *v.* Shelly, 6 W. & S. 336, followed.

In an action against husband and wife for slander uttered by the wife, the narr. omitted to aver the absence of the husband at the time the words were uttered. Defendant pleaded justification, and a verdict was had for plaintiff. Judgment being arrested as to the husband by the Court below:

Held, that the verdict cured the omission.

By the Act of April 11, 1848 (P. L. 536), no exemption is given the husband from liability for his wife's torts other than that if a judgment is obtained against him for such torts, execution shall first be had against her property.

Under the Act of June 8, 1881 (P. L. 80), the recognizance in error should be sufficient merely to secure payment of all the costs that may be legally taxed against the party who obtains the writ.

Error to the Common Pleas of Susquehanna County.

Case, by Temperance Quick against Lewis B. Miller and Susan Miller, his wife, for slanderous words spoken by the wife.

The declaration complained "of Susan Miller and L. B. Miller, her husband, the defendant in this suit," and contained three counts, the first averring that "the defendant," and the second and third that the "said Susan Miller, of malice against plaintiff, spoke and uttered with a loud voice in the presence and hearing of divers other people, certain false, scandalous, and defamatory words" (citing the words), etc.

Defendants pleaded not guilty with leave to justify.

A verdict was rendered for plaintiff in the sum of $1000. Whereupon the Court on motion of defendants' counsel arrested the judgment as to Lewis B. Miller, the husband, HAND, J., saying in an opinion filed, *inter alia*, as follows:—

"As this declaration stands the averments are conflicting. It avers utterance by both defendants, if we amend from the singular number to the plural, and by Susan Miller. If uttered by her, it is left in doubt as to whether they were uttered in the presence or absence of the husband. A natural conclusion would be that they were uttered in his presence. The rule requires in dubious pleading, *that* construction which is the more unfavorable to the party pleading. . . . We cannot believe that when the Legislature as an act of justice deprived the husband of the right to the wife's property, they intended to imprison him on a civil action for the wife's slander. . . . . We must hold that in tort for slander by the wife in the absence of the husband he is not liable, or we must enforce this judgment by arresting and imprisoning the husband, or must apply the law allowing a *capias*, or if bound to enforce that act, hold that it is essential that no ambiguity be allowed in the declaration and the averment must be clearly made that the tort was committed by the wife in the absence of the husband; we choose the latter. The husband for his own reputation would have the right to know and have it known from the record why he was under arrest. It would be an anomaly in the jurisprudence of Pennsylvania, if in the effort to vindicate the reputation of one citizen we utterly destroy the good name of another innocent of any crime or fault, by incarcerating him behind prison walls with no sign upon the record indicating how he was deprived of his liberty. In this case pleadings rise above mere technicality into the domain of justice and honor. The husband has done no wrong. There is great force in the language used by the Supreme Court of New Hampshire in Hams and Wife *v.* Webster and Wife, recently decided. 'So practically has the ancient unity become dissevered and dissolved, that the wife may not only have her separate property, contracts, credits, debts, wages, and causes of separate action growing out of a violation of her personal rights, but she may enter into legal contract with her husband and enforce it by suit against him. And since the wife's property is no longer her husband's nor her earnings his by mere force of law, and since he has no more legal power of physical control over her than she has over him, no more reason seems to remain for holding him liable for her torts than for holding her liable for his, and there remains "not a reason nor the semblance of a

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reason, growing out of the condition and wants of society, the progress of civilization, the exigencies of trade, or the analogies of the law," why the rules and forms adapted to a condition which has ceased to exist, and inapplicable to the conditions which have succeeded should be longer retained, *cessante ratione legis cessat ipsa lex.*'

"But if the husband must be joined and held to liability the reasons are trumpet-tongued why he should be so joined on the record as to show his liability is not of his own fault.

"We now hold that since the Act of 1848, in case of slander by the wife in the absence of the husband, the pleadings must conform strictly to the new law, and aver all that is required to be proved. Only so can we protect the rights of the husband against the rigor of the law. And why not? It is the province of the Court to conform pleadings to law, and see that they maintain justice and preserve personal rights.

"For authority in thus holding on a motion in arrest of judgment we refer to Chitty's Pleading, vol. i. star page 105."

The plaintiff thereupon took this writ, assigning for error the action of the Court in arresting the judgment as regards Lewis B. Miller, and entered recognizance in $100, being more than double the amount of costs for which plaintiff could be taxed in the event of the affirmance of the decree of the Court below.

Thereupon counsel for defendant in error moved to quash the writ of error on the ground that the recognizance was not in double the total costs accrued as required by the Act of June 8, 1881, P. L. 80.

E. L. Blakeslee and *Davies*, for plaintiff in error.

The husband is liable for the torts of his wife.

Keen *v.* Hartman, 12 Wr. 497.

A defect in the declaration amendable in the Court below is cured by the verdict.

Kelsey *v.* Nat. Bank, 19 Sm. 426.

W. H. Jessup (*H. C. Jessup* and *McCollum & Wattson* with him), for defendant in error.

The writ should be quashed because the total costs accrued in the cause are far in excess of the aomunt of the recognizance.

Act June 8, 1881, P. L. p. 80.

The intention of the Legislature was to discourage the removal of causes except upon penalty of paying upon affirmance all the costs that have accrued.

Before the Act of 1848, an action would lie against husband and wife for slanderous words spoken by the wife because by the marriage he acquired an absolute interest in her personal estate, and control over her person even to the extent of corporal punishment.

Hawk *v.* Harman, 5 Bin. 43.
Martin *v.* Robson, 65 Ill. 129.

But by that Act his rights in his wife's property and over her person were taken away, and with them every reason for his liability for her debts or misbehavior.

The omission of an averment in the declaration of the absence of the husband when his wife uttered the words is such a defect in substance as is incurable.

Say, 282.
Arch. Pl. 166.

April 16, 1883. THE COURT. The plaintiff in the declaration "complains of Susan Miller and L. B. Miller her husband, the defendant in this suit," for that the said Susan Miller did speak, utter, and publish certain false, scandalous, and defamatory words of, and concerning the plaintiff. Each count avers that the defamatory words therein set forth were spoken and published by the said Susan Miller, but does not allege that said words were uttered without the direction and not in the presence of her husband, said L. B. Miller. The defendants pleaded "not guilty with leave to justify." A verdict was rendered for the plaintiff, and judgment arrested as to L. B. Miller for the reasons: 1st. That the declaration fails to show that the words were spoken by Susan Miller in her husband's absence and without his direction; and 2d. That the declaration shows no cause of action against L. B. Miller.

1. The action was against husband and wife for a tort; if the tort of the wife, her husband was a necessary party; if the tort of the husband, his wife was improperly joined; and if she did the act in her husband's presence, *prima facie*, he was alone liable. In all the counts it is averred that the defendant, said Susan Miller, did the wrong complained of; her husband is joined in the suit, but is not charged with having committed the injury. It was necessary to prove that the wife uttered the words in the absence of her husband, so far as appears in this case. Had they been uttered in his presence and against his will and power of restraint, the case would be different. Conceding that the fact of the husband's absence when his wife uttered the words ought to have been averred in the narr. the omission is cured by the verdict. (Weinberger *v.* Shelly, 6 W. & S. 336.) There the action was for malicious prosecution, and the declaration contained no averment that the prosecution was commenced without probable cause. This Court approved the rule that "where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the fact so defectively or imperfectly stated or omitted, and without which

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it is not to be presumed that either the Judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by the common law." And "after verdict it will be presumed everything was done at the trial which was necessary to support the action, unless the contrary appears on the record." In an action for malicious prosecution, it is quite as essential to aver and prove want of probable cause for the prosecution, as in an action for slander by words spoken by the wife, to aver and prove absence of her husband. Then it must be taken as settled, that after a trial upon the merits, such an omission, whether in substance or form, will not defeat the verdict. The justice of the rule is illustrated by this case, which had already been tried twice before a jury, and the omission could not have misled or prejudiced the defendants. To the declaration they pleaded in effect that Susan Miller did not utter the words as charged, but should it be proved that she did, they would establish the truth of said words. And now L. B. Miller, in his history of the case, insists the verdict was wrong because the jury did not find, from the evidence given in justification, that the words expressed the truth. Here, the point for consideration arises upon the record, not upon the conflict of testimony or credibility of testimony.

2. The defendant in error claims that by operation of the statute relative to the rights of married women, a husband is no longer liable for the torts of his wife. With this view the learned Judge of the Common Pleas was so impressed as to "hold that since the Act of 1848, in case of slander by the wife in the absence of the husband, the pleadings must conform strictly to the new law and aver all that is required to be proved. Only so can we protect the rights of the husband against the rigor of the law."

In the argument, the defendant cited the decisions under the statutes in some other States, showing that the operation of said statutes was to give a married woman the power of control and disposition of her property, to make contracts, to sue and be sued, as if a *feme sole*, and to discharge the husband from liability for the torts of the wife during coverture, which he neither aided, advised, nor countenanced. An examination of the references, for instance, Martin *v.* Robson (65 Ill. 129) reveals that those statutes have a broader sweep than any which are in force in Pennsylvania.

The purpose of the Act of April 11, 1848, separate use as a *feme covert*. (Bear *v.* Bear, 33 Pa. St. 525; Pettit *v.* Fretz, Id. 118.) There has been no general removal of her disabilities as imposed by the common law, all remain except certain cases specified in the statutes. She has no power to contract debts, except in few instances. She may contract a debt for necessaries for the support of her family, but in such case execution upon the judgment recovered shall first issue against the husband alone, and if no property belonging to him can be found, then an execution may be issued and levied upon the separate property of the wife. The earnings of married women in all cases are the property of their husbands, except where a petition by a married woman has been presented to the Court and recorded, as provided by the Act of April 3, 1872. And the husband is not relieved from any duties or liabilities, except the provision that he shall not be liable for the debts of his wife contracted before marriage, and that if a judgment be obtained against him for the torts of his wife, execution shall first be had against her property.

Throughout the statute, whatever things are taken out of the operation of the general principles of the common law relative to the respective rights, disabilities, and liabilities of husband and wife, are sharply defined. Its purposes, limits, and specifications plainly show that no exemption is given the husband from liability for his wife's torts, other than is expressly named. By no pertinent rule of interpretation can the statute be held to abrogate the common law relative to the marriage relation. It makes some material and important changes or exceptions, and subject only to these, the law remains as before. Nothing can be found that requires any change in the pleadings where a husband and wife are sued for the wife's tort, or that calls for greater strictness in averments, or that overrules the doctrine in Weinberger *v.* Shelly (6 W. & S. 336). Were it necessary for preservation of the fruits of the trial and verdict, the rulings with reference to the pleadings should be pervaded with like spirit as the statutes providing for amendments.

It is unnecessary to remark the singular result that a judgment upon the verdict was permitted against the wife alone, in a case where had she been sued alone, she could have defeated the action by a plea of coverture.

The defendant moved to quash the writ of error because the plaintiff did not enter into recognizance in double the amount of costs that

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all costs that have accrued in the cause." That it is sufficient to secure payment of all the costs that can be legally taxed against the plaintiff, in case of affirmance, is not gainsaid. The action is against husband and wife, verdict against both, and judgment arrested as to the husband. Feeling aggrieved by the order in arrest of judgment, the plaintiff sued out this writ. In case of either affirmance or reversal she will only be liable for the costs accrued after suing out the writ, for she was liable for no costs as the judgment stood in the Court below.

The Act in its intendment requires a recognizance conditioned for payment of all costs which have accrued which the plaintiff in error is bound to pay, as the record stands which he proposes to remove. Should he fail to prosecute his writ with effect, the judgment will remain just as before the writ was taken, and he will be liable for no more costs than before, save what accrued on the writ. The defendant claims that "the intention of the Legislature was to discourage the removal of causes, except upon the penalty of paying upon affirmance of all costs that have accrued;" that is, if this case should be affirmed, the plaintiff shall pay the costs which had accrued, amounting to $1726.19, as the penalty for removing her cause. If this be so, every party who obtains a judgment that carries costs in his favor, although he believes it is for a small fraction of what is justly his due, to obtain a review in the Appellate Court, must obligate himself for payment of all costs in the cause, accrued and to accrue, in the event of affirmance of the judgment. This, indeed, would discourage removals by parties who had been erroneously deprived of only a portion of their rights, but not by those who had been wholly deprived. A party already liable for the accrued costs would incur no risk of a penalty by taking a writ of error. We discover nothing in the statute indicative of an intent to require security for any costs other than such as are and may be legally taxable against the party who obtains the writ.

The order for arrest of judgment as to L. B. Miller, one of the defendants, is reversed.

Opinion by TRUNKEY, J. CLARK, J., absent.

J. P. K.

Jan. '83, 270. March 28, 1883.

Sutton v. Anderson.

Malicious prosecution—Larceny—Burden of

Where the plaintiff's own testimony shows clearly that there was a probable cause for the prosecution the Court should so instruct the jury.

A. was a porter in B.'s store, and was discharged, whereupon he went to certain customers of B. and showed them samples of goods taken from B.'s store without his knowledge, and accused B. of cheating by substitution, etc. B., hearing of this, had A. arrested on the charge of larceny of the samples. A. was subsequently released on condition that he would not interfere with B.'s business in the future, and afterwards brought suit against B. for malicious prosecution:

Held, that there was probable cause for A.'s arrest, and that therefore defendant was entitled to judgment.

Error to Common Pleas No. 2, of Philadelphia County.

Case, by Robert Anderson against Frederick Sutton, to recover damages resulting to plaintiff for an alleged malicious prosecution by defendant.

On the trial, before FELL, J., it appeared that Anderson was a porter in the employ of Fred'k Sutton & Co. His duty was exclusively the performance of manual labor. On June 14, 1881, he delivered a bag of coffee to a customer of the concern, and at the same time used abusive language concerning his employers. Upon the firm hearing of this, he was discharged by Mr. Sutton. He then went to a number of the firm's customers, taking with him samples of goods which he had obtained from Sutton & Co.'s warehouse without their knowledge, and accused them of cheating by mixing and substitution; exhibiting the samples as evidence of the truth of his charge. Mr. Sutton having heard of this, went to him, charged him with stealing the samples, and requested the return of the property. Anderson at first denied, but afterwards admitted having them, and gave them up. Sutton then ordered Anderson's arrest on the charge of larceny, and made affidavit accordingly. On the next day Anderson was discharged without a further hearing, on condition that he would not interfere again with Sutton & Co.'s trade.

Defendant requested the Court to instruct the jury; "Under all the evidence if believed by you, there was probable cause for the arrest of Mr. Anderson; your verdict must therefore be for the defendant." *Refused.*

The Court charged, *inter alia*, as follows: "He, Anderson, had been using them (the samples) for a purpose highly improper, though not a criminal one, in injury to Mr. Sutton's trade." (Second assignment of error.) "Now it is for you to find in this conflicting testimony just what the truth is; and then you must decide this case in the light of the facts which surrounded

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time, that in addition to his duties as porter in the store he took samples and sold goods at night . . . . . A fair inference from it is, that they were taken without any intent to appropriate them to his own use; and that there was no probable cause for his arrest based on that state of facts." (Fourth assignment of error.) "Mr. Sutton's testimony puts the matter in a very different light." (Fifth assignment of error.) "The testimony of Mr. Miller agrees partly with each of the witnesses to whom I have referred. He says there was a denial by Anderson of his possession of the samples when first asked about them, while he is silent as to the statement made as to his purpose in having these samples in his possession." (Sixth assignment of error.)

Verdict and judgment for the plaintiff. Defendant thereupon took this writ, assigning for error the answer to the above point and the parts of the charge above set out.

John Walker Shortlidge, for the plaintiff in error.

E. Cooper Shapley, for the defendant in error.

April 16, 1883. The COURT. A careful examination of the plaintiff's testimony has convinced us that he made out a clear case of probable cause for the prosecution against himself, and therefore that the defendant's point should have been affirmed, and a verdict directed for the defendant.

The plaintiff himself testified that he was employed by Sutton & Co. at six dollars per week, that he was a porter, and that he did nothing but manual labor. He said he had never sold a dollar's worth of goods for Sutton & Co. while he was with them, that he once had samples which Sutton had given him on his own request, stating that he would try and sell some to a friend. These samples were put up by Sutton, who delivered them personally to the plaintiff and marked the prices on them. He further testified that immediately after he was discharged he went to Richardson, who was a customer of Sutton & Co.'s, that he had samples in his pocket which he showed to Richardson, and told him that Sutton & Co. delivered inferior goods to those they sold, and that he meant that Sutton & Co. were swindling and cheating their customers. He admits that he had taken the samples from Sutton & Co.'s store, from a lot of coffee that had just come in, that Sutton did not tell him to take the samples, and that no person saw him take them. He further says, that Sutton did not know that he (Anderson) had the samples, and that he did not tell him to show them to Richardson, or use them in any way. He says also that he wrapped the samples in paper when he took them, put them in his pocket, kept them there until he returned them to Sutton on the evening of the day he was discharged, and that it was for stealing these particular samples that he was arrested. He also testifies, that when he returned in the afternoon to Sutton & Co.'s store for a pair of shoes, Sutton asked him where he got the samples of coffee from, and he replied he got them up stairs, and thereupon Sutton charged him with theft, and sent for an officer. Charles Miller, a witness produced and examined by the plaintiff, said he was present in the afternoon when Anderson returned to the store, and heard the conversation between him and Sutton, and repeated it as follows: "Mr. Sutton said, 'What have you been doing to-day? What did you go to Richardson's for? Where are those samples you showed him, and where are those samples that you stole from up stairs?' Anderson first said: 'I have no samples.' Mr. Sutton then said, 'yes, you have, Richardson was here and told me all about it.' Then Anderson said, 'yes, I have the samples.' Mr Sutton then demanded the samples, and received them from Anderson."

It is not easy to conceive how a stronger case of probable cause than this could be made out. The person who took the missing goods from the owner admits that he took them without the knowledge, authority, or consent of the owner, that he took them secretly, that he used them for a purpose of revenge, that he kept them until he was charged with their theft, and his witness proves, that when asked for them he denied having them, but subsequently admitted having them, and delivered them to the owner. All the elements essential to prove larceny are present in this testimony, the unlawful taking by one, of the property of another, without the knowledge or consent of the latter, and the conversion of the property taken to the use of the taker. To make the matter worse, the taker admits that he used the property for his own private and personal purpose of revenge against the owner.

The facts as proven by the plaintiff and his witness, are far stronger than were the facts in the case of Bernar *v.* Dunlap (13 Norris, 329), in which we sustained a compulsory nonsuit. There the prosecutor was simply informed by the word of a third person, that he had seen the prosecutor's gauntlets in possession of the plaintiff; while here the plaintiff himself not only admits that he took the goods, and took them secretly, but produced them from his pocket, and delivered them to the prosecutor on demand of the latter, who immediately charged him with theft, and sent for an officer to arrest him.

Miller, the plaintiff's witness, testified, that Sutton charged the plaintiff with theft in the first instance, and that Anderson at first denied having them, but after being told that Richardson

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had told Sutton all about it, admitted that he had them, and delivered them to Sutton. Anderson's allegation, on the witness stand, that he took the samples the day before he was discharged, does not help his case in the least, as he does not say that he told that to Sutton, and he does not pretend that he had a general authority to take samples for any purpose. His statement that he took the samples to sell goods by, is emphatically disproved by his own testimony, that he used them with a customer of the house for the very purpose of preventing sales. It is not at all necessary to recur to Sutton's testimony to make out a case of probable cause. The burden of proving want of probable cause, rested upon Anderson, and he must also prove malice. (Kirkpatrick *v.* Kirkpatrick, 3 Wright, 288; Dietz *v.* Langfitt, 13 P. F. Smith, 234; Bernar *v.* Dunlap, 13 Norris, 329.)

The burden of proving probable cause was not shifted to the defendant in this case, because the plaintiff established it by his own testimony, and when this is the case it is the clear duty of the Court so to instruct the jury. This we held in both the cases of Dietz *v.* Langfitt and Bernar *v.* Dunlap (*supra*).

We think the learned Judge was in error in the matter covered by the fourth assignment. It is certain Anderson did not testify that he had a right to the possession of the samples, or that in addition to his duties as porter he took samples and sold goods at night. The statement of the learned Judge to that effect would tend to mislead the jury, and was hence erroneous. Nor do we think there was any conflicting testimony as to any material facts of the case. Upon the testimony of the plaintiff and his witness, it is quite clear to us that probable cause for the prosecution was fully established.

The abandonment of the prosecution was entirely explained by Vanzant, who said that Anderson promised he would go about his business, and never mention the name of Sutton again for reference or for any other purpose, if he, the witness, would induce Sutton not to carry on the prosecution, and that he did induce Sutton to take this course.

The assignments of error are all sustained except the second and sixth.

Judgment reversed.

Opinion by GREEN, J. STERRETT, J., absent.

T. R.

July, '82, 228. May 8, 1883.

Taylor v. Hanlon.

Trover and conversion—When not maintainable — Demand without refusal — Practice — Amendment—Change of form of action—Act of May 10, 1871.

By virtue of the provisions of the Act of May 10, 1871 (P. L. 265), a Court is justified on the trial of a cause in allowing an amendment in the form of the action.

Owing to the condition of the record in this case the Court was unable to say whether or not the Court below erred in changing the form of action from trespass to trover.

In order to support an action of trover, the plaintiff must prove not only a demand on his part of the article in question, but also a refusal on the part of the defendant to render the same to him.

In an action of trover for a horse, plaintiff cannot recover for unskilful medical treatment of the animal by the defendant.

Error to the Common Pleas of McKean County.

This was originally a proceeding before a justice of the peace by Karon Hanlon against Williard R. Taylor, to recover the value of a horse. The justice entered judgment in favor of the plaintiff, whereupon defendant appealed. No narr. was filed, the transcript of the justice's docket being treated as a narr. Plea, not guilty.

On the trial, before WILSON, A. L. J., it appeared that on August 3, 1880, the defendant engaged for the sum of fifteen dollars to cure the plaintiff's horse of ringbones and spavins, and return it within four days. The defendant, accordingly, took the horse away with him. On the third day he came back to the plaintiff, saying that the horse was not fit to take; that he had better keep her for two or three days more, and that he would bring her back on Saturday. This he failed to do. After the defendant had had the horse about three weeks, the plaintiff went to see her, and found that she was not in condition to remove from the barn, that both her hind legs were rotten below the gambrel joints and into the hoof. The plaintiff then told the defendant that he wanted him to pay for the horse, and demanded the sum of $85 for her. The defendant laughed at that, and offered $40, which the plaintiff declined to take. Upon the plaintiff's demand of the horse the defendant said she was not fit to be taken out. A week or ten days after the plaintiff again saw the horse, but found it in worse condition than before. He never got it back, and shortly after it was burned in defendant's barn.

Plaintiff then moved to amend and change the form of action from trespass to trover. Objected to. Objection overruled. Exception. (First assignment of error.)

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Plaintiff was asked the following question:—

"State, Mr. Hanlon, just what the value of the horse was."

Objected to, because there was no action pending for the value of the horse. Objection overruled. Exception. (Second assignment of error.)

The witness then answered—eighty-five dollars. He further testified that he never got the horse; that he did not demand the horse, but went there to take her away, but she was in no shape to be taken away. On his cross-examination he testified that he went there and looked at the horse, and got some parties to look too, and it made them sick at the stomach; and further, that he would not take her on account of her condition, but asked for payment.

The plaintiff then called two witnesses to testify as to the value of the horse. Objected to. Objection overruled. Exception. (Third assignment of error.) The plaintiff then rested.

The defendant offered no evidence, but asked for a compulsory nonsuit upon the ground that the testimony of the plaintiff showed that the defendant received the horse under a contract with the plaintiff; that the plaintiff subsequently called on the defendant, and seeing the condition of the horse, said it was no use to him, and demanded the price of the horse, and, upon the defendant's refusal to pay the price demanded, went off and left the horse in the possession of the defendant without endeavoring to take it. Motion overruled. Exception. (Fourth assignment of error.) The defendant then asked the Court to charge the jury that under the evidence and pleadings in this case the plaintiff could not recover the value of the horse. Refused. (Fifth assignment of error.)

The Court, in the general charge to the jury, said, *inter alia*, as follows: "And the Court now direct the stenographer to read the evidence of Mr. Hanlon to the jury. The important thing for you to determine from this evidence is whether Mr. Hanlon demanded the possession of this horse after that four days, and whether this possession was refused to be given by defendant. If Mr. Hanlon demanded possession after the four days and he refused to give it up, the plaintiff is entitled to recover for this horse."

Verdict for the plaintiff and judgment thereon. The defendant thereupon took this writ, assigning for error the action of the Court in allowing the amendment changing the form of the action, the admission of the evidence excepted to, and the charge of the Court as above.

N. B. Smiley and *Thomas A. Morrison*, for plaintiff in error.

If we assume, from the plaintiff's evidence, unskilful and improper treatment was the cause of the injury to the horse, then *case* was the remedy, and not trespass. But there is no evidence in the case that the defendant injured the horse in any way, but the injury presumably resulted from the disease. It is certainly not *proved* that the defendant injured the horse. Having discovered that his evidence would not sustain trespass, plaintiff moved the Court to change the action to trover. It is submitted that the amendment could not avail him, because his own evidence showed that he had no *cause* of action of which a justice of the peace had jurisdiction.

In appeals from courts of justice the *form* of action may be amended in the Common Pleas, but the *cause* of action must remain the same.

Gue *v.* Kline, 1 Harris, 64.
Lyon *v.* Chalker, 2 Watts, 14.

The amendment Act of May 10. 1871, only applies to the *form* of the action. As the justice of the peace had no jurisdiction of the cause of action, the Common Pleas could have none on appeal.

Peter *v.* Schlosser, 31 Smith, 439.

The action of trover and conversion was not sustainable, because the evidence showed lawful possession by the defendant, the refusal of plaintiff to take the horse, and a demand for payment, but no demand for a return of the property.

When one has the lawful possession of the goods of another and has not converted them, trover will not lie until there has been a refusal to deliver after demand.

Waring *v.* Penna. R. R. Co., 26 Smith, 490.

P. R. Cotter, for defendant in error.

Upon appeal from a justice of the peace the cause shall be decided by the Court upon its merits, and no deficiency of form or substance in the record or proceedings returned, or any mistake in the form or name of action shall prejudice either party in the Court of Appeal.

Act of March 20, 1840, § 4.

In amending the form from trespass to trover the cause of action was not changed, the damages claimed in both forms being the same.

The cause of action being the same, the Court could make such amendments in form of action as would advance justice.

Trego *v.* Lewis, 8 Smith, 463.

The evidence discloses a case of trover.

[PAXSON, J. Where is the evidence of a demand?]

The plaintiff testifies, in his examination in chief, that he made a demand.

[MERCUR, C. J. Is there evidence of a refusal?]

The failure to return the horse upon the stipulated time was such evidence. The failure to return the horse at all to the owner being the result of the defendant's maltreatment of the horse, was such a conversion of the property to his own use as to render him liable for the value of the horse.

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The plaintiff demanded the horse in person and by sending for her. The defendant refused to return her because she was unfit. That is such evidence of conversion as should be submitted to the jury.

2 Hilliard on Torts, 54, § 13.

The finding on the evidence of conversion was properly for the jury.

June 4, 1883. THE COURT. We are unable to say whether the Court below erred in permitting the plaintiff below to change the form of action from trespass to trover. If it was a change of the form of action only, the amendment was allowable under the Act of 10th May, 1871 (P. L. 265). There is nothing upon the record to show what the cause of action was before the justice. The transcript is not given, and no narr. was filed, the case having been tried under the rule which substitutes the transcript of the justice for a declaration.

Picking up our knowledge of the case as best we can from the paper-book, we learn that it was tried in the Common Pleas as an action of trover and conversion. The plaintiff claimed that he placed his horse with the defendant to be cured of "ringbones and spavins," and to be returned within four days. The horse was not cured, and was not returned within the time. The plaintiff called upon defendant afterwards for the horse, and was told that it was not in a condition to be moved. This was conceded by the defendant. He said, upon cross-examination:—

"I went there and looked at the horse, and got some parties to look at it too, and it made some of them sick to the stomach." He further says that he refused to take the horse away, and demanded pay for it. This will not sustain trover and conversion. There was no demand and refusal. The demand is nothing without the refusal.

Some time after the suit was commenced, before the justice, the plaintiff's barn was destroyed by fire, and the defendant's horse was consumed with it. There was no evidence that the horse was unskilfully treated by the defendant, and if there had been the plaintiff could not recover for such cause in an action of trover.

The 2d, 3d, 5th, and 6th assignments of error are sustained.

Judgment reversed.

Opinion by PAXSON, J. F. J. A.

Jan. '83, 310. Feb. 21, 1883.

Commonwealth ex rel. Farries v. Evans.

Cities of the third class—Election of School Controllers—Acts of May 22, 1874, and May 8, 1854.

A vacancy occurring in the office of School Controller in cities of the third class is to be filled by the Board of Controllers until the next municipal election, when the voters of the ward are to elect a Controller to serve until the expiration of the term in which the vacancy occurred.

Error to the Common Pleas of Lackawanna County.

Application for a writ of quo warranto, by John B. Farries against John D. Evans, to determine which of them was entitled to the office of School Controller from the First Ward of the city of Scranton.

The facts were as follows: The city of Scranton was granted letters patent, and became a city of the third class under the provisions of the Act of May 23, 1874 (P. L. 230). In the summer of 1880 a vacancy occurred in the office of School Controller from the First Ward which was filled by the election of defendant by the Board of School Controllers. At the spring election in 1881 the relator received a majority of votes cast for School Controller in the said ward and a certificate of election, which he presented to the board. They having refused him a seat he filed a suggestion for a writ of quo warranto and took a rule on defendant to show cause why the writ should not issue.

After answer the case was heard upon its merits, without formal pleadings, and the Court (HAND, J.), referring to an opinion filed in a similar case of Commonwealth *ex rel.* Fellows *v.* John E. Welch, C. P. of Lackawanna County, June Term, 1881, No. 24, discharged the said rule, and denied the writ of quo warranto, whereupon the Commonwealth took this writ, assigning for error said action of the Court.

I. H. Burns (*H. M. Edwards* with him), for plaintiff in error.

John P. Albro, for defendant in error.

April 2, 1883. THE COURT. The city of Scranton is a city of the third class, and is divided into twenty-one wards. Under the 41st section of the Act of 23d May, 1874 (P. L. 254), each ward is entitled to elect one School Controller. Those elected from even numbered wards at said first election (1878) to serve for two years, and those from odd numbered wards for four years; thereafter every two years alternately, they shall elect one each to serve for four years.

It will thus be seen that the term of a School

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Controller is four years, and that while the voter votes but once in four years for that office, yet an election is held biennially by reason of the alternation of odd and even numbered wards.

In regard to the filling of vacancies said Act provides: "And all vacancies which may happen in the said board as hereby constituted shall be filled in the manner as is now provided by law for vacancies in school boards."

In order to ascertain how such vacancies in school boards were filled in 1874 we must turn to the seventh section of the Act of May 8, 1854 (P. L. 618), which provides: "That each board of directors shall have power to fill any vacancy which may occur therein by death, resignation, removal from the district or otherwise, until the next annual election for directors, when such vacancy shall be filled by electing a person from the district from which the vacancy occurs to supply the same."

The office of School Controller of the First Ward of Scranton was declared vacant by the Board in the summer of 1880, and John D. Evans, the defendant, was appointed and elected by said board to fill the said vacancy. At the spring election in 1881, John B. Farries, the relator, having received the majority of votes cast for School Controller in the First Ward, and a certificate of election, presented said certificate to the Board of School Controllers of the city. Having been refused his seat, he filed a suggestion for a writ of quo warranto, and a rule was granted upon said John D. Evans to show cause why said writ should not issue. The Court below discharged the rule, which is assigned for error.

The learned Judge held that vacancies must be filled at the next biennial election; that the Act of 1854 refers to the manner of filling vacancies, but throws no light upon the question when an election to fill a vacancy under the Act of 1874 shall take place, and attention was called to the fact that the Act of 1854 requires vacancies to be filled at "the next annual election for directors," while there are no such annual elections under the Act of 1874. On the other hand, it was contended that the words "for directors," in the Act of 1854, are descriptive of the spring election as distinguished from the November election, and have no other significance. In view of the fact that in 1854 school directors were elected annually, the legal effect of that would have been the same, had it provided for filling vacancies "at the next spring election."

If the defendant was entitled to hold over until the next election for School Controller in his ward, he would hold for the entire term, for the reason that there is no biennial election in his ward, nor in any other ward in the city of Scranton. The First Ward elects a School Controller for four years, and it holds no other election for that office until the expiration of the term of the incumbent, unless there should be a vacancy, in which case we are of opinion it must be filled at the next municipal election. This we regard as the fair construction of the Acts of 1874 and 1854, and is in harmony with our political system. There is a mass of legislation in regard to filling vacancies in public offices, State, county, and municipal, and it all points in the direction of filling them by a popular vote at the earliest opportunity. The view taken by the Court below is in derogation of the rights of the people, and if the question were doubtful this would not be without weight.

We are of opinion that the writ of quo warranto should have been allowed, and the order refusing it is reversed.

Opinion by PAXSON, J. GREEN, J., absent.

J. D. B., Jr.

Oct. '83, 3. October 24, 1883.

Boyle v. Horner.

Affidavit of defence—Rules of Court—Allegheny County.

Although an affidavit of defence filed before return day admits a portion of plaintiff's claim, judgment therefor cannot be entered until after the return day.

Error to the Common Pleas No. 2, of Allegheny County.

Assumpsit, by James Horner against Z. & J. Boyle on a promissory note given by defendants to plaintiff for $400. The plaintiff's attorney filed his præcipe, together with an affidavit of claim, September 12, 1882, and the prothonotary issued the summons the same day, returnable the first Monday of October then next. Before the return day, on September 21, 1882, defendant filed his affidavit of defence, claiming therein a set-off as to a portion of plaintiff's claim, and admitting thereof $276, and gave notice to plaintiff of the filing of his specification of set-off. Thereupon and ten days before the return day to which the summons was returnable, plaintiff caused judgment to be entered for the sum admitted, a fi. fa. to be issued, and defendant's goods to be levied on. He took this proceeding under Rule 11 of the Courts of Common Pleas of Allegheny County, quoted below in the opinion of this Court.

Defendant then, on September 27th, obtained a rule to show cause why the judgment should not be stricken off, and the execution be set aside, for the reason that the judgment, having been entered before the return day of the writ, was irregular.

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The Court discharged this rule, WHITE, J., saying in an opinion filed: "The defendants stand solely on the technicality that the judgment could not be entered until after the return day. We think otherwise. Rule 11 does not fix any day for taking judgment in a case coming under it, and it plainly means that judgment may be entered any time after the affidavit is filed. The other rules referring to judgments by default after the return day have no bearing on this case. In many counties of the State all writs are returnable to the quarterly return days, yet under rules of Court judgments by default, or want of affidavits of defence, are taken before the return day. I can see no irregularity or injustice in such rules. The motion to set aside the judgment and execution is refused." KIRKPATRICK, J., dissented.

The defendant thereupon took this writ, assigning for error the entry of judgment before the return day of the summons, and the refusal of the Court to strike it off.

William Reardon, for plaintiffs in error.

As the rule itself fixed no time at which judgment might be entered, it was to be interpreted in relation to other affidavit of defence rules of the same Court, wherein it was provided that judgment might be entered at any time after the return day and ten days' service of the writ.

Thomas McFarland, for defendant in error.

The defendant by appearing and filing his affidavit of defence before the return day, waived his right not to appear before that day, and plaintiff is entitled to immediate satisfaction of the part admitted.

November 5, 1883. THE COURT. The judgment having been entered before return day of the summons was premature and cannot be sustained. Rule 11, under which it was taken, provides that "in all cases where affidavit of defence is required by these rules, it shall state whether the defence is to the whole or only a part of the plaintiff's claim, and if only to a part, it shall state to what part, and in such case the plaintiff may proceed to trial for his whole claim, or at his option take judgment for the part not denied, or admitted by defendant, which shall be final for the purposes of lien and execution, but shall not be a bar to the recovery of the rest of his claim, *provided* he shall state in his præcipe for said judgment that he declines to accept the same in full satisfaction of his claim and elects to proceed for the balance," etc.

The rule is silent as to when the judgment may

davit of claim, etc., as thereby required, shall be entitled to judgment "*at any time after return day and ten days' service of the writ*, unless the defendant, or some one for him, shall file an affidavit of defence," etc.

These rules are *in pari materia*—parts of a general system of practice, and must be construed together. When so construed, Rule 9 answers the inquiry suggested by the silence of Rule 11, and virtually says, judgments for the amount admitted to be due, or not denied by defendant, may be taken "at any time after the return day and ten days' service of the writ," and not before.

Aside from this it would be unreasonable to hold otherwise. The defendant is allowed at least ten days after service of summons, and until return day, inclusive, to appear and make defence. If he voluntarily appears before the time and files an affidavit of defence, he is not thereby precluded from amending or supplementing the same within the time allowed him by law and rules of Court. The right of plaintiff to judgment by default, under either of the rules referred to, must depend on the state of the record at the expiration of the time within which defendant is required to appear and present his defence. He may if he chooses, appear and file an affidavit on the day he is served with the summons, but he does not thereby waive his right to the full time allowed for appearing and perfecting his defence. The entry of judgment before return day was an unwarranted interference with the rights of the plaintiffs in error, and hence it must be set aside.

Judgment reversed and set aside, and *procedendo* awarded.

Opinion by STERRETT, J. GREEN, J., absent.

W. S. P.

Oyer and Terminer.

O. & T. of Bucks Co. November, 1883.

Commonwealth v. Harper.

Criminal law — Pleading — On an indictment charging a felony triable exclusively in the Oyer and Terminer, there cannot be a conviction for a misdemeanor.

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Defendant's counsel thereupon moved in arrest of judgment.

N. C. James, for the motion.

Ross, and *Murfit*, District Attorney, contra.

November 16, 1883. THE COURT. By the old practice in the criminal courts if the offence charged in an indictment included within itself an offence of minor extent and gravity of the same class, then the prisoner might be convicted of the minor offence though acquitted of the greater. Thus, upon an indictment for murder the prisoner might be convicted of manslaughter. But on an indictment charging a felony he could not be convicted of a misdemeanor, though the latter offence was included within the former. Nor could a count charging a misdemeanor be joined in the same indictment with a count charging a felony. The reason given for the distinction was that on the trial of an indictment charging a misdemeanor merely the prisoner was entitled to greater privileges than on a trial for felony, of which privilege he would be deprived if the two offences could be joined in the same indictment, or a conviction for misdemeanor be sustained when a felony was charged. (1 Ch. Cr. L. 250, 254.)

In our practice this distinction has generally been disregarded, the reason upon which it was founded having ceased to exist; a prisoner on trial for a felony being entitled to as many privileges in making his defence as one on trial for a misdemeanor.

Thus in Harman *v.* Commonwealth (12 S. & R. 69) it was held that a count for rape might be joined in the same indictment with one for an assault and battery with intent to ravish.

In Henwood and Arney *v.* Commonwealth (2 Sm. 424) it is said the rule as to misjoinder rests only on a technicality which will not stand in the way when the interest of the defendant is not jeoparded.

In Stevick *v.* Commonwealth (28 Sm. 460) the indictment contained three counts: 1. Rape; 2. Assault and battery with intent to commit a rape; 3. Fornication. On the trial the prisoner offered himself as a witness and was excluded. He was convicted and sentenced on the first count. The Supreme Court, on error, affirmed the judgment.

In the opinion it is said the fact that the indictment contained a count for a misdemeanor did not make the defendant a competent witness, because it contained also a count for a felony. If he had sought the benefit of his own testimony he should have asked that the several charges should be separately tried. The Court could thereupon have compelled the prosecutor to elect on which count he would proceed. We know that this is the constant practice in such cases.

In Hunter *v.* Commonwealth (29 Sm. 503) the defendant was indicted in a single count, that he "feloniously did make an assault on F., and shoot at said F., with intent to murder him." He was convicted of a simple assault and sentenced accordingly. The judgment was sustained by the Supreme Court. Justice PAXSON, in delivering the opinion of the Court says: the common law rule that upon an indictment for a felony, there can be no conviction for a misdemeanor no longer exists in Pennsylvania; that a felony triable in the Quarter Sessions may be joined in the same indictment with a misdemeanor growing out and a part of the same transaction. Whether a misdemeanor may be joined in the same indictment with a felony which is triable exclusively in the Oyer and Terminer, is a question about which he expresses no opinion, as the principle is not necessarily involved in the case. He also says, that the exclusion of the defendant as a witness was not a ground of complaint. Had the indictment included a count for the assault, the defendant would not have been a competent witness, and if convicted of misdemeanor only, the judgment would not have been arrested.

But with due deference to the opinions of the Judges of the highest tribunal of the State, I am permitted to suggest that if the indictment had contained separate counts respectively charging a felony and a misdemeanor, the Court, before which the trial was had, would have compelled the District Attorney to elect upon which count he would proceed, in order to secure to the defendant his right to testify on his trial for the misdemeanor. The Commonwealth ought not to be allowed to deprive a defendant of this privilege by charging only the higher offence in a single count.

The indictment now under consideration contains a single count charging rape; an offence triable exclusively in the Oyer and Terminer. The jury acquitted the defendant of the offence charged, but found him guilty of an assault with intent to commit a rape. It would have been idle for him to have offered himself as a witness on the trial, for he was clearly incompetent, and must necessarily have been excluded. The effect of the verdict, if allowed to stand, is to deprive him of the benefit of his own testimony on a trial for the lesser offence of which he has been convicted. The right to testify is a most valuable and important one; it has been given him by the Act of Assembly, and he ought not to be deprived of it by the peculiar manner in which the indictment is drawn. It is the duty of the Court to see that he be allowed all the privileges which the law gives him. This can be done and the ends of justice attained by arresting the judgment and trying him on an indictment which has

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already been found against him charging the misdemeanor.

The question is not ruled, but is left an open one, by the Supreme Court in the last cited case. The reason given for the common law rule against such convictions applies with full force here. In the administration of criminal justice and for the purpose of securing to a defendant the privileges which the law gives him, I prefer to adhere to the old rule and to hold, as I am permitted to do, that on an indictment for a felony triable exclusively in the Oyer and Terminer, there cannot be a conviction for a misdemeanor.

The judgment is accordingly arrested.

Opinion by WATSON, P. J.

Common Pleas—Law.

C. P. No. 1. Oct. 27, 1883.

Ellis v. Cadwalader.

Execution—Stay of—A terre-tenant may enter security for stay of execution.

Rule to enter security for stay of execution.

In this case there was a judgment against the original covenantor in a ground-rent deed for arrears of ground-rent, and on the issuing of an execution the terre-tenant made affidavit that he was owner in fee of the premises; that he was ready to give good and sufficient security for stay of execution; and that he claims this right either as terre-tenant simply, or as being competent as such terre-tenant to cause an appearance to be entered for the nominal defendant.

Longstreth, for the rule cited—

Jackson *v.* Juvenal, 1 T. & H. 1039. (A manuscript case of Judge SHARSWOOD, 1860.)

Sloan, contra, cited—

Erie City Bank *v.* Compton, 3 Cas. 195.

Ellis *v.* Cadwallader, 12 WEEKLY NOTES, 304.

C. A. V.

November 10. THE COURT. In this case the suit was against the original covenantor, and judgment was recovered against him. The terre-tenant comes in and swears that he is the owner, and asks to be allowed to enter security for stay of execution. This was allowed in the District Court in 1860, and has never since been controverted to my knowledge. The rule thus followed recommends itself to the Court, and I see no reason to deviate from it.

Rule absolute.

Oral opinion by BIDDLE, J. E. A. B.

C. P. No. 1. November 3, 1883.

Hickok v. The Park Association.

Practice—Security for costs—Foreign plaintiff—Laches—It is not too late to apply for a rule on the plaintiff to enter security after the case is at issue.

Rule on the plaintiff to enter security for costs.

In this case it appeared that issue had been joined, but the case had been continued upon the application of the plaintiff, who was a non-resident of this State.

W. L. C. Biddle, for the rule.

The granting of the application is entirely within the discretion of the Court, no matter whether the case be at issue or not.

Shaw *v.* Wallace, 2 Dallas, 179.

Mason *v.* Frick, 12 WEEKLY NOTES, 570.

C. Davis, contra.

The defendant has been guilty of laches, and the rule should therefore be discharged. Besides, under Mason *v.* Frick (*supra*), it is too late to apply for the rule where issue has been joined.

THE COURT. We do not think the defendant has been guilty of laches.

Rule absolute, security fixed at $200.

Per PEIRCE, J. D. H.

C. P. No. 4. November 10, 1883.

Metropolitan National Bank v. Gruber et al.

Special partnership—Acts of March 21, 1836, March 30, 1865, and February 21, 1868, construed—Where a partnership is composed of one special and two general partners, the use of the names of the two general partners with the addition of the words "and company" as the firm name, is unauthorized by any Act of Assembly and will render the special partner responsible as a general one for the payment of firm debts.

Sur rule for judgment for want of sufficient affidavit of defence.

Assumpsit, brought by the Metropolitan National Bank against Henry Gruber, Wm. F. Hoopes, and A. H. Mershon, copartners, trading as Gruber, Hoopes & Co., upon three notes signed by the firm name.

The affidavit of A. H. Mershon set out as a defence that by a special agreement duly recorded, he entered into a limited partnership with Henry Gruber and Wm. F. Hoopes, and that all the terms of the Act of 1836 relating to special partnerships had been complied with.

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Richard C. Dale (*Samuel Dickson* with him), for the rule.

The 13th section of the Act of March 21, 1836, expressly forbids the addition of the word "company" to the firm name; and it has been held that a violation of this requirement imposed upon the special partner a general liability.

Andrews *v.* Schott, 10 Barr, 47.
Vandike *v.* Rosskam, 17 Smith, 330.
Guillou *v.* Peterson, 8 Norris, 163.

The defendant Mershon cannot escape liability as a general partner under the supplemental Act of March 30, 1865, because that only applies to cases where there are more than two general partners.

Nor does the Act of February 21, 1868, apply to this case. It was not intended to apply to any other case than where the general and special partner had a common name; its purpose was to protect the special partner from the liability which might be imposed upon him from the use of the common name under the Act of 1836.

There is no Act of Assembly which allows the use of the words "and company" when there is no person to represent such company.

J. H. Brown, contra.

Under the Act of 1836, the word "company" could not be used. This was modified by the Act of 1865, so that where there were more than two general partners the firm name could consist of either of such partners with the addition of the words "and company," and in order that the public should not be misled, it was directed by the Act that the names of the general and special partners should be put up in a conspicuous place in front of the place of business, so that this sign is what the people are to look to when dealing with such a firm and not simply the firm name. Moreover the Act of 1868, allows the use of the name of the one general partner with the words "and company" when there is one special partner of the same name, why then should not the two names be used with the words "and company" when the requirement in regard to putting up the sign with the names and character of the partners is fulfilled.

Dale, in reply.

The idea of putting up the name is a condition precedent to their claiming the benefit of this Act, but that alone does not allow them to escape from the general liability. A large part of the people who deal with a firm never see such a sign, and they have to rely upon the firm name.

These Acts are contrary to the common law, and it is submitted that upon a strict construction of them it will be seen that no power is given to use the word "company" where there is no person to represent such company.

December 3, 1883. THE COURT. Albert H. Mershon entered into a limited partnership with Henry Gruber and Wm. F. Hoopes. The business was conducted under the firm name of Gruber, Hoopes & Co. The present action is upon a note made by Gruber, Hoopes & Co. Mershon sets up as a defence the facts that the partnership is a limited partnership, in which he was the special partner, and that the firm have complied with all the terms of the Act of 1836 relating to limited partnerships. The 13th section of the Act of 1836 enacted that "the business of the partnership shall be conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word company or any other general term, and if the name of any special partner shall be used in such firm, with his privity, he shall be deemed a general partner." And in Andrews *v.* Schott, 10 Barr, 47, it was held that the addition of the word company in contravention of the prohibition of the statute, deprived the special partner of the protection of the Act and made him responsible as a general partner. The supplement of March 30, 1865 (P. L. 46), enacted that "the business of the partnership shall be conducted under a firm in which the names of *all* the general partners shall be inserted, *except* that when there are *more* than two general partners the firm name may consist of either *two* of such partners, with the addition of the words 'and company,' but the said partnership shall put up upon some conspicuous place on the outside and in front of the building in which it has its chief place of business, some sign on which shall be painted in legible English characters all the names in full of all the members of said partnership, stating who are general and who are special partners." This Act, therefore, removes the prohibition relative to the use of the words "and company" only in cases where there are *more than two* general partners, and requires as a condition that the names of all the partners, general and special, shall appear upon a sign in a conspicuous place in front of the chief place of business. To this supplement an additional supplement was passed, February 21, 1868, P. L. 42, which enacts that "the firm name of any limited partnership may consist of the name of any general partner with the addition of the words 'and company,' notwithstanding the name of such general partner may be common to him and any special partner, but the said partnership shall put up the sign required by the second section of the Act of March 30, 1865, to which this is a supplement." This Act is entitled a supplement to the Act of 1865, and was plainly intended to qualify the provisions of that Act, which required the names of at lea st*two* of the general partners to appear in the firm, and authorized the use of the words "and company" where there are more than two. It modifies that

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Act by allowing the name of *one* general partner to appear instead of requiring *two*, and permits the addition of the words "and company," to represent the other general partner or partners. The words "may consist of the name of any general partner" are equivalent to saying "may consist of the name of any one of the general partners," and are only applicable to the case of a firm embracing several general partners. But no Act permits the use of the words "and company" where there is only one general partner, or allows it to be added to the name of a firm in which the names of all the general partners appear. In such cases the original prohibition contained in the Act of 1836 remains in full force. The addition of these words in such cases is calculated to mislead the public and to give a false credit by implying that there are other general partners besides those named. The Legislature has carefully refrained from authorizing this. The object of the supplement to the Act of 1865, was to dispense with the necessity of naming more than one general partner where there are others, and to allow those others to be designated under the general words "and company." No Act permits a special partner to appear in a firm under the words "and company." If the Legislature had designed to repeal all previous restrictions upon this subject it would have been easy to say so. We do not think that this was intended or has been done by the Act of 1868. The Act of 1868, which the Legislature declared in terms to be a supplement to the Act of 1865, was only intended as a modification of the Act of 1865 so far as to authorize a limited partnership embracing several general partners to carry on business in the name of one general partner with the addition of the words "and company," instead of requiring the names of at least two of the general partners to appear in the firm, as had been required previously by the Act of 1865. And the words "notwithstanding the name of such general partner may be common to him and any special partner," were added to avoid the possible effect of the clause of the thirteenth section of the Act of 1836, which enacted that "if the name of any special partner shall be used in such firm with his privity he shall be deemed a general partner." The Legislature has amended and modified the provisions of previous Acts relative to the use of the words "and company," so far as to allow their use as a designation of other general partners where there are more than one. But neither by the supplement to the Act of 1865, passed in 1868, or by any other Act, have they in our ceeding which is expressly prohibited by the Act of 1836. The addition of these words in the present case was in contravention of the Act of 1836, and is not justified by any subsequent Act. Under Andrews *v.* Schott, therefore, the defendant is responsible as a general partner for the payment of the note held by the plaintiffs.

Rule absolute.

Opinion by THAYER, P. J.

W. M. S., JR.

C. P. No. 4. June 2, 1883.

McCullough v. Hemingway and Shoneman.

Negligence—Master and servant—Necessity of relation to existence of liability—Relation must be actual—Knowledge of negligent act by owner of premises where it is performed does not render him liable if not done by his servant.

Sur rule for new trial and motion for judgment on point reserved.

The facts, as they appeared upon the trial, and as recited in the opinion of the Court, were as follows:—

"The plaintiff, on the 12th of March, 1881, while walking along a small street, called Birch's Place, which is about twelve feet wide, in passing by the side of the defendant Shoneman's store, was struck on the head by a large bag of waste paper, knocked down and severely injured. The paper was the waste made by Shoneman in the course of his business. It was stored by him in the upper story of his store, and when it had accumulated into a large quantity he sold it to the defendant, Hemingway, who is a dealer in waste paper and rags. Shoneman was not to deliver the paper, but Hemingway was to take it away. Hemingway sent his employés, Dickson and Williams, to Shoneman's store, to pack and tie up the paper in bags, and a few days after to take it away. They dropped the bags out of a window, in the side of the store, down to the street, and put them on a wagon. One bag had been thrown down safely, and then a second was dropped, which struck and injured the plaintiff. The bags were about six feet high, and weighed about 175 pounds. It appeared that this was the usual way of getting out the paper. Dickson testified that Shoneman told him that he could not take it out through the store. Shoneman testified that there was not sufficient room on the stairway to get the paper out that way, and he knew that it had been dropped out of the

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the window, although Dickson testified that he had taken paper out that way from Shoneman's on a prior occasion, but not for Hemingway. Dickson also testified that he told Hemingway how he was to get the paper out, but Hemingway denied it, while he admitted that he had previously taken paper away from that store."

The jury found a verdict of $4000 against both defendants, subject to the point reserved as to whether one, and if so which, was alone liable.

Richard P. White (with whom were *Charles Davis* and *Mayer Sulzberger*), for the defendant Shoneman.

The bags were owned by Hemingway, and the men removing them were his servants. The maxim *respondeat superior* applies only where the relation of master and servant actually exists.

Stevens *v.* Armstrong, 6 N. Y. App. 435.
Peaschey *v.* Rowland, 13 C. B. 182.
Butler *v.* Hunter, 7 H. & N. 826.
Gray *v.* Pullen, 32 L. J. Q. B. 169.
Hilliard *v.* Richardson, 3 Gray, 349.
Overton *v.* Freeman, 11 C. B. 867.
De Forest *v.* Wright, 2 Mich. 368.
Hobbit *v.* R. W. Co., 4 Exch. 254.
School District of Erie *v.* Fuess, 11 WEEKLY NOTES, 97.
Painter *v.* Pittsburgh, 10 Wr. 213.
Allen *v.* Willard, 7 Sm. 374.
Harrison *v.* Collins, 5 N. 158.

There cannot be two superiors severally responsible for the same wrongful act.

Wray *v.* Evans, 30 Sm. 102.

The test of service is this: suppose that the goods themselves had been injured, to whom would the men handling them have been liable?

The injury occurred, not because the bags were thrown out of the window, but because it was done negligently. Granting that Shoneman directed that the window should be used, his act was the remote and not the immediate cause of the injury.

Wharton on Negligence, 134, 143.
Ins. Co. *v.* Tweed, 7 Wallace, 52.
Carter *v.* Towne, 103 Mass. 507.

John G. Johnson, for the plaintiff.

Horn R. Kneass and *William Hopple*, for the defendant Hemingway.

C. A. V.

June 23, 1883. THE COURT. The rule of law expressed in the words *respondeat superior*, that an employer is responsible civilly for injuries caused by the negligence or carelessness of his servants or employés, while engaged in the business for which they have been employed, is so well settled that it requires neither argument nor the citation of authorities to support it. Whatever difficulties may have arisen in the cases, in which the rule has been invoked, have been caused by the question whether the relation of principal and agent, master and servant, or employer and employé existed between the persons whose carelessness caused the injury, and the persons sought to be held liable in the particular case under investigation. It is also settled that there cannot be two superiors severally responsible for the same injury or misfeasance. (Wray v. Evans, 30 Sm., 102; Laugher v. Pointer, 5 B. & C. 547–58.) [Here follow the facts *ut supra*.]

It was contended on the part of Shoneman, that he was not responsible for the injury, and the question as to his liability was reserved at the trial. The jury found for the plaintiff against both defendants, and assessed the damages at $4000. Upon the argument of the rule for judgment on the point reserved and for a new trial, the counsel for Shoneman contended that he is not liable, because Dickson and Williams were not his employés; and the counsel for Hemingway contended that he is not liable, but that Shoneman is, alleging that the paper was Shoneman's until the price was ascertained and it was paid for, and that Dickson and Williams were his employés while they were in the store getting the paper out; while the counsel for the plaintiff contended that both defendants are liable. In this triangular contest we are to discover and place the liability where it properly belongs.

We are of the opinion that the mere permission and knowledge by Shoneman, of the means by which the paper was to be removed by Hemingway, will not render him liable for the injury caused by the carelessness of Dickson and Williams. In order to make him liable, it is essential to show that Shoneman or his servants performed the work whereby the injury was caused. Dickson and Williams were not his employés. That the price of the paper had not been ascertained and paid is of no importance. It had been bought by Hemingway, and he was liable for the price when ascertained. Dickson and Williams were his servants sent by him to remove the paper. Shoneman took no part in getting it out. He gave no directions about the work, except to say that it could not be taken out through the store, and knew that it was to be removed through the window. If that could be done in a careful way without injuring any person, and it was done in a careless way, then the responsibility for the injury caused by such careless performance of the work would fall upon the employer of the persons guilty of the carelessness.

In Stevens *v.* Armstrong and Squires (2 Selden, 435) the defendants were merchants in the city of Troy, New York. They sold to Messrs. E. & D. B. Plum a box which was in the upper loft of the defendants' store. The Messrs. Plum sent their porter for it. He went up into the loft to get the box, and hallooed to some one to hoist

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the fall, which was on the outside and in front of the store, which, being done, the porter hooked the box by the ends and swung it out, and while it was descending, it struck against the middle roller, which knocked it out of the hooks, and it fell, striking the plaintiff violently on the head and injuring him. At the trial the judge charged the jury, that if they should find that the porter went into the store with the knowledge or permission of the defendants, he so far became their agent and servant, while engaged in that business, as to render them liable for the consequences of his carelessness, and the question on appeal was whether the judge did not err in so charging. The Court of Appeals held that "the defendants could not be rendered liable for the negligent acts of the porter, by virtue of the principle applicable to the relation of master and servant, unless that relation in fact subsisted. Knowing and permitting the porter to go into the loft to get the box, being in fact, at the time, the servant of Plum, and actually acting in his employment, did not constitute the porter, in any degree, the agent or servant of the defendants while engaged in removing the box. The relation of master and servant cannot be created but by contract, express or implied, between the master and servant." It was therefore held that the defendants were not liable, and that the judge had erred in his charge to the jury. See also Blattenberger *v.* The Little Schuylkill Nav. Co. (2 Miles, 309), where the subject is fully considered in its application to personal property.

The same principle applies to the use of real estate, although there was at one time a diversity of opinion upon the subject. But the distinction no longer exists. (De Forest *v.* Wright, 2 Mich. 368.) In Offerman *v.* Starr (2 B. 394) it was held that the lessor of a coal mine is not liable for injuries to a house on the surface, caused by the working of the mine by his tenant. To the same effect are the cases of Bears *v.* Ambler (9 B. 193) and The Little Schuylkill Nav. Co. *v.* Richards's Admin'r (7 Sm. 142), Stone *v.* Cartwright (6 Term R. 411). In Earle *v.* Hall (2 Met. 353) Hall, who owned land, agreed to sell it to Gilbert, and execute a deed on receipt of the purchase-money. Gilbert agreed to build a brick house on it. He built the house before the price was paid and the deed executed, and, in so doing, undermined the party-wall between the plaintiff's and the defendant's properties. It was held that Hall was not liable. The rule is the same in cases in which the owner of property employs a contractor to do work upon it, and injuries are caused by the negligence of the servants of the contractor. In such cases the owner is not liable. (Allen *v.* Willard, 7 Sm. 374; Harrison *v.* Collins, 5 N. 153; Hilliard *v.* Richardson, 3 Gray, 349; Overton v. Freeman, 73 E. C. L. R. 866; Gray *v.* Pullen, 32 L. J. Q. B. 169.) It is also the rule in cases against municipalities. (Painter *v.* The Mayor, etc., of Pittsburgh, 10 Wr. 213; School District of City of Erie *v.* Fuess, 2 Out. 600.) Even the reservation by the owner of the right to dismiss the workmen of the contractor will not subject him to liability for the default of the latter. (Reedie *v.* The Lond. & N. W. Ry. Co., 4 Exch. 244.) Nor will a stipulation that the work is to be carried on at such times and places, and in such manner as the engineer of the city should direct, make the city liable for the negligence of the contractor. (City of Erie *v.* Caulkins, 4 N. 247); nor "under the directions and to the satisfaction of the city engineer and the committee on streets." (Reed *v.* Allegheny City, 29 Sm. 300.) Thus, it will be seen that neither the right to dismiss the contractor's servants, nor even the power to direct how the work shall be done, will render the party employing the contractor, liable for the carelessness of the employés of the contractor while actually engaged in the work.

It is not unlawful in itself to take merchandise out of the upper stories of a warehouse, by lowering it on a rope, or even by dropping it, in a careful manner, down the outside of the warehouse; it is only a negligent or careless manner of doing such work, which makes the person doing it, or his employer, liable in case an injury results from his carelessness. As was justly said by Mr. Justice MAULE, in Peaschey *v.* Rowland (76 E. C. L. R. 182), the defendant "employed somebody to do something, which might be done ether in a proper or an improper manner; and he did it in a negligent and improper manner, and injury resulted to the plaintiff." "We have no right to look with extreme scrupulosity in cases of this sort to see if there is not some grain of evidence the other way." Chief Baron POLLOCK, in Butler *v.* Hunter (7 H. & N. 826), says: "It must be assumed that directions were given to do the work in the ordinary way, and to take all the proper precautions not to cause any mischief;" and, "where the mischief arises, not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, unless the relation of master and servant exists." That relation did not exist between Shoneman, and Dickson and Williams.

Deciding, therefore, that Hemingway is, and that Shoneman is not liable to the plaintiff in this suit, we enter judgment in favor of the defendant Shoneman on the point reserved, and discharge the rule for a new trial on the part of the defendant Hemingway, and direct that judgment be entered for the plaintiff against Hemingway for the amount of the verdict.

Opinion by ARNOLD, J. W. H. W.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, DEC. 20, 1883.* [No. 2.

Supreme Court.

Oct. & Nov. '83, 156. November 2, 1883.

Pullman Palace Car Company v. Gardner.

Sleeping cars—Theft from passenger while asleep—Negligence—Measure of duty of company—Evidence.

A sleeping-car company is not liable as an innkeeper for the safety of the valuables of passengers while asleep. It is, however, bound to exercise a reasonable and proper degree of care to prevent the valuables of a passenger being stolen from his bed or clothing while he is asleep.

A. having taken a berth on a sleeping car, retired for the night, placing his watch and pocketbook in his waistcoat, which was rolled up under his pillow. The sleeping-car company's regulations required an employé to be on guard all night in a position in which he could command a view of the whole aisle. On the night in question, the porter was absent from his place a few minutes blacking a passenger's boots in the ante-room of the car. The companion of said passenger in the mean time was left alone in the aisle of the car. In the morning A. discovered that his watch and pocketbook were gone. In an action by him against the company to recover the value of the articles lost, the Court charged that if the jury believed that the theft occurred while the porter was absent from the car, and that if he had remained in his place the theft could not have occurred without detection, the company was liable:

Held, that this was not error.

Evidence to the effect that another passenger in the same car was robbed on the same night, was held admissible in the above case on behalf of the plaintiff as bearing on the absence of proper care by the company.

Error to the Common Pleas No. 1, of Allegheny County.

Case, by William Gardner against the Pullman Palace Car Company, to recover damages for the loss of a gold watch and certain money, alleged to have been occasioned by the negligence of the company. Plea, not guilty.

On the trial, before STOWE, P. J., the following facts appeared: On April 8, 1881, plaintiff purchased a sleeping-car ticket from the defendant company, which entitled him to an upper 7 o'clock A. M. the plaintiff discovered that he had been robbed. The car in which plaintiff was had a sufficient number of employés, and their competency was not disputed. The regulations of the defendant company require a continual watch to be maintained, and, on the night of the robbery, the conductor of the sleeping car had sat in the aisle keeping a constant watch until 3 o'clock in the morning, at which hour the porter took his place. The porter could not be found to testify, but his declarations made when the robbery was discovered were given in evidence, under objection. From these it appeared that the porter had gone into the small ante-room for a short time to black the boots of a man who, though holding a ticket from Philadelphia to Altoona, left the car at Harrisburg, and that, while he was so engaged, another man, the companion of the first, and who (though holding a similar ticket) also left the car at Harrisburg, was in the main body of the car. The car was so constructed, that while the porter was in the ante-room, it was impossible for him to see along the main aisle.

The plaintiff offered in evidence the deposition, taken under a rule of the Court, of one Darling, a fellow-passenger of the plaintiff, which went to show that he had also been robbed on the same night and on the same car. Objected to by defendant; objection overruled; exception.

The Court charged the jury, *inter alia*, as follows:—

"In this case, the evidence satisfies me, and it would seem that is the reasonable conclusion from the testimony—that, however, is for the jury—first, that the regulations of this company were reasonable and proper. They kept a guard according to their regulations, and intended to keep a continuous watch, so that a man sitting there could see everything that was going on without interfering with the sleepers. He would have no business to be away except in a special case. They station him at the end of this little aisle where he can see the whole length of the car, see anybody undertaking to crawl from one berth to another, or anybody in the aisle. It is lit up sufficiently to be able to distinguish objects. These Pullman cars seem to have been sufficiently manned. There were five employés altogether. One man seems to me to have been quite enough at a time to guard a car in the way that ordinary care would require it to be guarded. The conductor says he was awake in

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find that reasonable care was exercised, as I think it was, up to that time, is, did this colored man do his duty? There is no evidence to indicate that he was not a sufficiently proper man. Therefore the company would not be liable for having employed a man not fit for the purpose. [Did he do his duty? The regulations required him to stay in the aisle of the car continuously, to watch there continuously, until the danger was over, until daylight. Did he do it? If so, where is the proof? We have his own declarations that he was on guard, coming from the conductor; but we have also his own declarations to the plaintiff that he went out of that apartment for a time to black a pair of boots or shoes. If he went out of that aisle, even for a very few minutes, and during that time this robbery occurred, and the jury believe that if he had been in his place of observation it would not and could not have occurred without detection, the company is liable, because he failed to do his duty to that extent that it allowed this robbery to be done. It was his fault and it is visited on the company, although they may have done everything they thought right to get a proper man. "Watching" is not simply to be on watch nominally, it is to be on watch actually, to be there, not under pretence of continuing there; there till you get tired and then go out and lie down or do something else, and let the very thing occur you are put there to avoid; watching must be continuous and active. He could not watch a car full of sleeping people very well if he were in the front part, in those little rooms or ante-chambers, or whatever they are called, where people dress and wash.]

"The counsel have directed your attention to the principal facts involved in the case. If you think the car was not sufficiently manned at that time, of course you have a right to say so; but if you think, with me, that there were sufficient people there, that one man was sufficient, according to the ordinary practice of the company, and if you believe, as seems to be the case, that the conductor did his duty, then the whole thing turns on what was done after the conductor went off watch, and there you have this evidence, or the want of evidence, if you choose. . . . He may not have taken this property, probably he did not, because the indications are that somebody else did—the men who got off under suspicious circumstances—but it would lie, according to the testimony, between those two men and the porter, and whether one or the other did it, if they did it the porter allowed them by his carelessness to do it, or if he did it, the company would be liable. I presume there is no pretence, however, that the porter did it.

"All of these matters are for the consideration of the jury, the possibilities and probabilities, and you have to take it altogether and render such verdict as you think proper, bearing in mind, of course, the one simple question, whether, at the time the robbery was committed, the employés of the company, this man in particular, who should have been watching, was doing his duty, and whole duty. . . . . Of course, if you think the defendant company did its whole duty, that the watchmen were diligent and attentive, you ought to find for the defendant."

Verdict for the plaintiff for $317.80 and judgment thereon. Defendant thereupon took this writ assigning for error, *inter alia*, the admission in evidence of Darling's deposition and the portion of the charge above included within brackets.

H. W. Weir, for the plaintiff in error.

It is manifest that this Pullman palace car falls short of the character of an inn and the company of an inn-keeper.

2 Kent's Comm., 596.
Dansey *v.* Richardson, 3 Ellis & Bl. 144.
Holder *v.* Soulby, 8 C. B. N. S. 254.
Kisten *v.* Hildebrand, 9 B. Monroe, 72.

The company is not liable as a carrier. It made no contract to carry, and even if it were a carrier it would not be liable, because the money was not delivered into its possession or custody, which is essential.

Tower *v.* The Utica & Schenectady R. R. Co., 7 Hill, 47.
2 Redf. Am. R. R. Cases, 138.
Pullman Palace Car Company *v.* Smith, 73 Ill. 360.

If the company is responsible, it can only be for want of ordinary care; but the Court went far beyond this, and exacted extraordinary care.

W. F. McCook, for defendant in error.

It is not claimed that the company is liable as insurers, inn-keepers, or common carriers, but the following propositions are relied on:—

First. That the company was a bailee for hire, accepting the custody and control of the persons or passengers with such wearing apparel and personal effects as are usual and proper for passengers to have with them.

Second. That the company, by its contracts, impliedly represented to the public and to the defendant in error that its cars were such in construction and so managed that a person might resign himself to unconscious sleep, and that whilst in this helpless condition reasonable provision had been made for the security of his life and personal property.

Third. That as a bailee, the company comes under the general rule of law, and is bound to exercise reasonable care only as to the subject matter of bailment. That reasonable care varies with circumstances; is greater at night, when the passenger is helpless and asleep, than in daytime, when he is awake and able to protect himself.

Fourth. That the defendant was liable only

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for failure to exercise such ordinary care, and this is a fact for the jury.

Woodruff Sleeping and Parlor Coach Company *v.* Diehl, American and English Railroad Cases, vol. ix. 294.
Blum *v.* Southern Pullman Palace Car Company, 3 Central Law Journal, 591.
Steamship Company *v.* Bryan, 34 Legal Intelligencer, 97.
Crozier *v.* Boston, etc., Steamboat Company, 43 Howard's Pr. 467.
Hutchinson on Carriers, note to § 49.
Thompson on Carriers, 531.

November 12, 1883. THE COURT. We have carefully examined the evidence and considered the assignments of error. Conceding that the company is not liable in this action as an innkeeper or common carrier, yet a reasonable and proper degree of care is imposed on the company. Whether it did exercise that degree of care under the circumstances was for the jury. The main object in taking passage in such a car is to permit the passenger to sleep. While in that helpless condition a duty rests on the company to provide reasonable care and precaution against the valuables of a passenger being stolen from his bed or from the clothes on his person. This is not the case of a robbery by force and violence, but by stealthy larceny. Unless a watchman be kept constantly in view of the centre aisle of the car, larceny from a sleeping passenger may be committed without the thief being detected in the act. While the fact that another passenger in the same car was robbed the same night was not relevant to prove that the defendant in error was in fact robbed, yet it was admissible as bearing on the absence of proper care by the company. This case was submitted to the jury in an able and correct charge. We see no error of which the company can complain.

Judgment affirmed.

PER CURIAM. G R. L.

Oct. '83, 150. October 11, 1883.

Sankey v. McElevey, Adm'r.

Debtor and creditor—Fraud—Misrepresentation and concealment—Statute of Limitations.

Debtor and creditor do not occupy a relation of confidence which makes it a duty for the debtor to disclose to the creditor or to his personal representatives the fact of the indebtedness or its amount, nor to disclose all the information concerning a debt when he has told a part.

Mere concealment of a cause of action by a debtor from his creditor or the personal representatives of his creditor is not a fraud, and does not toll the operation of the Statute of Limitations upon the debt, unless concealment be coupled with misrepresentation or positive fraud, or unless a confidential relation exists between the parties which makes it the duty of the debtor to speak.

Error to the Common Pleas of Lawrence County.

Assumpsit, by John McElevey, administrator of Robert McElevey, deceased, against David Sankey, to recover the amount of a note given by defendant to Robert McElevey, and made payable to his order by defendant, with interest thereon.

On the trial the following facts appeared: On April 15, 1845, the note sued upon was given by the defendant for $1545, to secure payment of that sum of money lent to him by Robert McElevey. The note was immediately delivered for safe keeping to James Power, who retained it until December, 1849, when it passed into the hands of T. J. Power. Defendant testified that soon after the date of the note an agreement was made by letter between him and Robert McElevey that the defendant should, in satisfaction of the note, convey to Amanda McElevey, Robert's sister, lot No. 39 in New Castle, defendant having bought this lot some time before at sheriff's sale. In the spring of 1849 Robert McElevey died intestate, and letters of administration on his estate were granted to his brother, the plaintiff. David Sankey, after telling plaintiff that he owed a debt to the estate, in June, 1850, delivered a deed to Amanda McElevey, conveying to her lot No. 39 for the nominal consideration of $1000, expressed in the deed. John and Amanda and their mother, Sarah McElevey, were present at the delivery of the deed, and John, who alone of these survived at the bringing of this action, testified that they knew nothing of the existence of the note, or of the contract in pursuance of which the conveyance was made, and that defendant told them nothing more than that the deed was given in consequence of a wish of Robert McElevey, and in payment of a sum of money due him by defendant, without informing them of the amount of the debt. This defendant denied, testifying that he informed them of the nature of the transaction as fully as he understood it himself. There was no evidence showing any wilful misrepresentation by defendant of the circumstances of the transaction. The property conveyed to Amanda was understood to be worth about $825.

The defendant's note remained in possession of T. J. Power until April 15, 1858, when it was delivered to defendant at his request, and on his giving a receipt in which was specifically described the amount of the note, its date, and the names of the parties. The note and the letter of agreement were kept by defendant secret from the knowledge of plaintiff, and were burned with defendant's house in 1871. It was not until two years before bringing this action that plaintiff learned of their existence, or of the receipt given to Power by defendant.

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Defendant submitted, *inter alia*, the following points:—

7. "Under the evidence of this case the bar of the Statute of Limitations was complete before the time when it is alleged the defendant got possession from T. J. Power on April 15, 1858." *Answer.* "This we affirm, but prior to that, in 1850, defendant entered into negotiations for payment of this, and then it was that we say he should have told the entire truth, and if material facts were then concealed by him with the fraudulent intent of avoiding payment of a just debt, it would prevent the running of the statute afterwards." (Third assignment of error.)

8. "The Statute of Limitations began to run from the time that the right of action accrued, without regard to plaintiff's knowledge of such right, unless it was prevented by actual fraud or a technical trust of which there was no evidence." *Answer.* "The forepart of this proposition we affirm and submit to you on whether or not there was actual fraud. We think there is evidence of actual fraud, and this we submit to you. (Fourth assignment of error.)

The Court charged the jury, *inter alia*, as follows: "Taking the deed, on the indebtedness then admitted to be due from Sankey, the question for you to pass upon is, whether or not Sankey divulged the whole truth; because we think that when he came to deal with these parties it was his legal duty to have divulged the entire truth. If you rely on the testimony of John McElevey that he concealed the amount of the indebtedness with fraudulent intent of avoiding payment of the difference between $1000 and the true amount of the indebtedness as shown by his note and his admission of $1545, the plea of the statute would not be a bar to recovering $1545, with interest from the date of the note until credit of $1000 in 1850, and then interest on the balance from that up until this day." (Second assignment of error.)

Verdict for plaintiff for $2280, and judgment thereon, whereupon defendant took this writ, assigning for error the portion of the charge above quoted, and the answers to his points.

D. B. Kurtz (*E. T. Kurtz* with him), for plaintiff in error.

There being no evidence as to when the note given by Sankey was payable, the right of action must be presumed to have accrued immediately on its delivery, and is barred at the expiration of six years unless actual fraud is proved such as would create a technical trust, and toll the running of the statute. Mere concealment does not constitute fraud, unless there is an obligation to speak, and there is no such obligation in the relation of debtor and creditor.

Eichelberger *v.* Barnitz, 1 Yeates, 307.
Harris *v.* Tyson, 12 Harris, 347.
Farnam *v.* Brooks, 9 Pickering, 212.

The Statute of Limitations applies to all cases except those involving technical trusts or actual fraud.

Campbell's Admr. *v.* Boggs, 12 Wright, 524.
Barton *v.* Dickens, 12 Wright, 518.
Morrell *v.* Trotter, 12 WEEKLY NOTES, 143.

R. B. McComb, for defendant in error.

November 5, 1883. THE COURT. This action was brought in 1882, upon a note given on April 15, 1848, thirty-four years after the cause of action accrued.

To the plea of the Statute of Limitations it was replied that the defendant had been guilty of such fraud as to prevent its operation as a bar. The alleged fraud consisted in withholding full information as to the true amount of the debt. The payee of the note, R. W. McElevey, died in 1849. Administration upon his estate was granted on August 22, 1849, to his brother, John McElevey, the present plaintiff.

On June 25, 1850, David Sankey, the defendant, executed and delivered a deed to Amanda McElevey, a sister of the payee, for lot No. 39, in New Castle, for the nominal consideration of $1000, alleging that the conveyance was made in pursuance of a contract between him and the payee, that he would convey the lot to Amanda in discharge of indebtedness for money borrowed by the defendant from the payee.

The defendant alleged and testified that he informed the parties, including Amanda and John and their mother, Sarah, of the whole transaction, stating the whole amount of the debt. At the time of the trial, and long before this action was brought, Sarah, the mother, and Amanda were dead. John, being alive, testified that the amount of the loan was not stated by the defendant when the deed was made, and the Court left to the jury the question whether the defendant's allegation on that subject was true, charging that if it was not, his conduct was such a fraud as would toll the statute.

In this we think there was error. The learned Judge charged the jury that there was no obligation on the part of David Sankey to make known the fact of his indebtedness, and that if he had said nothing the action would have been barred. But he said if the defendant did speak at all he was bound to tell the whole truth, and for not doing so forfeited the protection of the statute.

It is difficult to understand upon what principle this theory can be sustained. We are not furnished with a single authority either by the learned Judge of the Court below or by the counsel for the plaintiff, the defendant in error, in support of this proposition, and it seems untenable. If it be conceded, as, indeed, it is, and must be, that the relation of debtor and creditor merely is not a relation of trust and confidence, imposing upon the debtor the duty of

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information either to the creditor or his representative of the fact and extent of his indebtedness, and, therefore, that he is guilty of no fraud if he withholds all information, how can he be guilty of fraud if he does impart some information, and withholds only a part? To so hold would seem to be making the less greater than the whole. According to the doctrine of the Court below the defendant was under no obligation to inform the plaintiff of the fact of his indebtedness to the intestate, and if he gave no information at all, said nothing whatever upon the subject, he was guilty of no fraud, and his plea of the statute would be a perfect bar. But if he did tell the plaintiff that he owed the intestate, but did not tell him how much he owed him, then he was guilty of fraud, and cannot have the benefit of the statute.

In this case the plaintiff admits that in 1850, when the defendant made the deed to Amanda for the lot, he did tell him he had borrowed money from Robert McElevey, and that he was to make a deed to Amanda, but that he did not name the amount.

He testified thus: "He (Sankey) made the remark to me shortly after I took out letters of administration, that he had borrowed a certain amount of money, not naming the amount, from my brother, saying it was the desire of Robert that he should make the title to Amanda for the consideration of $825 or $850, he said to me for the lot, or the same amount which he claimed was laid off in Mercer County.

Q. Robert McElevey was to have credit for it?

A. Yes, sir.

Q. With the amount?

A. Yes, sir; it was $825–50. Mr. Sankey said to me: That was to be the amount that he was to deed the lot to Amanda for.

Q. How did the amount come to be mentioned or alluded to in that conversation? How did he come to refer to the amount in dollars and cents?

A. I don't recollect that that was the amount. He said he had borrowed some money from Robert, not naming the amount. This was in 1849, and the deed was not made out for more than a year after that, and the deed was made in my presence to me, and signed in my presence by his wife and him. I found the deed to be a thousand dollars, and I said to Mr. Sankey: "This cannot be possible, for I got information from you that it was to be $825 or $850 or whatever the amount was that was knocked down by the sheriff in Mercer County, and I took exception to putting it at $1000 at the time.

He gave me no information at all.

Q. Did he say anything about how much he got from Robert McElevey?

A. No, sir; he never told me or any one else and I guess he did not know himself."

In view of this testimony it is amazing that the plaintiff did not ask the defendant how much he borrowed from Robert. He gives no explanation of his omission to make this inquiry, nor does he at all allege that the defendant gave him any false amount as being the sum borrowed. Where then is the fraud? It was the right of the plaintiff to request and insist upon exact information, and if it was not furnished, he could have commenced appropriate proceedings at once, when the facts were of recent occurrence, and parties and witnesses were living. He knew the fact of indebtedness, for the defendant had himself informed him of it. He knew that the defendant alleged that the deed was to be made on account or in payment of the debt, for that also the defendant told him. Yet he makes no further inquiry, though his attention was attracted to the subject of amount by a discrepancy between the sum named in the deed and a different sum which he said had been named by the defendant as the intended consideration. He commences no proceedings, but lies by for thirty-two years after the most material facts were disclosed to him by the defendant, and then brings suit because the amount of the loan, and the fact that a note had been given was not disclosed to him.

Without any confidential relation existing between them, without any affirmative act of fraud or misrepresentation, without having parted with any property or right in consequence of any falsehood or deceit of the defendant, he now, after a delay of nearly a third of a century, seeks to compel the payment of a debt founded upon an ordinary loan of money, and in a common law action, by one who owed him no duty of information, yet did inform him of every material fact which would have established his liability. The only omitted fact is one which would determine merely the pecuniary extent of the liability, but of that fact the plaintiff was necessarily put upon inquiry when the other facts were communicated to him. It is certainly not the law that one who is merely a debtor to another is bound to inform the creditor of the fact of the indebtedness. Nor if the creditor dies does such a duty arise in favor of his legal representative. Hence there is neither fraud nor breach of trust on the part of the debtor in failing to impart such information. It was held in Barton *v.* Dickens (12 Wr. 518), that the trusts not reached or affected by the Statute of Limitation are those technical and continuing trusts which are not cognizable at law but fall within the proper and exclusive jurisdiction of a court of equity. On page 523, AGNEW, J., said: "Analogies, if resorted to, are adverse to the opinion of the Court below; as where the fidu-

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ciary relation ceases to exist at a known period, or where the relation is such as to put the plaintiff upon inquiry and demand. Thus the right of action of a ward against his former guardian is barred after six years from his arrival at age." In Campbell *v.* Boggs (Id. p. 524), it was held that the Statute of Limitation begins to run in favor of an attorney-in-fact, and even of an attorney-at-law, for not paying over money collected, from the time of collection, and not from the time notice is given of the receipt of the money.

It is true that when a plaintiff has been kept in ignorance of a cause of action by the actual fraud of the defendant the fact of the fraud is a good reply to the plea of the statute. This was the case in Bricker *v.* Lightner's Ex'r (4 Wr. 199), when the defendant snatched the notes in suit from the desk of the deceased payee on the morning after his death, and thereby concealed the knowledge of them from his representatives. It was the positive fraudulent act of the defendant which deprived him of the benefit of the statute. So also the mere fraudulent concealment of a cause of action by the debtor, if it be by means of an affirmative act, may operate to prevent the bar of the statute. As in the case of Wickersham *v.* Lee (2 Norr. 416), where the plaintiffs were misled by false information given them as to the collection of a claim which had been entrusted to the defendants. The plaintiffs had constantly applied for information and that which they received was not true in fact. In the opinion it was said, "so long as they (the agents) give him (the creditor) to understand that his claim is uncollected, he is put off his guard. The duty of inquiry lies on him, but having made inquiry of his agents and being misinformed by them, they cannot set up the statute when they have misled him and thereby induced him to delay his action."

The same doctrine is well illustrated in the case of Ferris *v.* Henderson (2 Jones, 49), where there was actual fraud and fraudulent concealment by means of false affirmation as to the plaintiff's condition of servitude, in consequence, and by means of which he was deterred from bringing his action for many years, and it was held these facts constituted a good reply to the plea of the statute.

The subject of fraudulent concealment of a cause of action was very fully considered in the case of Troup *v.* Smith (20 Johns. 32). It was there held that in an action of assumpsit for negligence, want of skill and fraud in the performance of work, the defendant having pleaded the Statute of Limitations, the plaintiff could not reply a fraudulent concealment of the badness of the work by the defendant so that the plaintiff did not discover the fraud until within six years before the commencement of the suit, so as to deprive the defendant of the protection of the statute.

The same rule was held in the cases of Smith *v.* Bishop, 9 Vermont, 110; Fee *v.* Fee, 10 Ohio, 469; Allen *v.* Mille, 17 Wend. 202; Baines *v.* Williams, 3 Iredell, 481.

The doctrine is specially applicable in common law actions in which the courts hold themselves bound by the explicit provisions of the statutes of limitation. But even in courts of equity we apprehend that there must be some relation of trust and confidence between the parties, imposing a duty to give information or some affirmative act of fraud, something more than mere silence, which will suffice to defeat the operation of the statute, when the basis of the reply to the statute is concealment of the causes of action.

In the recent and very excellent work of Wood on the Limitation of Actions, pp. 586 and 274, the subject of the effect of fraud on the operation of the Statute of Limitations is very fully and ably presented. He shows that in some of the States it is expressly provided by law that the fraudulent concealment of a cause of action shall be a bar to the running of the statute, except from the time of its discovery. As to these he says on pp. 590 and 276, "The provision that if a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto the action may be commenced at any time within the period of limitation after the discovery of the cause of action, applies to causes of action for fraud as well as to other causes of action; but the concealment contemplated by the statute is something more than mere silence; it must be of an affirmative character, and must be alleged and proved so as to bring the case clearly within the meaning of the statute."

It was claimed as evidence of fraudulent concealment in the present case, that the defendant obtained possession of the note in suit from T. J. Power, who had it in custody, in April, 1858, and that he concealed that fact from the plaintiff. The Court below negatived the plaintiff's point upon this transaction, because at the time it occurred, the claim was already barred by the statute and the receipt given for the note contained no promise to pay the debt, nor any recognition of the debt as an existing obligation. This ruling was in our opinion correct, and disposes of that part of the plaintiff's case. In any event the note was not the cause of action. It was the mere evidence in one form of the fact which did constitute the cause of action, to wit, the loaning of the money. Of that fact the defendant did communicate knowledge to the plaintiff within one year after the death of Robert McElevey, the plaintiff's intestate.

The plaintiff was beyond all question thereby put upon inquiry as to the amount of the money

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loaned, the time and manner of its payment, and of all material circumstances connected with the transaction. If he chose to neglect this duty of inquiry and suffer a delay of thirty years without invoking the aid of the law, he is not in condition to set up fraudulent concealment of the causes of action as a reply to the plea of the statute. The second, third, and fourth assignments of error are sustained and on them—

The judgment is reversed.

Opinion by GORDON, J.

MERCUR, C. J., and PAXSON, J., absent.

T. W. B.

May, '83, 17. June 1, 1883.

Philadelphia and Southern Mail Steamship Co. v. Commonwealth.

Taxation—Corporations—Steamship companies engaged in inter-state and foreign commerce—Acts of March 20, 1877, and June 7, 1879—Constitutional law—Tax on gross receipts.

A steamship company incorporated in Pennsylvania, and engaged in the business of transporting freight and passengers between ports in the United States, and between such ports and foreign countries, is liable, as to its receipts from ocean freight in the foreign and inter-state trade, to the tax on gross receipts imposed by the Acts of Assembly of March 20, 1877 (P. L. 6), and June 7, 1879 (P. L. 112).

Those Acts are not, in respect to such tax, in contravention of Art. 1, section 8 of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations, and among the several States.

Error to the Court of Common Pleas of Dauphin County.

This was an appeal by the Philadelphia and Southern Mail Steamship Company from a settlement made by the Auditor-General and State Treasurer, charging said company with tax on its gross receipts for the period from January 1, 1877, to June 20, 1881, under the Acts of Assembly of March 20, 1877, and June 7, 1879.

The case was by agreement tried without a jury under the provisions of the Act of April 22, 1874 (P. L. 109), before SIMONTON, P. J., whose findings of facts and conclusions of law are reported in full in 12 WEEKLY NOTES, page 502. The essential facts are also stated in the opinion of this Court *infra*.

Judgment was entered for the Commonwealth for $7262.56, being the amount of tax claimed as per settlement, with interest from June 5, 1882, to January 22, 1883, and Attorney-General's commission. Whereupon the defendant took this writ, assigning as error the ruling of the Court that the Acts of March 20, 1877, and June 7, 1879, so far as they impose a tax on gross receipts of steamships, received for the transportation of merchandise and passengers between different States of the United States, and between ports of the United States and foreign countries, under the navigation laws of the United States, are not in conflict with the commercial clause of section 8, Art. 1 of the Constitution of the United States; and the entry of judgment in favor of the Commonwealth.

Morton P. Henry, for plaintiff in error.

No State can regulate, interfere with, or abridge the coasting or foreign trade carried on under the navigation laws of the United States.

Gibbons *v.* Ogden, 9 Wheaton, 1.
Sinnot *v.* Davenport, 22 Howard, 227.
Almy *v.* California, 24 Howard, 169.
Henderson *v.* The Mayor, 2 Otto, 274.

All commerce which is not completely internal, but which extends to or affects other States, is within the commercial clause of the Constitution of the United States.

Gibbons *v.* Ogden, *supra*.
Telegraph Company *v.* Texas, 15 Otto, 460.
Railroad Company *v.* Maryland, 21 Wallace, on page 470.
The Daniel Ball, 10 Wallace, 557.

Taxation is a regulation of commerce. A corporation engaged in commerce is within the protection of the commercial clause.

Tel. Co. *v.* Texas, Id.
The Inman S. S. Co. *v.* Tinker, 4 Otto, 238.
Gibbons *v.* Ogden, *supra*.

A State can tax the business or franchise of a corporation within its limits, or which is being transported within the State.

Tax on Gross Receipts, 15 Wallace, 284.

But a State cannot tax goods the property of citizens of other States, or intended to become the property of such citizens, while being carried in the inter-state trade.

Freight Tax Cases, 15 Wallace, 232.

A State can authorize a corporation to build a ship, but not to use it. The ship itself, as property of citizens, may be taxed by the State, but its business cannot, because not controlled, regulated, or protected by the State. It is only when doing business within the State that it can be so taxed.

Standard Oil Company, 12 WEEKLY NOTES, 293.
St. Louis *v.* Ferry Company, 11 Wallace, 430.

The freights are earned not under the franchise of the corporation, but by authority of the navigation laws of the United States. The Acts of Assembly impose a tax upon "steamboats," which term would include vessels used for the internal commerce of a State, but cannot be properly held to embrace sea-going vessels or steamships. This distinction is recognized in the Revised Statutes of the United States, and in the popular use of the words.

Robert Snodgrass, Deputy Attorney-General (with him *Lewis C. Cassidy*, Attorney-General), contra.

The Railway Gross Receipt Cases (15 Wallace, 284) rule this case. The Act of Feb. 23,

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1866, under which they arose, is practically identical with the Acts of March 20, 1877 (P. L. 6), and June 7, 1879 (P. L. 112), out of which this case springs. The tax is not upon interstate transportation, but upon the fruits of such transportation after they reach the treasury of the carrier, and become mingled with its general property. The distinction sought to relieve the plaintiff in error cannot be found in the cases cited. A tax on gross receipts, and on the franchise of the corporation, are distinguished from the tax on tonnage, and are held not to be repugnant to the Constitution of the United States.

Osborne *v.* Mobile, 16 Wallace, 481.
Munn *v.* Illinois, 4 Otto, 135.
Ins. Co. of North America *v.* Commonwealth, 6 Norris, 173.

Even if the plaintiff in error is not a steamboat company within the meaning of the Acts of March 20, 1877, and June 7, 1879, it is certainly embraced within the class of "transportation companies."

Columbia Conduit Company *v.* Commonwealth, 9 Norris, 307.

October 1, 1883. THE COURT. The plaintiff in error is a corporation of this State. Its principal place of business is in Philadelphia. It is a transportation company. It owns sea-going steamships, which it employs in the coasting trade between the port of Philadelphia and the ports of cities in other States and in other countries. The voyages are made on the navigable waters of the United States and on the ocean. Its vessels are enrolled and registered under the navigation laws of the United States. Its gross receipts were received for the transportation of freight and passengers between the different ports named.

The tax in question was imposed on gross receipts, under the Acts of March 20, 1877, and of June 7, 1879.

It was urged that the Acts imposing taxation do not apply to a corporation of the class of the plaintiff in error. We think this position clearly untenable. Whether it be a steamship company or a steamboat company is wholly unimportant. It is clearly a transportation company, engaged in the business of transporting both freight and passengers. It is thus brought clearly within the letter of the statute imposing the taxes.

It is further contended that if the Acts are held to apply to this corporation they are in conflict with that clause of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States." If a tax on gross carrier after it has reached the treasury of the corporation. The fact that it may have been derived from transportation of freight between States, or between the home port and a foreign port, matters not. It has, nevertheless, become subject to legitimate taxation. The statute does not look beyond the corporation to those whose business has furnished the money which passed into its treasury. It looks no further than to determine whether the business of the corporation brings it within the statute for purposes of taxation. Whenever the fruits of the transportation have become mingled with its general property in the treasury, then the fund is subject to taxation by State authority. (The Tax on Gross Receipts, 15 Wall. 284; Osborne *v.* Mobile, 16 Id. 481.) A tax on gross receipts is in the nature of a tax on the franchise. It is solely by the exercise of the franchise granted by the Commonwealth that the corporation obtains the money on which this tax is imposed. It matters not where the money is gathered. The corporation obtained all its powers here. Its principal office is here. The Commonwealth which breathed into this corporation the breath of life has power to impose taxes on the product of its own creation. (Insurance Company of North America *v.* The Commonwealth, 6 Norris, 173; Commonwealth *v.* Gloucester Ferry Company, 2 Out. 105.)

We do not deem it necessary to refer to and answer seriatim the numerous cases cited by the plaintiff in error. We do not think they controvert the cases we have cited and the reasons on which they rest. The learned Judge arrived at a conclusion with which we are entirely satisfied.

Judgment affirmed.

Opinion by MERCUR, C. J. GREEN, J., dissents. F. M. O.

Jan. '83, 208. May 22, 1883.

Womelsdorf v. Heifner.

Justices of the peace—Appeals from—Judgment recovered for manual labor—Act of April 20, 1876—Requirements of—Amending of an appeal not taken in compliance with the Act.

An appeal from a justice of the peace, which has not been taken in accordance with the law, may be perfected later, and even after the time for appealing has elapsed, where no injury will thereby be done to the other party's rights.

A. took an appeal from a judgment obtained against

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Act of April 20, 1876 (P. L. 43). A rule to strike off the appeal having subsequently been made absolute:

Held, that the transcript did not show that the claim in question was for "wages for manual labor" within the meaning of the Act of 1876. *Held*, further, that the recognizance having been perfected, the appeal should not have been stricken off.

Error to the Common Pleas of Huntingdon County.

This was, in the Court below, an appeal from the judgment of a justice of the peace. On December 23, 1881, judgment for $30 was entered in favor of J. Heifner against D. Womelsdorf, before a justice of the peace. On January 10, 1882, defendant appealed from the judgment against him, and filed a bond in the sum of $60 conditioned for payment of the costs. On April 10, 1882, the transcript was taken by appellant to his attorney, who filed it and on the same day obtained leave to amend and to file an additional recognizance. On April 17, 1882, appellant filed an additional bond in the sum of $75, conditioned for the payment of the debt and costs, and on the following day filed his affidavit that the appeal was not taken for delay, in accordance with the provisions of the Act of April 20, 1876 (P. L. 43).

The appellee subsequently took a rule to strike off the appeal, which was made absolute, whereupon the appellant took this writ, assigning for error the action of the Court in making the above rule absolute.

R. Bruce Petrikin, for the plaintiff in error.

The defendant before the justice took out the appeal himself, and did all the justice required of him; as soon as he employed counsel, the transcript was filed and leave obtained to amend. There is a long line of authorities that, if the appeal is erroneous, the appellant should be allowed to perfect it within a given time, and that it is error to quash the appeal.

Means *v.* Trout, 16 S. & R. 349.
Huntingdon *v.* Jackson, 2 P. & W. 431.
Adams *v.* Null, 5 W. & S. 363.
Koenig *v.* Bauer, 7 Smith, 171.

These cases all involve the substantial point here concerned and evince the desire of this Court to preserve the party's right to a jury trial; they all concern the recognizance required by the Act of 1810, while this case concerns also the affidavit required by the Act of April 20, 1876 (P. L. 43, Purd. Dig. 2083–4); but the former is as imperatively demanded by the earlier Act as is the latter by the later.

Woodruff *v.* James, 2 WEEKLY NOTES, 50.

Moreover, the transcript does not show the case to be within the Act of 1876, as the work and labor may have been that of superintendence.

R. M. Speer (with him *H. C. Madden*), for defendant in error.

That the work was manual appears from the transcript, as it is of course to be presumed that the work was the usual sort of farm work; this has, moreover, been admitted by the other side, by asking for leave to amend and by filing his additional recognizance. The Act of 1876, *supra*, being remedial, should be liberally construed to effect its object; it is imperative also, and makes it a condition precedent that the affidavit shall be filed before the appeal is taken.

Heitler *v.* Earing, 18 Pittsb. L. J. 59.
Wilson *v.* Kelly, 31 Smith, 411.

See also—

Lovering *v.* The Com'th, 1 Pittsb. 333.
Carter *v.* Hess, 3 WEEKLY NOTES, 325.
Mountney *v.* McFarland, 7 Phila. 392.

October 18, 1883. THE COURT. We think the Court below erred in striking off the appeal from the justice. It is true the recognizance as originally taken was defective, if we regard the case as coming within the Act of April 20, 1876 (P. L. 43), which requires bail for the debt and costs upon appeals from judgments rendered "for wages of manual labor." This error in the recognizance was discovered by counsel for appellant on the day the appeal was filed, and a rule was at once taken to perfect the recognizance. The Court below granted leave to amend; the additional recognizance was filed and subsequently the plaintiff's counsel obtained a rule to show cause why the appeal should not be stricken off. This rule was made absolute.

The law favors the right of appeal. It involves the right of trial by jury. Where an appeal has been taken in good faith and within the time prescribed by law, it is usual to allow a defect to be amended; in other words, to perfect the appeal. So where a recognizance is defective it is usual to allow it to be perfected where it produces no delay and does the other side no injury. The books are full of such cases.

Aside from this it is more than doubtful whether the case comes within the Act of 1876. That Act refers only to the "wages of manual labor." The transcript is "for work and labor don on farm." It may be argued that work and labor on a farm is manual labor. But this is a mere argument, and a transcript should deal in facts. For anything that appears, the work may have been that of superintendence merely. It must be remembered that the Act of 1876 is class legislation, and where one man claims a right that is not common to citizens generally, every requisite to bring the case within the Act should appear upon the docket of the justice clearly and not argumentatively. It is especially proper to apply this rule where one of the parties is attempting to deprive his opponent of a trial by jury upon a mere technicality.

The judgment is reversed, the appeal is reinstated, and a *procedendo* awarded.

Opinion by PAXSON, J.

GREEN, J., absent. W. M. M.

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Quarter Sessions.

Q. S. of Delaware County. October, 1883.

Commonwealth v. Springer.

Husband and wife—Right of wife to exclude her husband from her house.

When a wife who owns the house she lives in, forcibly prevents her husband from entering, he has no remedy except divorce.

A husband will be required to give security to keep the peace when the wife testifies that she is afraid of bodily injury in case he succeeds in effecting a threatened entry to her house, the title to which she holds in her own name, and from which she has excluded him.

This was a proceeding known as "surety of the peace," brought at the instance of Mrs. S. M. Springer, in the name of the Commonwealth, against her husband George F. Springer, before T. G. Preston, Esquire, a justice of the peace of Delaware County, under the 6th section of the Criminal Code of 1860 (Purd. Dig. 376, pl. 6), The justice's transcript showed that upon the affidavit of S. M. Springer "that she is the sole owner, in her own right, of a certain property in the said city of Chester, Delaware County, and that the defendant hath threatened to take unlawful possession of the same by force, and that by reason of such threat, deponent verily believes she is in danger of being injured in person or estate," the said justice issued a warrant against said defendant, and upon his appearance at the hearing, bound him over in $200 bail, with surety, to appear at the next Court of Quarter Sessions to answer the above charge, and in the mean time to keep the peace.

It appeared by the testimony taken on the hearing that while the defendant was absent on a gunning trip the plaintiff locked the house against him, and on his return refused him admittance. That the plaintiff held the title to the real estate in her own name. The defendant endeavored to enter the house, and, failing in that, sent a letter to plaintiff which closed with the words, "I will give you until the first day of January next to comply—if not settled by then I will take possession, peaceably if I can, forcibly if I must."

V. G. Robinson, for plaintiff.

The act threatened by the defendant was made a breach of the peace as early as 1700.

If he has no legal remedy he has no legal right to possession, and cannot take possession by force.

This case falls directly within the provisions of the Act of 1860, sec. 6, Purd. Dig. 376, pl. 6.

W. B. Broomall, for defendant.

The Act of 1848 protects a married woman in the ownership and enjoyment of her separate estate, so that it may not be sold or charged by the husband or his creditors, but this does not reach the result of the exclusion of the husband by the wife from the possession of it in common with the wife.

Walker *v.* Reamy, 12 Casey, 410.

The right of possession of a wife's property is in the husband as head of the family.

Johnson *v.* Fullerton, 8 Wright, 466.

Where his wife is in possession a man may break open the door and forcibly enter without exposing himself to a criminal prosecution.

2 Wharton on Crim. Law, sec 2026.
Morris *v.* Bowles, 1 Dana, 97.
1 Russell on Crimes, 6th Amer. ed., page 307.

November 5, 1883. THE COURT. The wife of the defendant makes oath that he has threatened to forcibly break into her dwelling-house. That she has separated from him and does not desire to cohabit with him. That the house in which she lives is her own separate property in which he has no interest whatever except such as the law bestows upon him as her husband.

He, upon the other hand, alleges that he left his home temporarily upon a gunning excursion, with no intention of permanently separating from his wife. That upon his return in about a week or ten days he found the doors shut against him, and upon attempting to enter was forbidden to do so. Some abortive efforts at a reconciliation were made which ended in a written missive making a peremptory demand for restoration to his marital rights, and winding up with the threat that if he could not be restored peaceably he would enter forcibly. This was followed by his arrest and binding over to keep the peace.

The wife positively swears that she is in mortal dread of personal violence if he should attempt forcibly to enter her house, and claims the protection of the law by requiring him to find sureties of the peace.

The single question is, can a wife exclude her husband from the right to eat at her table, ride in her carriage, and sleep in her bed? While the relation of husband and wife continues in its normal condition, and there is no rupture of those

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board, and the comforts of her society and enjoyment of her property, we can see no way to insure to him those rights and comforts by force. The right may exist, but the remedy is by making himself agreeable to her rather than by resorting to force and arms. He perhaps may use actual force as between him and her so long as he does not injure her person, destroy her property, or break the public peace. The latter is of paramount importance, and must be preserved regardless of the consequences to mere private rights.

The difficulty here presented did not exist at common law; it has grown out of the Married Woman's Act. If she is strong enough to turn her husband out of her house, or, after he has voluntarily left it, if she can successfully bar the doors against him so securely as to require actual force and a breach of the public peace to effect an entrance, I am inclined to the opinion that his only remedy is to seek another home, invite her to share it with him, and upon refusal subject her to the pains and penalties of wilful desertion. In such case he could either refuse to contribute to her support, and preserve his right of curtesy in her estate by denying her a lawful divorce, or if he desired it, he could successfully break the bonds of matrimony ~~and seek a more congenial wife~~.

In the Commonwealth *v.* McGolrick (reported in 1 Del. Co. Rep. 446) we held the husband to keep the peace in a somewhat similar case. To attempt to break into her house by force would result in forcible resistance by her, her friends, mercenaries, and coadjutors. No personal valor of his could overcome such troops. This would require an accumulation of additional forces, munitions, and muniments of war upon his part, ending in riot and bloodshed requiring peradventure the interference of the militia, army and navy of the Commonwealth. The dreadful consequences of matrimonial infelicity to the old city of Troy admonishes us to nip the germ of strife in the bud by holding the husband to keep the peace and be of good behavior.

The same question has recently arisen in England in another form. In that case the wife sought relief in equity and the Chancellor interfered by injunction restraining the husband from entering his wife's house. The case is now up for review before the House of Lords, and a final decision is awaited by the profession with more than ordinary interest.

Let the defendant enter his own recognizance with surety in three hundred dollars to keep the peace, etc., and pay the costs.

Opinion by CLAYTON, P. J.

Q. S. of Philadelphia Co. October 26, 1883.

Commonwealth v. Pavitt.

Libel—Indictment—Privileged communications.

Defendant wrote to prosecutor's attorney, in answer to a letter from the attorney threatening suit, denying that he was indebted to prosecutor, and saying that the prosecutor bought the horse, concerning which the demand was made, "to cheat somebody with:"

Held, that this was a privileged communication, and that an indictment for libel based thereon should be quashed.

Sur motion to quash indictment for libel.

On the argument of the motion, it was admitted by the prosecutor's attorney that the alleged libellous words were contained in a letter written by the defendant to the prosecutor's attorney, in reply to a letter from said attorney, stating that a claim against said Pavitt had been placed in his hands by the prosecutor, in which reply the defendant, denying the liability, and referring to a transaction he had had with the prosecutor, used these words: "Then I sold him a horse, and he paid me for him, and he has got a receipt for the same. His receipt shows that he bought an unsound horse to cheat somebody with; he finds he cannot do it, and he wants me to take him back."

Henry Pleasants, Jr., for the motion.

Words written in fair response to an attack by another are privileged—

Odgers on Libel and Slander, 228–29.
Koenig *v.* Ritchie, 3 F. & F. 413.
Regina *v.* Veley, 4 Id. 1117.

—especially when the alleged libel is addressed to prosecutor's attorney. Such communications are for the common convenience and welfare of society, and the law does not confine them in narrow limits.

Toogood *v.* Spyring, 1 C. M. & R. (Exch.) 193.

George S. Graham, District Attorney, contra.

November 24, 1883. THE COURT. An indictment was found at the September Term, 1883, of the Quarter Sessions, which charges the defendant with having written and published concerning the prosecutor, Arthur W. Yarrow, a malicious libel.

The prosecutor caused a letter to be written by his attorney to the defendant, containing the statement that his client had placed a matter in his hands against the defendant, asking that early attention be given to it, which might save the necessity of legal proceedings. In substance it is a demand made by the prosecutor, through his attorney, upon the defendant for satisfaction of a claim which he had against the defendant, and a threat of suit if it was not promptly attended to.

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The reply to this note was written on the day following, in which defendant denies indebtedness or liability to the prosecutor; refers to a transaction between them in the preceding month, and adds, "then I sold him a horse, and he paid me for him, and he has got a receipt for the same; his receipt shows that he bought an unsound horse to cheat somebody with; he finds he cannot do it, and he wants me to take him back."

This reply was written to the attorney of the prosecutor, and sent to him, and by him received through the mail. Under the authority of Callan *v.* Gaylord (3 Watts, 324) this makes out a publication of the alleged libel. The writing and sending of the letter is not denied, but the defendant takes issue with the Commonwealth upon the question as to whether, confessing the fact of writing and publishing the letter, these acts were justifiable under the law; contending that if justifiable the communication is to be regarded as privileged, in the absence of proof of actual malice; and, if privileged, that the communication is not a malicious or defamatory libel.

The principle on which this motion to quash rests is, that it was called out by what the defendant regarded as a wrongful demand made upon him by the prosecutor; that it is therefore to be regarded as at least an excusable retort; and because it was made in the conduct of his own affairs, in matters where his interests were concerned, it is privileged. The law, as thus stated, is clearly asserted by PARKE, B., in Toogood *v.* Spyring (1 Crompton, Meeson, and Roscoe, Excheq. R. 193). In such case the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending on the absence of actual malice.

To this is added the further remark, that if fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.

It may upon authority be asserted, that the principle is clearly recognized that a publication is privileged when it is called for, either by the duty or the fair and honest maintenance of the interest of a party who has made it. It was so held in Koenig *v.* Ritchie, by COCKBURN, C. J. (3 Foster & Finlason N. P. Cases, 413). In that case the plaintiff had published a pamphlet accusing defendant of fraud, to which defendant replied by pamphlet that plaintiff's charges were false and calumnious, and that in another matter plaintiff had sworn in opposition to his written statements.

The facts of this case place it on higher ground as a privileged communication than that on which Koenig *v.* Ritchie stands, where the offensive statement was given to the public, and where the probable injury to the plaintiff and the tendency to provoke a breach of the peace, was very much greater than can be predicated of the case in hand.

The alleged libel here was not made public, and is to be regarded as if sent under seal to the prosecutor himself, repelling a demand, which, if unfounded in fact and in right, was an unwarrantable attack upon the defendant, and to which he had the right to retort in the manner in which he did, when he, in effect, said, the receipt which I gave him shows that I sold the horse to him with full knowledge on his part that he was an unsound horse, which authorizes me to say, that his only object was to cheat some person by selling to him an unsound horse. This falls far short of charging false swearing, given to the world in a pamphlet, which was, as we have seen, held to be justifiable, and therefore not malicious, in the absence of proof of evil intent.

This principle has been carried to the extent of authorizing a publication by one acting in the capacity of solicitor, or of counsel for another. The client of the solicitor was attacked in a newspaper by the prosecutor, to which the defendant replied, on behalf of his client, by publication also in a newspaper, charging that the prosecutor had perjured himself on another occasion. (Regina *v.* Veley, 4 Foster & Finlason, 1117.) It was held that this was a privileged communication, if the article was written and published in answer to the charges made against the client of the defendant, and if, of course, no actual malice was shown.

In the present case there is made out a mere technical publication at best, from which no inference of malice arises, because the communication was written as a reply to one addressed to the defendant, it was therefore not a gratuitous publication; there is no fact in the case from which malice can be inferred, other than the writing and sending through the mail the letter complained of. The communication was an answer to, and was restricted to a reply to the subject-matter of the letter; there was no stepping aside or going out of the way to make an attack on the prosecutor; it was a denial, a retort which the prosecutor brought on himself, by making a demand, in a way that might justly be regarded as offensive, accompanied, as it was, by a threat of suit; the answer of which, the prosecutor complains, falls clearly within the class of communications which are held in Toogood *v.* Spyring to be privileged, because made by the defendant in the conduct of his own matters, and in which his interests were concerned. Nor

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can it be inferred that the letter of the prosecutor was taken advantage of or made the occasion for a malicious attack by the defendant, who might have said less, but who, under the authority of the cases referred to, did not transgress the limits of retort or legitimate reply, which was provoked by the prosecutor. A proper consideration of the facts of the case as they were admitted or disclosed on the argument, as constituting the basis for the indictment, and which are to be regarded as if incorporated in the indictment itself, leads to the conclusion, that upon the trial of the case, I should feel bound to instruct the jury to render a verdict of not guilty, and this conclusion requires that the motion to quash the indictment should be granted, and it is so ordered.

Opinion by ALLISON, P. J. T. W. B.

[*Cf.* Juson *v.* Evans, 12 A. & E. 733.]

Common Pleas—Law.

C. P. No. 1. November 10, 1883.

Sims et al. v. Stribler.

Pleading—Declaration in foreign attachment—Amendment of—Plaintiff in foreign attachment brought for breach of contract may amend his declaration by filing special counts.

Foreign attachment. Rule to amend declaration by filing special counts.

At the time the writ in this case issued, plaintiffs filed the common counts and a bill of particulars, under the practice in foreign attachment, in order to take judgment at the third term for want of an appearance.

A rule to dissolve having been discharged (see 40 Leg. Int. 100), the defendant entered an appearance, whereupon the plaintiffs sought to amend their narr. by filing two special counts, setting out (1) the defendant's contract to deliver a certain quantity of oats, and breach thereof, whereby plaintiffs lost the price paid and the profits they would have made; and (2) defendant's contract of warranty and breach, whereby plaintiffs lost the price paid and the profits they would have made.

Carr, for the rule.

The cause of action set out in the narr. as amended is within the remedy by foreign attachment because the profits are neither unliquidated nor speculative damages. They are profits referable to a fixed standard, viz: the market price upon the day when the oats as contracted for should have been received.

Carland *v.* Cunningham, 1 Wright, 228.
Redwood *v.* Consequa, 2 P. A. Browne, 62.
Fisher *v.* Consequa, 2 W. C. C R. 382.
Clark *v.* Wilson, 3 Id. 560.
Lear *v.* Heath, 1 E. C. L. 76.
2 Sutherland on Damages, 397, 418, 422.
2 Chitty on Pleading, 235.

The amendment is of right as if proceedings had been begun by summons.

Magee *v.* Beirne, 3 Wright, 62.
Fuller *v.* Bryan, 8 Harris, 144.
Albany Ins. Co. *v.* Whitney, 20 Sm. 248.
Blyler *v.* Kline, 14 Sm. 130.

At the farthest there is only a variance between the narr. and the affidavit. This is immaterial, and cannot be taken advantage of here.

2 Troubat & Haly's Prac. § 2281, and notes.

Hunsicker, contra.

In foreign attachment nothing can be recovered by way of damages for loss of the advantages of a contract.

Carland *v.* Cunningham, 1 Wright, 228.
Connell *v.* Godfrey, 22 Pitts. L. J. 136.
Marr *v.* Cook, 1 Del. Co. R. 157.

Plaintiffs elected to treat their demand as a claim for an over advance; they cannot now add a demand for unliquidated damages.

THE COURT. Rule absolute. F. M. L.

C. P. No. 1. January 30, 1883.

Yardley v. Cuthbertson.

Practice—Bill of exceptions—Judge's charge—All that part of the charge which relates to the specific points excepted to is entitled to be entered on the bill of exceptions.

Sur settlement of bill of exceptions.

The plaintiffs excepted to the Judge's specific answers to their points and to those of the defendants, but not to the general charge. On presenting the bill of exceptions they omitted to enter the general charge. The defendants claimed that the entire charge should be given.

Robert N. Willson and *George Junkin*, for the plaintiffs, argued that the Judge's charge to the jury should not go into the bill of exceptions, because the plaintiffs had not excepted to any portion thereof, but only to the Judge's specific separate answers to certain points presented by both sides. Plaintiffs are not compelled to include in the bill of exceptions that which has no legal connection with what has been excepted to.

A. Sydney Biddle, *H. J. McCarthy*, and *George W. Biddle* (*Wm. A. Porter* with them), contra.

The answers to points presented by counsel are only a portion of the Judge's charge to the jury, and appear upon the bill of exceptions as

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such. It has frequently been decided that the Judge need not answer the points separately, provided he has done so in his general charge; and that a verbal inaccuracy in the answer to a point, or in one portion of the charge, may be immaterial when read in connection with the charge as a whole. We are therefore entitled to have the charge, so far as it relates to the matter covered by the answers to the points excepted to, inserted as a whole.

THE COURT. All that portion of the charge relating to the points excepted to should, if desired by the defendants in error, be placed upon the bill of exceptions in order to explain the specific answers to points which are merely a part of the charge. The rule of the Supreme Court requires that the Judge's charge should be printed, and this means all of that which the Judge, in case of a difference of opinion between counsel, considers relevant as explaining the matters excepted to. The charge cannot be looked at by the Supreme Court, being no part of the record, unless made part of the bill of exceptions; and it has frequently been decided that the Judge need not answer points specifically, provided they are sufficiently answered in the charge at large, and also that the charge as a whole will be looked at to explain and qualify the particular answers to points which may be excepted to. As the whole charge relates to the subjects referred to in the points and their answers, and as they are relevant to the matters excepted to, and as defendants desire it, it must be included in the bill of exceptions.

Oral opinion by ALLISON, P. J.

C. P. No. 2. December 15, 1883.

Application of Mrs. Kilgore.

Attorneys-at-law—Women—Married women—The settled practice of the Colony and State of Pennsylvania having confined the profession of attorney to men, that practice has acquired the force of law, and a change by which women should be admitted to the bar is a legislative, not a judicial power.

Motion for the admission of Mrs. Carrie Burnham Kilgore to practice as an attorney.

A diploma of the University of Pennsylvania, showing that Mrs. Kilgore had passed the examination of its law department, and also a certificate admitting her to practice in the Orphans' Court of Philadelphia County, were presented.

H. G. Jones and *Damon Y. Kilgore*, for the motion.

Women have been admitted to practice in many States and in the Supreme Court of the United States. The matter was before the Legislature of this State, and would have been decided in favor of allowing women to practice if a mere accident had not defeated the bill. The Senate at one time passed the bill, and it failed in the House, only because not presented in time. One of the objections to the bill was that it was unnecessary, the courts having already ample power to admit women.

THE COURT. If you were entirely right in what you have just said about this being a matter upon which we might establish our own rules it might perhaps require very grave consideration. Although in that case I do not know whether I, myself, should entertain very serious doubts, but it seems to me that it is a question which lies entirely beyond the province of the judiciary and can only be decided by the Legislature.

Those are only recent instances which you refer to in other States. It cannot be an established custom. If we go farther back, for centuries there has been no instance of a woman having been chosen to fill this office. A long-continued custom meeting with general acquiescence, particularly where it takes the form of public acts, has always been considered as an evidence of the popular will, which in every free country is to govern, whether it be right or wrong. And especially in our law inherited from our English ancestors long-established custom becomes a law. For the judiciary to undertake to decide in a matter of that sort, would be an error. The matter is beyond our province, and belongs exclusively to the Legislature. If the people of this State really desire to alter the existing rule it is in their power to do so at the session which they are soon to have of the Legislature at Harrisburg, and, of course, we will follow the command laid down to us by a superior power. I do not think we can take it upon ourselves to make a change.

I may say in the case of a married woman there seems to be some reasons that may not apply in the case of a single woman. A married woman is by law relieved in a manner of responsibility, and has not all the responsibility which devolves upon a man.

If women are to take the place of men they should act under the same responsibilities. That, however, will be for the Legislature to consider. I think it is one of those subjects which we should refrain from acting upon.

The motion is refused.

Oral opinion by HARE, P. J. S. G. F.

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C. P. No. 4. June 30, 1883.

In re Sons of Progress.

Corporation—Charter—Similarity of name—The word "Independent," as part of the name of an order held descriptive merely, and not to constitute a sufficient distinction between it and the name of an order whose title is in other respects identical.

Application for a charter for an organization to be know as the "Grand Lodge of the Independent Order Sons of Progress."

Sur exceptions filed by the "Grand Lodge of the Order Sons of Progress," to the title of the intended organization.

The exceptions were (1) that the exceptants were chartered in 1881; (2) that the objects of the two are identical; (3) that the proposed corporation consists principally of former members of the exceptants expelled under their charter for violation of their laws; and (4) that the similarity will mislead to the prejudice of the exceptants.

E. Furth (*Singer* with him), for the exceptants, cited—

First Presbyterian Church of Harrisburg, 2 Gr. 240.

Jos. A. Abrams, contra.

The names are distinct enough to prevent confusion. The third and fourth exceptions are irrelevant, or without evidence to sustain them.

[ARNOLD, J. But the word "Independent" is simply descriptive. The true name is Sons of Progress.]

THE COURT. Exceptions sustained.

THAYER, P. J., absent. W. H. W.

C. P. No. 4. November 17, 1883.

Schleppi v. Gindele.

Landlord and tenant—Tenantable condition—Duty to repair—No implied undertaking of fitness of premises—Affidavit of defence.

Covenant sur lease, for rent.

Sur motion for judgment for want of a sufficient affidavit of defence.

The lease was in the usual form, described the premises as a "beer vault or cellar," and provided that the lessee will, "during the said term, keep, and, at the termination thereof, deliver up the said premises in good order and repair, reasonable wear and tear, and accidents by fire excepted." The tenancy was from year to year.

The affidavit of defence set forth that at the commencement of the term part of the premises consisted of an ice-house, which was very essential to the conduct of the defendant's business; that twenty months afterwards the ice-house fell in, and became and remained entirely useless; that the plaintiff was informed of this at the time, and refused to repair; and that by reason thereof the defendant had suffered loss exceeding the rent due, and was obliged to vacate the premises to the great detriment of his business.

D. C. Robinson, for the motion.

By the covenants of the lease the burden of keeping in repair was upon the defendant.

Walz *v.* Rhodes, 1 WEEKLY NOTES, 49.
Wheeler *v.* Crawford, 6 Id. 172.
Hoy *v.* Holt, 10 N. 88.

I. Newton Brown, contra.

The refusal of the landlord to make tenantable repairs, and the consequent removal is a good defence to an action for rent.

Brolaskey *v.* Loth, 5 Phila. 81.

A tenant should not be compelled to pay rent longer than the thing rented is capable of being used.

Ripley *v.* Wightman, 4 McCord, 447.
Ives *v.* Van Epps, 22 Wendell, 155.
Trotter *v.* Henderson, 17 Leg. Int. 190.

Lukens *v.* Hedley (1 WEEKLY NOTES, 266) has no application; there the premises became untenantable by ordinary wear and tear. Here the tenant has entirely lost the use of them by destruction.

[ARNOLD, J. It was decided in Moore *v.* Weber (21 Sm. 429) that there is no implied obligation that the premises are fit for the purposes for which they are rented, or that they are tenantable or shall continue so.]

THE COURT. Rule absolute.

THAYER, P. J., absent. W. H. W.

Orphans' Court.

November 17, 1883.

Graham's Estate.

Orphans' Court practice—Separate and independent proceedings should not be embraced in one petition—Petition for a private sale should not contain an application to invest in other real estate—Act of March 29, 1832—Act of April 18, 1853, "Price Act"—Guardian ad litem—Not to be appointed without notice to minors or next of kin.

Sur petition to sell real estate at private sale, and to invest purchase-money in other real estate.

The petition of the executor set forth that testator died seised of certain real estate in the city of Philadelphia, and by his will devised the

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same to his wife and daughter Margaret for the life of his wife, and upon her decease to his said daughter, so long as she remained single and unmarried; and, upon her marriage, to his said daughter Margaret, and his daughter Eliza during their life, but upon the decease of either, then one-half of said premises to his daughter Mary in common with the survivor during life. And after the death of his wife and daughters, testator ordered his executor to sell said real estate at public or private sale, and the proceeds he disposed of amongst his children and grandchildren, as set forth particularly in the will; that the widow and daughters of testator are all living, and some of the latter have children who are still minors. That the owner of adjoining land is about to erect thereon a large mill or manufactory to be operated by steam and machinery which will greatly diminish the value of said premises, and it is therefore for the interest and advantage of those interested therein that the same should be sold. That he has offered to purchase said premises at private sale for $2600, which is more than can be obtained at a public sale. Wherefore petitioner prayed authority to sell said premises at private sale to said purchaser for the price mentioned, in fee simple, indefeasible by any party or persons having a present or expectant interest therein.

Petitioner further stated that in case said sale be authorized as aforesaid, it will be for the benefit of the persons interested to invest the purchase-money in other real estate to be held for the use of the same persons, and for the same estates as the premises so sold were held, under the will of testator. That said purchaser is the owner of a dwelling-house and lot of ground in said city, which he is ready and willing to sell and convey to petitioner for the price of $2600, which is a fair and reasonable price.

The petitioner, therefore, prayed authority to invest the purchase-money aforesaid, when received in the purchase of the last-mentioned premises, to be held for the same uses and estates as the premises first mentioned are held under the will of testator. That a citation may issue to the parties interested therein to show cause why the prayers of the petition should not be granted, and that a guardian *ad litem* be appointed for such of them as may be minors.

Samuel Gormley, for petitioner.

petition, proceedings in their nature distinct and independent. They should always be separated. One may be granted, the other refused. And while additional labor may be required of counsel, this is preferable to probable confusion of the record thus misleading other counsel and the parties interested. It is of the utmost importance that the record, the history of each case or proceeding should be intelligible and harmonious. This petition is therefore defective in combining with an application to sell decedent's real estate at private sale under the Act of 1853, a further application to be allowed to invest the purchase-money in other real estate. We will, however, in this instance treat the latter as surplusage, and as if the petition was simply for the sale of the real estate.

While the Act of 1853 provides that "if minors shall have no guardian, the Court shall appoint a guardian for them," it does not contemplate an appointment by the Court of its own volition without notice, but that the Court shall proceed in accordance with the usual practice where minors have no guardian, and their interests are to be affected. The course to be adopted is clearly pointed out in the Act of March 29, 1832 (Purdon, 1105, pl. 17), and should in all cases be pursued. The reason is apparent. The minors will not be bound by proceedings to which they are not made parties, and of which they have had no notice according to law. In Swain *v.* Fidelity Ins. Co. (4 P. F. Smith, 455), it is held that no Court has authority to appoint a guardian *ad litem*, without first giving notice to the minor or his next of kin, as provided by the Act of March 29, 1832. And a minor over fourteen years of age, on whom there has been no personal service of process, and for whom no guardian has been appointed, is not bound by a judgment in partition; he may avoid it on attaining full age. (Id.) For the reasons stated we must decline at present to appoint a guardian *ad litem*, but will grant the citation to the parties of full age, and direct notice to be given to the minors if above fourteen years of age, if not, to their next of kin, of the filing of the petition, and that they are required to appear on or before the return day of the citation, and apply for the appointment of a guardian to represent them, otherwise application will be made to the Court to appoint a guardian for them.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, DEC. 27, 1883.* [No. 3.

Supreme Court.

Jan. '83, 137. Jan. 31, 1883.

Burkhard v. Travellers' Insurance Co.

Accident insurance—Construction of policy—Voluntary exposure to danger.

Ambiguous words in a policy of insurance will be held to have the meaning most favorable to the insured, the presumption being that he took the policy on this construction, and the company could have avoided the difficulty by being more specific.

In an action by an administrator of an insured on a policy of accident insurance which excepted injuries caused "by voluntary exposure to unnecessary danger, hazard, or perilous adventure" or by "walking or being on the road-bed or bridge of any railway," it appeared that the insured arose from his seat when the train came to a standstill on a drawbridge at night, went to the front platform, stepped off the car, and fell through a hole, caused by the removal of planks during repairs, and received fatal injuries therefrom; the company set up as a defence to the action a violation of the above conditions:

Held, that the facts of the case did not show a voluntary exposure to danger; exposure to a hidden danger without any knowledge of it does not constitute voluntary exposure.

Held further, that the intention of the restriction against walking or being on the road-bed or a bridge of a railway was not to guard against injuries resulting from a defective road-bed or bridge, but against danger of injury from trains passing thereon.

Error to the Common Pleas No. 2, of Philadelphia County.

Debt, by Leonard Burkhard, Sr., administrator of Leonard Burkhard, Jr., deceased, against the Travellers' Insurance Company of Hartford, upon a policy or ticket of accidental insurance issued to Leonard Burkhard, Jr., the plaintiff's intestate, in the sum of $3000 for and during the term of thirty days from the date thereof.

The policy contained, *inter alia*, the following clause and condition:—

"And no claim shall be made under this ticket when the death or injury may have been caused by voluntary exposure to unnecessary danger, hazard, or perilous adventure, or by walking or being on the road-bed or bridge of any railway."

The case was tried by agreement without a jury, before HARE, P. J., in accordance with the provisions of the Act of April 22, 1874, before whom the facts appeared to be as follows:—

The deceased, Leonard Burkhard, Jr., was on his way through Indiana to Louisville, Kentucky, *via* the Ohio and Mississippi Railway. The train was stopped on the railway bridge across the Ohio by the opening of the drawbridge, and Burkhard rose from his seat, went to the front platform, stepped off it to the railway track, fell through a hole caused by the removal of some of the planks with a view to repairs, and received a fatal injury which caused his death.

The plaintiffs submitted, *inter alia*, certain points, which with the answers thereto were as follows:—

1. Should your Honor believe from the evidence adduced, that plaintiff's decedent was half asleep or drowsy at the time of the accident, and that he was under the impression that he had arrived at the Louisville depot, his destination, and left the coach to see whether his surmises were correct, plaintiff is entitled to recover. *Answer*. I hold that it is not necessary to enter on the consideration of this, because I find that there is not sufficient evidence that the plaintiff was half asleep or drowsy at the time of the accident, or that he was under the impression that he had arrived at his destination, and left the car to see whether his surmises were correct.

6. Should you, however, believe from the evidence adduced that, when plaintiff's decedent left the car he had full control of his senses, and merely left the same because the train had stopped, as is customary for male passengers to do on long journeys, intending to return when notified by the railroad officials or engineer's whistle; that he was not told to remain in the car, and had no knowledge of the dangerous condition of the bridge, then it was not such a "voluntary exposure to unnecessary danger" as will excuse the defendants and relieve them from liability under the contract of insurance and the law applicable to this class of cases. *Declined*.

The Court found for the defendant, saying, *inter alia*, as follows:—

"The defendants would be liable were it not that the policy contains two clauses—one that the insured shall not voluntarily expose himself to danger; the other, that he shall not be on a railway track or bridge. Both these conditions were, in my opinion, broken by Leonard Burkhard. To leave a railway train in the obscurity of the night while it is standing on a railway track over a river is certainly an exposure to danger which, if not uncommon among the travelling community, is clearly 'voluntary' within the meaning of the policy, nor can there be a reasonable doubt that deceased violated the prohibition against being on the track or bridge, although his stay was momentary, and he fell immediately through into the river.

"It was, indeed, contended that Burkhard had been asleep a short time previously, and might not have known what he was doing; but

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if such an excuse could avail under any circumstances it is not sustained by the evidence, because the deceased was aroused by the conductor, went to the water-closet, came back and seated himself before the train arrived at the bridge, and was presumably in full possession of his faculties when he again rose a few minutes afterwards and proceeded to the platform as above stated."

Judgment was then entered for defendant, in accordance with this opinion. Whereupon the plaintiff took this writ, assigning for error the answers to the points as above, and the portions of the opinion above cited.

Henry D. Wireman, for the plaintiff in error.

Under the facts and circumstances of this case there was no voluntary exposure to unnecessary danger, within the meaning of the policy.

Schneider *v.* Provident Life Ins. Co., 24 Wis. 28.

Inasmuch as Burkhard stepped from the car and *immediately* fell through a hole in the bridge, it cannot be said with reason that he broke the condition on the policy against his "walking or being on the road-bed or bridge of any railway."

The conditions in an insurance policy must be construed liberally in favor of the assured.

Schneider *v.* Provident Life Ins. Co., *supra.*
North American Ins. Co. *v.* Burroughs, 19 Smith, 43.
Penfold *v.* Universal Life Ins. Co., 85 N. Y. 317.
Trew *v.* Railway Passenger Ins. Co., 6 H. & N. 839.

It is against the policy of the law to limit the meaning of the word "accident" in this class of cases.

Theobald *v.* Railway Passenger Ins. Co., 26 Eng. Law and Eq. Rep. 432.

The exposure to danger was not voluntary because the accident proceeded from a cause unknown to the defendant.

Webster's Dictionary, "Voluntary."
Worcester's " "

Wayne MacVeagh, for defendant in error.

The deceased violated the condition in the policy, which prohibited him from voluntary exposure to unnecessary danger. Negligence and voluntary exposure are equivalent terms.

Morel *v.* Mississippi Valley Ins. Co., 4 Bush, 535.
Lovell *v.* Accident Ins. Co., 3 Ins. L. J. 877.
Hoffman *v.* Travellers' Ins. Co., 7 Am. Law Rev. 594.
May on Insurance, §§ 530, 531, and 534.
Sawtelle *v.* Railway Passenger Ins. Co., 15 Blatch. 216.

The fact that the cause was unknown to the defendant does not make the exposure any less voluntary. The danger was certain, and ought to have been present to the mind of a man of ordinary sense and prudence.

Lovell *v.* Accident Ins. Co., *supra.*

The deceased violated a condition of the policy by "being" on the bridge of a railway. The Judge found as a fact that the deceased was *on the bridge*, and his findings of facts are conclusive, and not assignable for error.

Kerr *v.* Ames, 39 Leg. Int. 392.

October 1, 1883. THE COURT. This case arises on a contract of insurance against injuries and death through external, violent, and accidental means. The death of the intestate was so caused. The general terms of the policy are broad enough to make the company liable. It claims exemption therefrom under certain exceptions in the policy. What rule then must be applied in the interpretation of this contract and its exceptions?

The true principle of sound ethics, says Chancellor KENT, is to give the contract the sense in which the person making the promise believes the other party to have accepted it. A just sense should be exercised in so interpreting it as to give due and fair effect to its provisions. (2 Kent's Com. 557.) Where a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrow construction. (2 Whart. Cont., sect. 670.) Hence when an insurance company tenders a policy to a party seeking to be insured, and uses in the policy ambiguous words, these words will be held to have the meaning most favorable to the insured, as the presumption is that on this construction he took the policy, and as the company could have avoided the difficulty by being more specific. (*Vide* Fowkes *v.* Insurance Co., 3 B. & S. 917.) The words in such case, said Mr. Justice BLACKBURN, ought to be construed in that sense in which, looking fairly at them, a prudent man would have understood the words to mean. It is now well recognized as a general rule, that when a stipulation or an exception to a policy of insurance emanating from the insurers, is capable of two meanings, the one is to be adopted which is most favorable to the insured. (May on Insurance, sections 172, 179; Wood on Insurance, sections 141–6; Allen *v.* Insurance Co., 85 N. Y. 473; Western Insurance Co. *v.* Cropper, 8 Casey, 351; White *v.* Smith *et al.*, 9 Id. 186.) In case of doubt as to the meaning of terms emanating from an insurance company, they are to be construed most strongly against the insurer. (May on Insurance, *supra;* Fawkes *v.* Insurance Co., *supra;* Wilson *v.* Insurance Co., 4 R. I. 156; Bartlett *v.* Insurance Co., 46 Maine, 500; Bowman *v.* Insurance Co., 27 Mo. 152; Insurance Co. *v.* Slaughter, 12 Wall. 404; N. A. Life and Accident Insurance Co. *v.* Burroughs, 19 P. F. Smith, 43.)

The object of this company is to insure against accidents; the purpose of this policy is to pay specific damages for bodily injuries, and death caused by external violent and accidental means; the death of the intestate was so caused; the company seeks to avoid liability under two

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clauses in the policy. One provides the insurance shall not extend to a case of death or injury caused by "voluntary exposure to unnecessary danger;" the other that "walking, or being on the road-bed or bridge of any railway are hazards not contemplated or covered by this contract, and no sum will be paid for disability or loss of life in consequence of such exposure, or while thus exposed."

The insured was travelling by rail through Indiana on his way to Kentucky. The train stopped on the bridge across the Ohio River, by reason of the draw part of the bridge being open. He went to the front platform of the coach in which he was riding and stepped off and through a hole in the floor of the bridge causing his death; this hole was about three feet wide and four feet long. It was caused by the removal of some planks during the making of repairs.

1. Was this act of the insured a voluntary exposure to unnecessary danger?

To make him guilty of the "voluntary exposure to danger," he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous; the uncontradicted evidence shows that several other passengers got out of the coach, and some of them in advance of the insured; they certainly apprehended no danger. It is customary for male passengers to alight when a train stops for any length of time. No notice was given to passengers that it was dangerous to get out of the coach where it stood. So far as appears, the bridge, with the exception of this hole, was well covered with plank and entirely safe. When the intestate alighted other passengers were standing on the bridge near the brakeman; the latter was sitting on timber that was lying on the footwalk of the bridge, and was to be used in the repairs being made; the passengers had no knowledge of these repairs; the brakeman held his lantern so placed on the floor that another timber cast its shadow over the hole, making it impossible for the insured to see it; he could see that portion of the floor lighted by the lantern, and the passengers standing thereon; he could see the brakeman near them; he stepped out of the coach in plain sight of the brakeman; he had a right to suppose he could land on a floor as firm as that on which the others stood; neither word nor sight gave him any notice of danger; he did not approach the opening caused by the draw and was not injured thereby.

It is true he voluntarily left the car, but a clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto without any knowledge of the danger does not constitute a *voluntary* exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental. Accident is defined by Worcester to be an event proceeding from an unknown cause, or happening without the design of the agent; an unforseen event, incident, casualty, chance. And by Webster, an event that takes place without one's forethought or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance, casualty, contingency.

In view of the unquestioned facts the death of the intestate was accidental. The danger was unknown. The injury was not designed. We think there was not such a voluntary exposure to danger as to fairly bring the act of the insured within the meaning of the exception.

2. Was he walking or being on the road-bed or bridge of the railway?

He certainly was not *walking* on the road-bed or bridge, and strictly speaking it is doubtful whether he was *being* on either. The evidence indicates that without touching either he probably passed directly from the steps of the car through the hole in the bridge. We will not, however, put the case on the narrow ground that he did not come in contact with either road-bed or bridge. The language of the exception clearly implies two thoughts. One, that the insured must not be on the road-bed or bridge for any length of time; the other, that the prohibition is not to guard against injury resulting from a defective road-bed or defective railway bridge, but against the danger of injury from trains passing thereon. If the design was to apply the language to bridges defectively constructed or out of repair, it would not have been restricted to *railway* bridges. It would have included all bridges, both foot and wagon. The purpose is not to avoid liability for injuries resulting from being on bridges unsafe in themselves. The manifest intent is to exempt from responsibility for damages caused by collision with trains moving thereon.

The present is not like a case between a passenger and a railway company, in which the company may be exempt from liability for damages arising from negligence of the passenger, not voluntary. Nor did the act of the insured prove such a reckless exposure of his person, nor obvious risk of danger, as to bring him within the application of the rule declared in Morel *v.* Miss. Valley Ins. Co. (4 Bush. 535); Lovell *v.* Accident Ins. Co. (3 Ins. Law Jour. 877); Sawtelle *v.* Railway Pass. Ass. Co. (15 Blatchford, 216), and kindred cases.

We therefore think, under the facts found and the rules of law which we have stated, the learned Judge erred in holding that the conduct of the

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insured brought him within either of the exceptions, so as to relieve the company from liability.

We discover no merit in the seventh specification of error. The others are substantially sustained.

Judgment reversed, and judgment in favor of the plaintiff for $3000, with interest thereon, from the commencement of the suit, and costs.

Opinion by MERCUR, C. J. W. M. S. JR.

Oct. & Nov. '83, 114. October 8, 1883

Zuver v. Clark.

Ejectment — Fraudulent conveyances—Sheriff's sale—Waiver of inquisition—Evidence.

A conveyance of land in fraud of creditors of the grantor vests in the grantee a good title as to the grantor and all persons except those defrauded. Lien creditors of the grantor at the date of such conveyance, and other creditors who know of, assent to, and recommend such conveyance are not defrauded thereby.

A sheriff's sale of the land under a judgment obtained by a defrauded creditor subsequent to the fraudulent conveyance passes the debtor's title, subject to prior liens, unaffected by the fraudulent conveyance. The purchaser at such sheriff's sale must, however, pursue his legal remedy, impeach the conveyance, and show a valid title as against the grantee; he cannot treat such conveyance as a nullity.

In ejectment by a purchaser at such sheriff's sale against the fraudulent grantee, parol evidence is admissible on behalf of the defendant to show that an indorsement on the writ of fi. fa., under which the sheriff's sale was had, waiving inquisition, was a forgery, by reason whereof the sheriff's sale under said fi. fa. was void, and the plaintiff acquired no title whatever.

Where a witness is incompetent to testify as to some matters and competent as to others, the objection must point to the matters to which he is incompetent to testify.

A party, against whom a conveyance is not fraudulent, cannot impeach the conveyance, although fraudulent as to other persons.

Error to the Common Pleas of Lawrence County.

Ejectment, by Elizabeth Clark against Joseph Zuver and Nancy Zuver his wife, to recover possession of a lot of ground in New Wilmington, Lawrence County. Plea, not guilty. On the trial, title to the premises in question was admitted in D. F. McCready, prior to 1855. It appeared that Joseph Zuver, prior to 1855, lived in New Wilmington, and owned some property. Becoming involved, he agreed with D. F. McCready to the judgments against Joseph Zuver. The exchange of deeds did not take place until March 30, 1857. At this date the liens against Joseph Zuver's property amounted to $891.71. These were paid by McCready, and the difference ($358.29) secured by a note drawn by McCready in favor of Mrs. Nancy Zuver.

The deed for the property in dispute was made and delivered by McCready to the defendant Nancy Zuver, wife of Joseph Zuver. Samuel Zuver, brother of Joseph Zuver, knew of this arrangement, recommended it, and was the subscribing witness to both deeds; although it was claimed there was no evidence that he knew the deed was made to Nancy Zuver.

In addition to the judgments against Joseph Zuver, he also owed two notes, upon which Samuel Zuver was surety, amounting to $250, and some other debts. On the same day the deeds were executed, March 30, 1857, Joseph Zuver and Nancy Zuver executed and delivered to Samuel Zuver their bond, with warrant of attorney, etc., in the sum of $250, conditioned to indemnify Samuel Zuver against the payment of these two notes, upon which Samuel was surety. Nancy Zuver denied the genuineness of her signature. Samuel Zuver, acting for Joseph in his absence, sold Joseph's personal property, and took notes from the purchasers; Samuel also receipted to Joseph for $159, to apply on the notes.

On January 19, 1858, Samuel Zuver caused judgment to be entered on said bond, issued a fi. fa., upon which the sheriff sold the property in dispute, Samuel Zuver being the purchaser, and the proceeds were applied to his own judgment. On the writ of fi. fa. was indorsed a waiver of inquisition, etc. etc., signed by Joseph Zuver and Nancy Zuver, dated November 4, 1858. Samuel Zuver took possession under this sale, and his title became vested in Elizabeth Clark, the plaintiff. Joseph Zuver and family moved away in 1859, and returned in 1880 or 1881. They took possession of the property, and Mrs. Clark brought this action of ejectment. Samuel Zuver died before the bringing of this suit and Joseph died after suit was brought.

Plaintiff offered in evidence the fi. fa., with waiver indorsed. Objected to by defendant, that the waiver was a forgery apparent on its face, the Zuvers' names being wrongfully spelled; and that Joseph Zuver could not waive inquisition as against his wife, the judgment being void as to her. By the COURT: "The Court decide to consider that Nancy Zuver was a married woman, and the wife of Joseph Zuver; that the bond on which

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and the sale on the fi. fa." Exception. (First assignment of error.)

The defendant made the following offer:—

"Defendant proposes to prove by the witness that Joseph Zuver was absent from home during the fall of 1858, at the time the waiver of inquisition purports to be signed, and up to and after the time of sale by the sheriff of the property in dispute; and that the signature to the waiver of inquisition is not the signature of Joseph Zuver; for the purpose of showing that there was no waiver of inquisition." Objected to by plaintiff. Objection sustained. Exception. (Second assignment of error.)

Plaintiff offered George E. Zuver as a witness generally. Objected to by defendant, on the ground of incompetency—witness being a son of Samuel Zuver, deceased, and bound by said Samuel's deed of general warranty. Objection overruled. Exception. (Third assignment of error.)

Defendant presented the following points:—

(1) That if Samuel Zuver approved, recommended, or acquiesced in the conveyance of the property in dispute to Nancy Zuver, at or before the date thereof, the same was not fraudulent as to him, and plaintiff cannot recover. *Answer*. Affirmed if there were no other creditors, and this one was provided for. (Fourth assignment of error.)

(2) That if Joseph Zuver paid Samuel Zuver moneys at any time, and placed personal property in his hands for sale, sufficient to pay the debts secured by the judgment, upon which the premises in dispute were sold, plaintiff cannot recover. *Answer*. Affirmed if this was all the debts, and they were secured or provided for. Exception. (Fifth assignment of error.)

Verdict and judgment for the plaintiff. Whereupon, the defendant, Mrs. Nancy Zuver, took this writ and assigned for error the admission of plaintiff's testimony and the rejection of hers, above noted, and the answers of the Court to her points.

Martin and *Gardner*, for plaintiff in error.

It is undisputed that the legal title to the land in dispute was in Nancy Zuver, that she was in possession, claiming under the deed of March 30, 1857. A sale of improved land on a writ of fi. fa., without waiver of inquisition by the defendant in the writ or owner of the land, is absolutely void.

Baird *v.* Lent, 8 Watts, 422.
Wolf *v.* Payne, 11 Casey, 97
Gardner *v.* Sisk, 4 Sm. 506.
St. B. Church *v.* Wood, 11 Sm. 103.

Whether inquisition was waived is a matter of proof. It was manifest error to rule that no one, except the defendant in the writ, could set up want of inquisition; for Wolf *v.* Payne (*supra*), rules that the owner of the land has the right to waive inquisition, and not the defendant in the judgment. It was error to refuse to let the defendant below show that the waiver was a forgery, as the waiver had been admitted in aid of Mrs. Clark's title, if for any thing.

St. Bartholomew's Church *v.* Wood, *supra*.

George E. Zuver is the son of Samuel Zuver, and resides upon land which Samuel Zuver owned at the time the lot in dispute was purchased. This land descended to witness, who was bound by the deed of general warranty.

De Chaumont *v.* Forsythe, 2 P. & W. 507.
Whitchill *v.* Gotwalt, 3 P. & W. 313.

A party cannot advise and acquiesce in the transfer of property, and then impeach the title, by alleging that his debt was not secured, because some other creditor was defrauded.

French *v.* Mehan, 6 Sm. 286.
Davidson *v.* Little, 10 Harris, 245.
Monroe *v.* Smith, 29 Sm. 459.

D. B. Kurtz (*E. T. Kurtz* and *McMichael & McConnell* with him), for defendant in error.

It is conceded that Nancy Zuver neither contracted nor paid for the lot in dispute, although the deed was made to her. Her husband was then in debt and made no provision for the payment of these claims. Therefore this was a voluntary conveyance, hindered and delayed creditors, and vested no title in her as against them. The title was in Joseph Zuver, and the subsequent sheriff's sale of the property vested the title thereto in the purchaser, under whom the defendant in error claims. Nancy Zuver was a mere intruder, and could not take any advantage of the weakness of the title of the plaintiff below.

Hunter *v.* Cochran, 3 Barr, 105.
Riland *v.* Eckert, 11 Harris, 215.
Bear Valley Coal Co. *v.* Dewart, 14 Norris, 72.
Green *v.* Scarlett, 3 Grant, 228.

Joseph Zuver abandoned the possession, and was estopped from setting up the want of waiver. The want of inquisition can only be taken advantage of by the defendant.

Wray *v.* Miller, 8 Harris, 111.
Crawford *v.* Boyer, 2 Harris, 380.
Christy *v.* Brien, 2 Harris, 248.

When the objection to an offer is a general one, if any part of the testimony is admissible, there is no error in overruling the objection.

Robinson *v.* Buck, 21 Sm. 386.
Laubach *v.* Laubach, 23 Sm. 387.
Phila. *v.* Leidy, 10 Barr, 45.

November 12, 1883. THE COURT. As against everybody except persons intended to be defrauded the deed by McCready to Nancy Zuver vested a good title in her for the lands in controversy. Joseph Zuver was as completely divested of title as if the conveyance had been made to his wife in good faith for a full consideration in money; and if void as to his creditors, yet the title was changed, and a sheriff's sale upon a judgment obtained against Joseph Zuver after the

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delivery of the deed would be subject to liens which existed at and before the date of delivery. A sheriff's deed would pass to the purchaser all that was conveyed to the fraudulent grantee, and as such grantee took subject to liens, if any, the purchaser at sheriff's sale would take upon the same terms. Lien-creditors are not included among persons who may be defrauded by the conveyance of land, for they may follow the land irrespective of all changes in the title, honest or dishonest. (Byrod's Appeal, 31 Pa. St. 241; Fisher's Appeal, 33 Id. 294.) But the deed being void as to the defrauded creditors, as regards them it is still their debtor's estate which is sold in satisfaction of their debts, and the purchaser obtains the right to contest and avoid the conveyance. (Hoffman's Appeal, 44 Pa. St. 95; Jacoby's Appeal, 67 Id. 434.) Should a surplus remain after paying the debts it would belong to the grantee, for the grantee's title only fails so far as it stands in the way of the creditors.

At the time Samuel Zuver obtained his judgment Nancy Zuver was the apparent owner of the land. He was the purchaser at the sheriff's sale made by virtue of a fieri facias issued on his own judgment. Indorsed on the writ is a waiver of inquisition, purporting to be signed by Joseph and Nancy Zuver. It may be conceded that, *prima facie*, the waiver is genuine, having been taken by the officer and returned with his writ. The defendant objected that the waiver was a forgery, but the Court ruled that she could not set up the want of inquisition, and overruled her offer to prove the forgery and that there had been no waiver of inquisition. That was error. Whether the grantor or the grantee in the alleged fraudulent conveyance is the party who can legally waive inquisition, is a question not raised at present; the cause was tried as if the defendant had no right to object to the plaintiff's title.

It has already been seen that the right to contest Nancy Zuver's title and possession can only exist in a creditor or purchaser at sheriff's sale. If that sale was void the purchaser was without footing to make the contest. A creditor cannot oust her, or contest her right, save by due legal proceeding. Were he to intrude into possession he could not defend on the ground that her deed is void, or voidable. He must obtain judgment, and pursue the proper legal means for collection St. 506; St. Bartholomew's Church *v.* Wood, 61 Id. 96.) Nothing can be added to the opinions in these cases in support of the points decided, nor need other cases of like import be cited. In St. Bartholomew's Church *v.* Wood there was a pretended waiver of inquisition, but it was held that testimony was admissible to show that in fact there had been no waiver.

The third specification of error cannot be sustained. As printed in the paper-book the objection to the witness, George E. Zuver, materially differs from the bill of exception, which shows that the objection was to his competency to testify. He was competent with respect to matters that had occurred after the death of his father, and if incompetent to prove events prior to said death, the objection should have been pointed to that period.

The defendant's first and second points should have been affirmed without the added qualification. If Samuel Zuver's debt was paid, or a satisfactory arrangement made with him for its payment, or if he approved or recommended the conveyance of the property to Nancy Zuver, he was not a person intended to be defrauded, and the conveyance was valid as against him. If the conveyance was void as to other creditors, and not as to himself, that fact could in no way work to his advantage. As well might Joseph Zuver have attempted to avoid the conveyance as one of his creditors who advised and approved the making of it. None but a person intended by the parties to the conveyance to be hindered, delayed, or defrauded, or one holding under such person—for instance, a purchaser at judicial sale in the collection of a debt due such person—can avoid the conveyance; for only as against such person or persons is the deed void under the Statute of Fraudulent Conveyances.

Judgment reversed, and venire facias de novo awarded.

Opinion by TRUNKEY, J.

MERCUR, C. J., and PAXSON, J., absent.

J. M. S.

Oct. & Nov. '83, 1. October, 4, 1883.

Potts et al., Executors, v. City of Pittsburgh.

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Error to the Common Pleas of Westmoreland County.

Trespass quare clausum fregit, by James Potts and W. V. Evans, executors of the estate of John Karns, deceased, against the city of Pittsburgh, a municipal corporation of the county of Allegheny, to recover damages for an alleged trespass on lands situate in Westmoreland County. Service of the writ was made in Pittsburgh on Robert Liddell, mayor of the city of Pittsburgh.

On the trial, when plaintiffs had closed their testimony, HUNTER, P. J., on motion of defendant, granted a nonsuit, on the ground, *inter alia*, that a municipal corporation can only be sued in the county in which it is situate. The Court subsequently refused to take off said judgment of nonsuit, whereupon the plaintiff took this writ, assigning for error said judgment.

James S. Moorhead (with him *J. A. Marchand*), for plaintiffs in error.

A municipal corporation can commit a trespass.

Hilliard on Torts, vol. 2, p. 474.
Angell and Ames on Corporations, 388.
Turnpike Company *v.* Rutter, 4 S. & R. 6.
McCready *v.* Guardians of the Poor of Philadelphia, 9 S. & R. 94.

Trespass being a local action, can only be brought in the court of the county within which the land entered lies.

Act of June 13, 1836, § 79 (P. L. 587).

A sheriff may go into an adjoining county, and serve process on residents therein for a trespass or nuisance committed on land within his bailiwick.

Act of June 13, 1836, § 37 (P. L. 579).

Section 42 of the same Act (P. L. 579) makes a similar provision as to a corporation whose officers are non-resident.

H. P. Laird (with him *Edgar Cowan*), for defendant in error.

A public municipal corporation can only be sued in the courts of the county in which it is situate.

Lehigh County *v.* Kleckner, 5 W. & S. 181.
Oil City *v.* McAboy, 24 Smith, 249.

A municipal corporation is never included in a statute unless specifically mentioned, and is, therefore, not affected by § 42 of the Act of June 13, 1836, *supra*.

October 22, 1883. THE COURT. There was no error in refusing to take off this nonsuit. A municipal corporation can be sued only in the courts of the county where it is situated. (Oil City *v.* McAboy, 24 P. F. Smith, 249.) The 37th section of the Act of 13th June, 1836, is not applicable to trespasses committed by any corporation. The 42d section of the same Act does not apply to *municipal* corporations. In the absence of any Act of Assembly the sheriff cannot go beyond his bailiwick to serve process on a municipal corporation. It is no sufficient answer to say that a local action must be brought in the county in which the property is located. Conceding that in effect this view prevents the city of Pittsburgh from being sued any where *in trespass* to right this wrong, yet it leaves open to the plaintiffs all such forms of action as may be instituted in the county of Allegheny to recover damages for the alleged injury.

Judgment affirmed.

PER CURIAM.

PAXSON, J., absent. J. D. MC K.

Oct. & Nov. '83, 115½. October 18, 1883.

Hutchison v. Kerr.

Statute of Frauds—Parol sale of land—Equitable and legal title—Ejectment—Evidence.

A parol sale of specific land for a sum certain, followed by possession in pursuance thereof and the making of valuable improvements, will create such an equitable interest as will be bound by the lien of a judgment against the vendee. The sheriff's vendee of this equitable title is entitled to all the rights of the judgment debtor, including the right to recover possession.

It is immaterial that the judgment debtor, subsequent to the date of the entry of judgment, declared to a stranger that he had no title.

Error to the Common Pleas of Butler County.

Ejectment, by James Kerr, against Milton Hutchison, for a lot of ground in Arrandale, Butler County. Plea, not guilty.

On the trial, before MCJUNKIN, P. J., title to the premises in question was admitted in James Black prior to 1874. The plaintiff's evidence showed that, by a parol agreement in 1875, Black agreed to sell the lot to Daniel Hoffman for $40; that Hoffman took possession, erected a house into which he and his family moved, and made other improvements to the value in all of about $200; that on June 18, 1876, plaintiff recovered a judgment against Hoffman, and under an execution sold said premises at sheriff's sale in 1880, as the property of Hoffman, when he, plaintiff, became the purchaser.

It appeared that Hoffman had left the premises in the spring of 1879, and his family went away in June of that year, leaving the key of the house with a neighbor.

The defendant claimed under a sale of the premises by James Black, by articles of agreement in 1880, to William G. Smith, and under a lease from Smith to defendant.

There was evidence, as to the possession by defendant, that some time after Hoffman had moved from the house the defendant obtained

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the key from the neighbor, in whose custody Mrs. Hoffman had left it, upon the representation that William G. Smith wished to look at the house. Smith afterwards, when requested, refused to surrender the key to its former custodian.

The defendant made the following offer: "We propose to prove by the witness on the stand (Milton Hutchison) that Daniel Hoffman, the purchaser of the lot in dispute from James Black by parol, informed the witness in the fall or winter of 1879 that he had no title to the property; that he could not sell the property because he had no title to it, and that he could not pay the purchase-money, and that he intended to move away from it and never come back again. This to be followed by proof that he did move away and abandon the possession; for the purpose of showing an abandonment of the contract, if any contract has been proven, and that these or other similar declarations were communicated to James Black, and that in pursuance thereof he resumed possession of the property in dispute."

By the COURT. I do not see how that could be received to affect the title of the plaintiff acquired under the judgment. It was a lien upon the property at the time and before this conversation, and we do not see how it could affect the right of the plaintiff here to the possession of the property. (First assignment of error.)

The defendant presented the following point: "That if all the disputed facts in proof in the cause were found in favor of the plaintiff, it would not make out a case of part performance that cannot be adequately compensated in damages, and therefore does not take the case out of the operation of the Statute of Frauds and Perjuries, and the verdict must be for the defendant."

Answer. We refuse to instruct you as requested in this point. It is for the jury to find the facts, and for the Chancellor upon the facts so found to determine whether it would be unjust to rescind the contract. (Third assignment of error.)

Verdict and judgment for the plaintiff, whereupon Milton Hutchison sued out this writ, and assigned for error, *inter alia*, the refusal of the Court to receive the above offer and the answer to defendant's point.

A. T. Black, for plaintiff in error.

Lewis Z. Mitchell, for defendant in error.

October 22, 1883. THE COURT. The gun was to be postponed until the death of the mother of the vendor. Hoffman took possession in pursuance of his purchase. He inclosed the lot with a fence; moved a house on the lot and fitted it up as a residence, erected a wagon shop thereon, and planted some fruit trees. All the improvements cost nearly two hundred dollars. He resided thereon with his family for several years. While thus in possession under his purchase, and after these improvements, large compared with the amount of the purchase-money, were made, the judgment was entered, and bound all his equitable estate in the lot. The defendant in error purchased by virtue of a sheriff's sale on that judgment.

While Hoffman withdrew from the actual possession before the sheriff's sale was made, yet the key of the house was left in the hands of an agent by Mrs. Hoffman to keep possession for them. That key appears to have been procured from the agent by the owner of the legal title under a misrepresentation of authority from Hoffman. Under the facts disclosed it cannot be held to be a voluntary yielding up of the possession of the lot. All the evidence given, and the declarations made to one then a stranger to the title, which were rejected, are insufficient to discharge the equitable interest of Hoffman from the lien of the judgment. As Hoffman had been put into possession by the vendor, and had made improvements four times the value of the purchase-money, neither he nor one claiming under him could be deprived of the possession in the manner stated. The owner of the legal title must go out of possession and assert his claim in a legal manner. (Eberly *v.* Lehman, 13 WEEKLY NOTES, 395.)

Judgment affirmed.

PER CURIAM. J. M. S.

Oct. & Nov. '83, 173. October 18, 1883.

Smith v. Commonwealth.

Criminal law—Perjury—Pleading—Two indictments for same offence.

The pendency of an indictment is no ground for a plea in abatement to a second indictment charging the same offence.

A plea averring the pendency of another indictment for the same offence is a nullity.

Error to the Quarter Sessions of Butler County.

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28, June Sessions, 1882, tried and convicted. The Court granted a new trial upon the grounds that the offence was defectively charged, and that the *allegata* and *probata* did not agree. Thereupon a new information was made and another bill charging the same offence found and returned at No. 31, December Sessions, 1882. The District Attorney elected to go to trial upon the second indictment, and moved to quash the first; or, if that application was denied, moved to enter a *nolle prosequi* to the first. To this the defendant objected, and he insisted upon being tried under the former indictment, No. 28, June Sessions, and moved to quash the second indictment. The Court refused that motion, and ordered the trial to proceed upon the second indictment. Exception.

The defendant was convicted. Motions in arrest of judgment and for a new trial were overruled and the defendant was sentenced. Whereupon defendant took this writ, assigning for error, *inter alia*, the action of the Court in refusing to quash the indictment; in compelling the defendant to go to trial upon the second indictment while the first was pending and undisposed of, and in not arresting judgment.

J. Q. Sullivan and *L. Z. Mitchell*, for plaintiff in error.

Charles McCandless (*W. A. Forquer* and *A. M. Cunningham*, District-Attorney with him), for defendant in error.

November 5, 1883. THE COURT. The only specifications of error that are worthy of even a passing notice, are grounded on the pendency of the first indictment, No. 28, of June Sessions, 1882, found several months before the one on which plaintiff in error was tried, convicted, and sentenced. The motions to quash the indictment and in arrest of judgment, as well as the so-called special plea and the rulings of the Court in reference thereto, etc., are all based on the existence of the prior pending and undetermined indictment. The several specifications relating to these subjects, respectively, have no other foundation on which to rest, and if that is insufficient they cannot be sustained.

The plaintiff in error was tried on the first indictment and convicted, but the Court set aside the verdict and granted a new trial, because the offence was defectively charged, and the *allegata* and *probata* did not agree. Instead of attempting to remedy the defect by amendment, a new information was made and another bill duly found and returned by the grand jury. Substantially the same matters are charged in both indictments, as constituting the crime of perjury, but there are such essential points of difference between them, in the manner of charging the offence, that if defendant had been tried a second time on the first indictment, with the same evidence as that given on the former trial, in all probability he would have been acquitted. It is not at all surprising, therefore, that he should demand a trial on the first rather than the second indictment. A trial and acquittal on the former would have afforded him at least a plausible pretext for pleading *autrefois acquit* to the second indictment. The District-Attorney claimed the right and, with consent of Court, elected to try the second indictment, and at the same time offered to enter a *nolle prosequi* on the first, or to agree that it be quashed, but defendant objected, and in consequence thereof nothing was done. Under these circumstances, it is difficult to see any valid objection to the action of the Court in sustaining the District-Attorney and ordering the trial to proceed on the second indictment. The pendency of the first indictment was no obstacle, much less a bar to a trial on the second. How could it be otherwise? After the verdict was set aside and a new trial granted the case stood as it did before trial, at issue on the plea of not guilty. The pendency of that issue could not be pleaded either as a former conviction or acquittal. Indeed, it is impossible to see how it could stand in the way of a new trial on the second indictment. If both indictments were confessedly for the same offence an acquittal or conviction on either would shield the defendant from conviction on the other. If they were for different offences, he could have no valid objection to being tried on both.

It is well settled, on both reason and authority, that the pendency of an indictment is not good ground for a plea in abatement to another indictment in the same court for the same cause. Whenever either of them, and it matters not which, is tried and judgment pronounced thereon, such judgment will afford a good plea in bar to the other, either of *autrefois convict* or *autrefois acquit*, but nothing short of a conviction or acquittal will support such a plea. (Commonwealth *v.* Drew, 3 Cushing, 279; Regina *v.* Goddard, 2 Ld. Raymond, 920; Whart. Crim. Pleading and Practice, sect. 431; 2 Hawkins, P. C. 309; Foster's C. L. 105; 1 Chitty, C. L. 446.)

If it had not been for the objection interposed by the defendant the first indictment would have been disposed of by entering a *nolle prosequi* thereon, or otherwise, before the trial on the second commenceed.

It follows, from what has been said, that the so-called special plea was a nullity, and the Court committed no error in so treating it.

The subject of complaint in the first specification is the refusal of the Court to quash the indictment. In support of the motion to quash thirteen reasons were urged, the chief of which

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is the pendency of the first indictment. That reason, as has been observed, underlies nearly all the assignments of error. It has already been considered, and it is therefore unnecessary to add anything to what has just been said on the subject. There is nothing in any of the reasons assigned that would have justified the Court in quashing the indictment.

For reasons already suggested, the second and third specifications, both of which relate to the pendency of the first indictment, are not sustained.

The fourth specification, that "the Court erred in going into the jury-box on questions of fact," etc., as the plaintiff in error expressed it, is an unjust reflection on the learned Judge before whom the case was tried. His charge was quite as favorable to the defendant on trial as he had any right to expect. In it the law of the case was clearly presented, and the facts were fairly submitted to the jury, without any apparent effort on his part to invade their province.

The grounds upon which the motion in arrest of judgment were based are clearly insufficient, and hence there was no error in overruling the motion.

The subjects of complaint in the remaining specifications are the rejection and also the admission of the evidence therein referred to.

We find no error in any of the rulings of the Court on these subjects. There is nothing in the record that calls for a reversal of the judgment.

The judgment of the Court of Quarter Sessions is affirmed, and it is ordered that the record be remitted to said Court for the purpose of carrying said judgment into effect.

Opinion by STERRETT, J.

GREEN, J., absent. J. M. S.

Common Pleas—Law.

C. P. of Delaware Co. November 5, 1883.

Wetherill v. Commissioners of Delaware County.

on the farm. When the County Commissioners refuse to draw their warrant on the sheep fund for damages duly certified by the Township Auditors, the proper remedy is by mandamus. The duty of the Commissioners in such cases is merely ministerial.

Rule to show cause why a mandamus should not issue.

The facts were as follows: Wetherill, as trustee for his two minor sons, was owner of sheep which were kept on the farm of his father-in-law, Wm. S. Johnson, in Radnor Township, where he boarded with his family, but had no interest whatever in the farm or the farming operations thereon. A son of Wm. S. Johnson also boarded on the same premises and kept two dogs which were not properly returned for taxation. Certain of these sheep having been killed by dogs, Wetherill had the damages thus sustained duly appraised by the Township Auditors and certified by them to the County Commissioners, with a statement that he owned or possessed no dogs. The Commissioners having refused to draw their warrant upon the County Treasurer for payment of the amount so certified because untaxed dogs were kept on the same farm where the sheep were kept, Wetherill presented a petition to the Court of Common Pleas setting out the foregoing facts, and asking for a mandamus upon the Commissioners commanding them to draw their warrant.

Upon filing this petition the Court granted this rule upon the Commissioners, who thereupon filed an answer setting forth substantially (1) that Wetherill's remedy was by common law action and not by mandamus, and (2) that the fact that untaxed dogs were kept on the same farm where the sheep were kept, barred his right to remuneration from the sheep fund.

H. Pleasants, Jr., for the rule.

The loss sustained by Wetherill creates no liability upon the county. His right to remuneration is purely statutory, and he is simply invoking the aid of the Court to give him the full benefit of the statute. This case has all the elements which justify the issuing of the mandamus.

Com'th ex rel. *v.* Commissioners, 8 Cas. 222.

Sisson *v.* Bailey, 1 Luz. Legal Rec. 56, and cases cited.

The Acts of March 23, 1809, § 2 (5 Sm. Laws, 36), and April 2, 1821, § 2 (7 Sm. Laws, 449), threw upon the Township Auditors, who, being

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correctness of the Auditor's certificate, the County Treasurer could claim the same right. This case should be ruled by Sisson *v.* Bailey (*supra*).

H. C. Howard, for the Commissioners.

The Act of March 23, 1809, § 4, gives the assessor authority to return "every dog kept or staying about a house" as the property of "the person inhabiting the house." And the Act of April 2, 1821, § 2, deprives the owner, whether constructively or actually, of untaxed dogs, from participation in the fund.

C. A. V.

December 3, 1883. THE COURT. The petition sets forth that the relator, as trustee for minor children, was the owner of sheep. That they were killed while pasturing upon the farm of his father-in-law, by unknown dogs, and that he applied agreeably to the Acts of Assembly in such cases provided, to the Auditors of the township, "who duly appraised the damages and costs at $18, and *certified that the petitioner did not own or possess any dogs*." That he furnished a certified copy of said appraisement to the County Commissioners, and demanded a warrant upon the treasurer of the county to be paid out of the fund raised by tax on dogs, and that said Commissioners have refused to draw said warrant, whereby he is without legal remedy, and prays for a mandamus commanding the Commissioners to draw said warrant.

The answer of the Commissioners sets up two defences, to wit, That the remedy by mandamus is not the proper one, and that the petitioner has his remedy by action at law against the county. *Second.* That the petitioner is not entitled to payment for his destroyed sheep, because untaxed dogs were kept on the premises where the sheep were pastured.

The evidence shows that the petitioner was a boarder with the owner of the farm upon which said sheep were killed. That he had no control over the farm, and nothing whatever to do with the farming of said land. The owner of the land had no interest in the sheep. There were two dogs kept on the premises belonging to a son of the proprietor of the farm. These dogs had not been returned or taxed.

The first defence is undoubtedly bad. There is no remedy by action at law upon the fund pro- question was settled in the case of Sisson *v.* Bailey, 1 Luz. Leg. Reg. 56.

The second defence would be good if it had appeared that the owner of the sheep had had any control over the farm, or the untaxed dogs kept upon it. It is very difficult to draw the line between the rights of children who are *sui juris*, and strangers. It would be severe justice to hold that the sheep of a stranger at pasture upon another's farm would be deprived of all claim on the dog fund, because the owner of the farm had not returned his dog for taxation. In the abstract that is this case.

It may also be very doubtful whether the certificate of the Auditors is not conclusive. The law has appointed them as a tribunal to inquire of and certify to the facts. They are to act under oath. They are required "to view and ascertain the damages sustained by the owner of the sheep destroyed, and when they shall have ascertained the-*legality* of the claims, and the *damages* so sustained," they shall certify, etc. They are also "required to ascertain whether the *owner* of the sheep so destroyed, owns, possesses, or keeps a dog or dogs about his or her house; and shall make report of the fact to the Commissioners . . . and if it shall appear to the said Commissioners that the owner aforesaid did not make a true return to the proper assessor of the dog or dogs subject to taxation, the said owner shall not be entitled," etc. This is a penal provision, and must be strictly construed. Unless the certificate of the Auditors shows that dogs were kept by the owner of the sheep, the Commissioners have no jurisdiction to inquire whether such dogs were or were not kept by the owner. Their duties, under such certificates, are merely ministerial. The tribunal appointed by the law has finally disposed of the case. The law has given no appeal from the finding of the appraisers, and all the Commissioners have to do is to draw the warrant.

This view of the law is in accordance with the view of Judge HARDING, in Sisson *v.* Bailey (1 Luz. Leg. Reg. 56), and a writ of peremptory mandamus is, therefore, directed to issue.

Opinion by CLAYTON, P. J. A. B. G.

C. P. No. 2. December 7, 1883.

Pennock et al. v. Brown.

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The plaintiffs by the claims filed, claimed to have a lien for the payment of $6267.25, "against all that six story brick office building with basement and attic . . . erected on . . . ground situate," etc., Nos. 411 and 413 Walnut Street; and alleged therein, *inter alia*, that "the said debt . . . is the balance due on a contract for the erection of said building, . . . and is the price or value of materials furnished and work and labor done, including demolition and removal of old buildings, . . . stone, stone mason's work, brick, etc. etc., . . . by the said claimants for and about the erection and construction of said office building," . . . of which the defendant is "the owner or reputed owner and contractor at whose instance and request the said materials were furnished and labor done."

Annexed to the claim filed and referred to in it, was a copy of the contract between the plaintiffs and the defendant, under which the work, etc., was done. The contract was in substance for the removal of the old buildings then on the said ground, and the erection in place thereof of a new office building, in accordance with plans therein specified; the contract contained the following clause, viz.: "the balance . . . shall be due the" plaintiffs, after the completion of the new building, "on the production and delivery of a full and complete release . . . of all liens and claims whatsoever." There was no evidence of any other lien than the plaintiffs'.

C. E. Morgan (with him *Lewis*), for the rule.

The mechanic's lien law is to be construed strictly. A lien has never been given for "demolition and removal." This claim is for a balance including such items, and is inseparable and bad.

Act 16 June, 1836, § 1, P. L. 696.
McCay's Appeal, 1 Wr. 125, per Strong, J., 128.

[HARE, P. J. Is not such demolition a part of the erection of the new building?]

[MITCHELL, J. Where destruction ends and construction commences is a shifting line.]

By the contract the release of all liens was a condition precedent to the payment of the balance; this amounted to a contract not to file a lien.

Long *v.* Caffrey, 9 WEEKLY NOTES, 25.
Given *v.* Church, 11 Id. 371.

B. K. Lowry and *J. G. Johnson*, contra, were not called upon.

THE COURT. We think this case should go to a jury.

Rule discharged.

I. T. M.

C. P. No. 2. December 7, 1883.

Simpson v. King et al.

Partnership—Partner cannot confess a judgment which would bind individually a non-assenting partner—His name on motion will be stricken from the record—On such judgment execution may go against the partner confessing and the firm assets.

Rule to strike out the name of the defendant King from the record.

The record showed that judgment had been entered against A. W. King and T. E. Otis, trading as King & Otis, by virtue of a judgment note filed, of which the following is a copy, viz:—

$700. Phila. Aug. 4th, 1883.

Sixty days after date we bind ourselves to pay to Alexander Simpson . . . the sum of seven hundred dollars. . . . And we hereby authorize any attorney of any court of record . . . to confess judgment against us for said sum. . . .

KING & OTIS. [SEAL.]

From the depositions taken in support of this rule it appeared, *inter alia*, that the said note had been so signed by Otis for a firm debt, but without the authority of his partner King.

Terry, for the rule, relied on—

Quillen *v.* Lawrence *et al.*, 4 WEEKLY NOTES, 239, and cases there cited.

Furth and Singer, contra.

We are entitled to execution against the firm assets.

[MITCHELL J. That is the case, but you cannot have a general judgment against the partners not joining.]

THE COURT. Rule absolute. I. T. M.

C. P. No. 3. Dec. 4, 1883.

Bair v. Joseph Robinson and Mary Robinson, his wife.

Married women—Liability for necessaries—What are not necessaries for the support and maintenance of the family within the Act of 1848—Funeral expenses of the mother of defendant residing with her.

Sur motion to take off nonsuit and grant a new trial.

Upon the trial, before YERKES, J., the following testimony was given:—

The plaintiff was a furnishing undertaker; the principal defendant was a married woman with a separate estate. Her husband was impecunious. At the request of defendant, and upon her order, plaintiff conducted the funeral of the mother of defendant, who prior to her death had been for

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many years a member of the family of defendant, and died in and was buried from defendant's house. The mother had no estate, and contributed all her means to the support and maintenance of the family of defendant. The Court granted a compulsory nonsuit.

Chas. Henry Hart, for the motion.

What are family necessaries in each particular case is a question for the jury and not for the Court.

Parke *v.* Kleeber, 1 Wr. 251.

The Act of 1848 provides that the separate estate of every married woman shall be liable "in all cases when debts may be contracted for necessaries for the support and maintenance of the family" of said married woman. A mother residing continuously with her daughter comes within the meaning of the word "family," as used in the Act.

Lynn *v.* Lynn, 5 Casey, 369.

That the burial of the dead is a necessity needs no argument.

Park *v.* Kleeber, 37 Pa. 251.
Davidson *v.* McCandlish, 19 P. F. S. 169.
Freymoyer's Estate, 2 Lancaster Bar, Oct. 29, 1870.

[YERKES, J. This is a disgraceful business, but I do not see how funeral expenses can be considered as necessaries for the "support and maintenance" of the family.]

[LUDLOW, P. J. All legitimate expenses that are necessary to decently maintain the family in the rank of life to which it is accustomed, ought to be included as necessaries, and it seems to me that funeral expenses are certainly among these.]

Eo die. THE COURT. Motion refused.
LUDLOW, P. J., dissented.

A. B. W.

Orphans' Court.

O. C. of Lycoming County. December 6, 1883.

Wistar's Estate.

Partition in Orphans' Court—Powers of commissioners—Where land is parted into as many purparts, of equal value, as there are heirs, and said purparts are allotted among the heirs in severalty, no valuation is necessary of the land, as a whole or of the separate purparts.

Sur exceptions to report of commissioners in make partition was filed, and commissioners were appointed.

The commissioners reported that they had divided the real estate of the decedent into five parts of equal value, and allotted them to the five heirs by name, without returning a valuation of the several purparts or of the whole real estate.

The following exceptions were filed to their report:—

(1) Because the commissioners have not valued the real estate in said writ of partition described as a whole.

(2) Because they have fixed no value upon any of the purparts into which they have divided said real estate.

(3) Because they have allotted the five purparts into which they have divided the said real estate to the five different heirs of Richard Wistar by name.

(4) Because the Acts of Assembly, authorizing the Orphans' Courts to issue writs of partition, do not allow the commissioners to divide the real estate into purparts and arbitrarily allot them to different heirs.

Henry C. Parsons, for the exceptions, relied on—

Act of April 22, 1856, sec. 10, P. L. 534, Purd. 437, pl. 156.
Klohs *v.* Reifsnyder, 11 P. F. S. 240.

C. LaRue Munson (with him *Addison Candor*) contra, cited—

Act of April 19, 1794.
Act of April 7, 1804.
Gordon's Law of Decedents, 344 *et seq.*, 360–366, and Appendix xvii.–xxiii.
Act of March 29, 1832, P. L. 201, Purd. 433.
Remarks of Commissioners in their report accompanying Act of 1832, reported in Hood on Executors, 489, 490.
Hood on Executors, 555.
Sampson's Appeal, 4 W. & S. 86, and opinion, p. 88.
Darrah's Appeal, 10 Barr, 211.
McCall's Appeal, 6 P. F. S. 364.
Benfield's Estate, 7 WEEKLY NOTES, 575.
Scott on the Intestate Law, 392, 393.
Coke on Littleton, sects. 243–249.

December 15, 1883. THE COURT. The primary duty of an inquest or commission in partition in the Orphans' Court is to divide the real estate into as many purparts of equal value as there are heirs or persons entitled thereto, and make allotment of the same. For many obvious reasons it rarely occurs that this can be done, and hence the existence of such power and practice is obscure.

A careful examination of the statutes on the subject, considering the purposes to be effected

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able mainly as timber land, and as it was practicable, so it became the duty of the commissioners, under their oaths, to divide the land into as many parts of equal value as there were persons entitled to share therein. It is only when "equal partition in value" cannot be made that the provisions of the law for returning a value for the whole or for each part becomes necessary.

For these reasons, and because there is no allegation of inequality, unfairness, or injustice in these proceedings, all the exceptions are dismissed, and the report of the commissioners is confirmed absolutely; and it is ordered that a formal decree be submitted by counsel.

Opinion by CUMMIN, P. J. C. L. M.

June 19, 1883.

Langton's Estate.

Executors—Citation to take out letters—Jurisdiction of Orphans' Court—Act of March 15, 1832—Letters testamentary—Election to accept or renounce—Orphans' Court has no jurisdiction to compel election—Practice—How election to be compelled.

Sur petition for citation to executors to take out letters testamentary, and answer.

The petition of Lydia M. Langton set forth that she is the widow of decedent, a resident of New York, who died in that city in 1865. After a contest of the will there was a compromise and agreement whereby it was admitted to probate in New York, in 1876. By the will the real estate in New York was devised to the Roman Catholic Archbishop of New York, and that in Pennsylvania to the Archbishop of that State. The real estate and certain personalty in Pennsylvania, in which the petitioner has an interest, both under the will and agreement, has not been administered upon. A copy of the will, probated in New York, certified under the Act of Congress, has been filed by the petitioner in the office of the Register of Wills of Philadelphia. The petition prayed that a citation issue to the Archbishop of Pennsylvania and the Rev. Nicholas J. Walsh, the executors named for Pennsylvania, to show cause why they should not take out letters testamentary from the Register of Wills of Philadelphia, and administer the estate in Pennsylvania, or renounce their right to take out the same, or else that letters of administration c. t. a. be granted to the petitioner.

The answer alleged that no personal property has come into the hands of respondents, and that they have no knowledge of the existence of any, and that the only real estate is in Schuylkill County.

Edward Brady, for the petitioner.

The answer presents no reason for not taking out letters testamentary. An executor must either apply for letters or renounce.

Heron *v.* Hoffner, 3 R. 393.

And the renunciation must be evidenced by some act entered of record.

Bowman's Appeal, 12 Sm. 166.

A. A. Hirst, contra.

This is an effort to go into a county where there is no property, and force executors to take out letters testamentary.

June 30, 1883. THE COURT. The petitioner has overlooked the fact that by the Act of March 15, 1832 (Purd. 407, pl. 14) the Register is given exclusive jurisdiction to grant letters of administration *cum testamento annexo*, where the executors refuse or renounce their right to act in such capacity. And no authority has been conferred upon the Orphans' Court to compel an election to accept or refuse the trust and execution of the will. Our jurisdiction being not original, but appellate, as to all judicial acts and decisions of the Register, we cannot grant relief in the present proceeding. We may, however, suggest, that the petitioner should notify the surviving executor of the filing of a copy of the will in the Register's office, in pursuance of the twelfth section of the Act of March 15, 1832, and that he is required to take out letters testamentary thereon, within a reasonable time, to be named, and in default thereof she will apply for the same. Proof of the service of such notice, as also of service upon the next of kin of testator should be filed with the Register at the time of making such application (Maupay's Estate, 2 Brewster, 491.)

For the reason stated the petition is dismissed.

Opinion by HANNA, P. J.

W. H. W.

October 15, 1883.

Moroney's Estate.

Debtor and creditor—Distribution—Diversion of personal property from payment of debts—When volunteer distributee of personal property is estopped from claiming as creditor against real estate.

Sur exceptions to adjudication.

The facts, which were not fully developed at the audit, were as follows: The accountant filed her account as trustee to make sale of the real estate of her husband, she being his administratrix. She had filed her account of the personal property some years ago, and a balance of over $6000 was awarded to the mother of decedent and herself as distributees. The accountant was also the executrix of her father's estate, an asset of which was a claim against her husband's estate for $500, money loaned, and which her father had bequeathed to her brother. At the audit of the personalty this brother was not present, and nothing of him was then, or has

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since been, learned. The accountant knew of the claim, but nothing was said of it at the audit. A few days after distribution, she instituted proceedings in the Common Pleas, in the name of her brother, against herself as administratrix of her husband's estate, and recovered judgment. The amount of this judgment was claimed out of the fund produced by the sale of real estate, at the audit of the administratrix's account as trustee to make sale.

To the allowance of this claim exceptions were filed by the heirs of the decedent.

W. H. O'Brien, for the exceptants.

It may be that the money was due by our estate to the other, but the suit was improperly brought in the name of the brother. The ground of complaint is that the accountant knew of this claim, but remained silent, and suffered half of the personalty to be distributed to herself absolutely as widow. That fund was primarily liable, and the effect of allowing the claim now out of the proceeds of the realty is to reduce the estate of the heirs who take after the death of the widow and accountant.

Chas. F. Hinkle, for the legatee and claimant.

There was no fraud in the Common Pleas. The money was honestly due, and there was ample evidence to sustain the verdict and judgment.

[PENROSE, J. But you have no standing here. You are a legatee of this money under your father's estate. You must look to the accountant as executrix of his estate, not to her as administering her husband's estate.]

Joseph I. Farley (*Pierce Archer* with him), for the accountant.

At the distribution of the personalty, the claim was overlooked, not withheld. The effect of allowing it out of the realty was not thought of by any one at the audit.

October 27, 1883. THE COURT. It is conceded that the suit in the Common Pleas was brought in the absence and without the knowledge of the nominal plaintiff, who had been away from the city and unheard from for a number of years; that the accountant, who was the apparent defendant, was the real plaintiff, or, at least, the instigator of the proceeding; and that the money which it was brought to recover, $500, was a sum held by the accountant as executrix of her father, alleged to have been loaned to or deposited with her husband, of whom she was the administratrix, and for which she was her

of the testimony of the party directly liable to the plaintiff, could scarcely be received as conclusively establishing the responsibility of the estate of the decedent in this Court, as against persons not parties to or having any notice whatever of the suit.

The present account is that of the administratrix, as trustee to make sale of the real estate of the decedent, under proceedings in partition. Her account of the personal estate was filed in the spring of 1880; and in July of that year, with full knowledge of the claim which she now seeks to have paid out of the proceeds of his real estate, and without disclosing to the Court its existence, she permitted a distribution of the personal estate, amounting to $6663.05, to be made—the distributees being the mother of the decedent and herself, his widow, to whom the entire balance as above was awarded in equal shares absolutely. Four days after the adjudication making this distribution had been filed, but before its final confirmation, the accountant caused the suit which has been referred to to be brought in the Common Pleas; and now, nearly three years after such distribution, she seeks, in the name of the supposed plaintiff, who has never been heard from at any time since or before the suit was brought, to recover payment out of the proceeds of the real estate, in which she and the mother of the decedent had but a life interest only. It is clear that this cannot be permitted. The personal estate was the primary fund for the payment of the debts of the decedent. The judgment in the Common Pleas is against her as administratrix. She already has in her pocket, as distributee, half the sum which should have gone to the payment of this claim, and is bound to refund when the amount is required for that purpose. The distribution of the fund, with which the entire amount of the debt should have been paid, would not have been made but for her own negligence or default; and the consequences should fall, therefore, as between herself and innocent parties, upon her, and not upon them, the estate which she permitted to be thus diverted having been ample to pay in full.

The alleged creditor is not the party making the claim. So far as any one connected with the estate knows, he may be dead, and the accountant, his sister, may be the person entitled to his estate. She is the real claimant. Can she be permitted to take advantage of her silence at a time when she ought to have spoken, and when she had in her hands the means of pay-

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pocket half of the required amount, and had chosen, with full knowledge, to part with the other half to a mere volunteer.

We think, under all the circumstances of the case, that the claim upon the judgment is sufficiently protected by the obligation of the accountant and her co-distributee to refund such part of what they received in distribution as may be required for the payment of the debts of the decedent; and we, therefore, sustain the first exception on the part of Bridget Barnes.

In consequence of the manner in which the account has been stated, there has been set apart for the accountant, as widow, for life, one-half of the gross proceeds of the sale in partition; and all of the costs and allowances, including the debts directed to be paid, have been thrown upon the other half, which has thus been entirely absorbed, the accountant's share remaining intact. This, of course, cannot be. The amount credited as set apart must, for the purpose of distribution, be added to the balance shown by the account; and, after the deduction of all costs and allowances, debts, etc. etc., what remains be divided among the parties to the partition or their lien creditors, according to their respective interests, upon compliance with the provisions of the Acts of Assembly, the share of the widow remaining charged upon the premises sold, and collateral inheritance tax being charged against the shares of such of the parties as are liable thereto.

The account is referred back to the Auditing Judge for further proceeding.

Opinion by PENROSE, J. W. H. W.

October 16, 1883.

Hobson's Estate.

Decedent's estate—Presumption of payment of income to cestui que trust in the absence of any claim by his representatives — Interest, when chargeable.

Sur exceptions to adjudication.

Before the Auditing Judge the following facts appeared:—

Mary Ann Hobson, the testatrix, died in 1873. She bequeathed to her brother Hartley, $2500, in trust, to divide the income between Samuel, another brother, and himself, remainder to certain charities. By a codicil she bequeathed $3000 to Hartley in trust, the whole income to be paid to Samuel, and after his death this sum to sink into the residue, which was to go to Hartley absolutely, the bequest to charities to stand. The Pennsylvania Company for Insurances on Lives and Granting Annuities was appointed to succeed Hartley as trustee, should he not live long enough to carry out the provisions of the will.

Hartley survived Samuel several years. He filed an inventory and appraisement of the estate of his testatrix, but no account, which was filed by his administrator. The amount as found by the inventory and appraisement was $10,500. The balance found when the account was filed was $4900, at the adjudication of which the Auditing Judge surcharged the deceased executor with the amount of the inventory of the estate of the testatrix. It was urged, in behalf of the Pennsylvania Company for Insurances on Lives and Granting Annuities, that interest on this sum should also be charged from the time of filing the said inventory to the time of the filing of the pre ent account, which the Auditing Judge refused, on the ground that payment of the income bequeathed to Samuel Hobson must be presumed to have been made in the lifetime of that legatee, and that part of the principal now unaccounted for to have been presumably appropriated by the deceased executor in his right as residuary legatee, and credit was accordingly allowed for the sum thus appropriated, in a distributive payment.

To this finding exceptions were filed on behalf of the Pennsylvania Company for Insurances on Lives, etc., the present trustees.

John G. Johnson, for the exceptant.

Samuel Wakeling, for the administrator of Hartley Hobson.

October 27, 1883. THE COURT (after stating the facts) held as follows: The conclusion reached by the Auditing Judge we think was, in the main, correct. In the absence of any claim by the representatives of Samuel Hobson, the presumption is a fair one that all arrears of income had been paid at his death. His brother, the deceased executor, survived the testatrix nearly nine years, and there was nothing to show that at any time during that interval he had notice or knowledge of any demand against the estate which he represented. He chose, without resorting to a formal account and settlement, to make a partial distribution, and he thereby entailed a personal liability upon his own estate; but we cannot stigmatize an act as a fraud upon creditors when the delay of those creditors alone made the act possible. The legacy of $2500 is not within this line of reasoning. On the death of the surviving brother, it vested in possession in the charities, who thereupon became entitled by the terms of the will to the securities in which it was invested, with the interest and dividends thereon. The executor's estate should have been surcharged with interest upon this legacy from the date of death of the executor.

Subject to this correction, the exceptions are dismissed and the adjudication is confirmed.

Opinion by ASHMAN, J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JAN. 3, 1884.* [No. 4.

Supreme Court.

Jan. '83, 8. March 8, 1883.

Schug's Appeal.

Orphans' Court sales—Misdescription of property sold—Puffing.

It is sufficient ground for setting aside an Orphans' Court sale that there was a mistake of twenty-five per cent. in the number of acres sold, and also that there was puffing or fictitious bidding at the sale.

Judicial sales should be so conducted as not to mislead or entrap bidders. Notwithstanding the maxim *caveat emptor* is applicable to such sales, it is the duty of those who conduct them to act in good faith and as far as possible to avoid any misdescription or misrepresentation of the quality or quantity of the land.

At the instance of the purchaser, an Orphans' Court sale will be set aside where the auctioneer has made fictitious bids even, if such puffing was not authorized by the seller who cannot repudiate the fraud and at the same time retain its fruits.

Appeal of Richard Schug from a decree of the Orphans' Court of Northampton County, discharging a rule to show cause why the confirmation of sale of certain real estate should not be stricken off, and the said sale set aside.

Upon the hearing before SCHUYLER, J., the facts appeared to be as follows:—

Catharine Moyer, administratrix of Peter Moyer, deceased, obtained on the 16th of August, 1881, an order of sale for the payment of decedent's debts of a certain tract of land belonging to said decedent and described in the advertisement as "bounded by lands of Elizabeth Schweitzer, Anna Crawford, Michael Kindt, and others, containing forty-two acres more or less." Prior to the sale the administratrix instructed the crier, one Ettweins, not to sell the property for less than $3500. At the sale on September 17, 1881, the property was started by one Russell at $2600, and was then run up by fictitious bidding of the crier to $2900. Richard Schug, the petitioner, who, up to that time, had taken no part in the sale, was then approached by the crier, who testified:—

"I went up to Richard Schug and said to him the property was cheap, because there was forty-two acres of land; I coaxed him to bid; he then gave me the bid for $3000; the bid immediately before Mr. Schug was from the administratrix, as my instructions at first were not to let the property go for less than $3500; that bid I made myself for the administratrix." Again he testified, speaking of Russell's bid of $2600: "I bid it up for the administratrix as her agent or was authorized by her; was not acquainted with the property; do not know the value of property in that neighborhood." Mrs. Moyer testified: "I thought it contained forty-two acres, did not know it was less." Richard Schug testified: "I bought by the lump *as containing forty-two acres;* the crier told me it contained forty-two acres, and if I paid $3000 it would not be $100 per acre; then I gave him the bid of $3000; did not know that the previous bid to mine was by him for the estate."

In the beginning of March, 1882, Schug called on the administratrix for the deeds, the property consisting of three separate adjoining tracts, and he then for the first time discovered the deficiency. Supposing still there might be a mistake, under the advice of a justice of the peace, whom he had employed to write the deed, a survey was made and it was then found that there were only thirty-one acres and eighty-five perches of land. Just before the survey he was informed by the widow and by the heirs that Peter Moyer, the decedent, always spoke of it as containing forty-two acres, and they always believed it contained that many acres. There was no evidence to show that the petitioner was personally acquainted with the boundaries or had ever gone over the property. On March 23, 1882, immediately after the survey, Schug petitioned the Court to strike off the confirmation and set the sale aside. Testimony was taken, when Schug for the first time learned that there was underbidding at the sale by the crier. On May 8, 1882, he presented another petition setting forth these additional facts and praying as before.

After hearing and argument the Court discharged the rule, whereupon Schug took this appeal, assigning for error, *inter alia*, the discharge of his rule.

A. S. Knecht (with him *R. I. Jones*), for appellant.

A sale even after confirmation does not divest the title of the heirs, for it remains in the power of the Court until a deed has been executed and delivered.

Leshey *v.* Gardner, 3 W. & S. 314.
Demmy's Appeal, 7 Wright, 168.
McRee's Estate, 6 Phila. 75.

Puffing at an Orphans' Court sale renders it void.

Pennock's Appeal, 2 H. 446.
Staines *v.* Shore, 4 H. 200.

Robert L. Cope, for appellee.

As a general rule the Supreme Court will not review an exercise of discretion by the Orphans' Court on a motion to set aside a sale of real

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estate unless the record shows palpable and gross abuse.

Bowers's App., 3 N. 311.
Neeld's App., 20 S. 113.
Haslage's App., 1 Wr. 440.

The rule of *caveat emptor* applies to an Orphans' Court sale.

Galbraith *v.* Galbraith, 6 W. 117.
Sackett *v.* Twining, 6 H. 199.

If the by-bidding had no effect or influence upon the purchaser's bid, the latter cannot avoid his contract.

Curtis *v.* Aspinwall, 114 Mass. R. 197.
Oram *v.* Rothermel, 2 Out. 300.

October 1, 1883. THE COURT. Judicial sales, especially those made under direction of the Orphans' Court, should be so conducted as not to mislead or entrap bidders. Notwithstanding the maxim *caveat emptor* is applicable to such sales, it is still the duty of those who conduct them to act in good faith and, as far as possible, avoid any misdescription or misrepresentation as to quality or quantity of the property offered for sale. In this case, the property in question was so described as to induce the belief that it contained about forty-two acres, when in fact it contained twenty-five per cent. less. This was not discovered by appellant until shortly before the time for making the deed and delivering possession. If the administratrix, in preparing her application for order of sale, had exercised reasonable care, the mistake, as to the quantity of land, could not have occurred. Reference to her husband's title papers, in her possession, would have revealed the fact that the entire tract contained only a fraction over thirty-one acres. In addition to the advertisement, which in itself was calculated to mislead bidders, the auctioneer on the day of sale especially urged appellant to bid on the property, assuring him, at the same time, that it contained forty-two acres. It is very evident from the testimony that appellant was misled by the advertisement and declaration of the auctioneer and purchased the property believing it contained the number of acres represented. This result was brought about not by his fault, but by the carelessness of the administratrix, supplemented by the misrepresentation of the auctioneer. If compelled to pay for the land, the cost to him per acre will be about thirty-three per cent. more than he supposed he was bidding. These circumstances alone appeal strongly to the conscience of a chancellor, in ing received but one *bona fide* bid, $2600, he resorted to the reprehensible practice of fictitious bidding by which the amount was advanced to an apparently real but actual bogus bid of $2900, and then, by further misrepresentation, succeeded in obtaining appellant's bid of $3000, which, after consultation with the administratrix and other interested parties, was accepted. In whatever form it may be practised, puffing at a judicial sale is contrary to every principle of fair dealing. (Pennock's Appeal, 2 Harris, 446; Staines *v.* Shore, 4 Harris, 200.) In the latter case, it was held that the employment of a puffer by the seller vitiates the sale, and it is not material whether the property purchased brought no more than its general value. For no fair purpose is the employment of a puffer necessary, and it must vitiate every sale in which recourse is had to it. It matters not in what form, or by what means, secret fictitious by-bidding is effected, or by what name it may be called. It is the same in principle, whether the auctioneer himself performs the part of a decoy or a puffer is specially employed for that purpose. In making sale, the auctioneer is the agent of the seller and the latter is so far affected by his acts and declarations that he cannot repudiate the fraud as unauthorized and at the same time hold on to its fruits.

In view of the circumstances to which we have briefly adverted, especially the misrepresentations by which appellant was undoubtedly misled as to the quantity of land offered for sale, and the manner in which the sale itself was conducted, we think the Orphans' Court, in the exercise of that sound discretion with which it is clothed, should have granted the relief prayed for by appellant.

Decree reversed at the costs of the appellee, and it is now adjudged and decreed that the decree of the Orphans' Court confirming the sale be opened and the sale set aside, at the costs of the administratrix; and it is further ordered that the administratix refund to appellant the amount paid by him on account of purchase-money.

Opinion by STERRETT, J. C. B. T.

May, '83, 30. May 30, 1883.

Fahnestock's Appeal.

Trustee. Measure and standard of duty of

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Where a trustee, acting in good faith and in the exercise of his discretion, retained securities which came to his hands as assets of the trust estate, the fact that such assets depreciated in value and caused loss to the estate is not cause for surcharge of the trustee, nor will he be on that account deprived of compensation for services and of expenses attending the exercise of the trust.

Certiorari sur appeal to the Common Pleas of Adams County.

Appeal by Edward G. Fahnestock, trustee under the will of Joseph Baugher, deceased, from a decree of said Court, requiring him to pay over a certain sum of money.

Upon the audit of the account of said Edward G. Fahnestock, trustee, as hereinafter mentioned, the following facts appeared: Joseph Baugher died testate, leaving to survive him a widow and two daughters, one of whom is Mrs. Annie M. Baker; the other, Mrs. Caroline Heiner. In his will he devised and bequeathed, *inter alia*, to his widow, one-third of his personal property absolutely, and one-third of his real estate for life; and the residue of his estate, of all kinds, to Benjamin Deford, in trust for his two daughters above named. The real estate was sold to Sanford Shroder, a step-son of the decedent, for $4000, and another tract to J. F. Shroder, also a step-son, for $3250. The widow's dower was secured by a mortgage of $2416.66 upon the first-named property. The widow died in 1853. In 1866 Benjamin Deford filed his account, which was duly confirmed, and resigned as trustee, whereupon Edward G. Fahnestock was appointed trustee in his place on August 20, 1866, and received, as the corpus of the trust, the following securities and moneys:—

Mortgage, Sanford Shroder,	$2416 66
Note, Samuel Fahnestock,	5200 00
Three months' interest,	78 00
Check, Benjamin Deford,	2282 89
	$9977 55

Of this amount he held the one-half, being $4988.78, as trustee for Mrs. Annie M. Baker.

Notwithstanding some depreciation in real estate values, and some arrearages of interest, the trustee considered the Shroder mortgage amply secured; but a writ of alias sci. fa. was issued to Jan. T. 1877; judgment was taken in default, for $2996.60, being principal and portions of the corpus of the fund paid on her order; the sum of $208.33, being one-half the loss on the above-mentioned mortgage; the sum of $1000, invested in the premises bought at sheriff's sale; the expenses of the sale; taxes; repairs; and the sum of $400, his allowance for compensation as trustee; and exhibited a balance in his hands as trustee of $1713.08.

Mrs. Baker, the *cestui que trust*, filed exceptions, *inter alia*, to the credits set forth above, alleging that the loss on the mortgage was occasioned by the negligence of the trustee, and that, therefore, he was liable for the same, together with all the costs and expenses incident thereto.

The auditor appointed to pass upon said exceptions (William A. Duncan), after reciting the above facts, dismissed all the exceptions save the one as to the trustee's allowance, which he reduced to $217.70, which was increased by $50 for his actual expenses, making a gross balance of $1847.68, from which was deducted $62.22, the expenses of audit, leaving a net balance of $1785.46. The auditor also found that the trustee was not guilty of gross negligence in his management of the trust, but acted in good faith, and that, therefore, he should not be charged with the losses. To these findings of the auditor Mrs. Annie M. Baker, the *cestui que trust*, excepted.

The Court (McLean, P. J.) sustained the exceptions as to said credits, compensation, and expenses; and also as to gross negligence on the part of the trustee; reformed the account, and exhibited a balance of $5001.46, which it was ordered and decreed that the said trustee should pay to his successor in the trust; and further, that the said trustee should pay individually the costs of audit and decree.

From this order and decree the trustee appealed, assigning for error the action of the Court, *ut supra*.

David Wills, for appellant.

Facts found by an auditor are conclusive, unless shown to be clear and flagrant errors, and the report, having the weight of a verdict, will be set aside only on ground sufficient for the granting of a new trial at common law.

Miller's Appeal, 6 Casey, 478.
Harris's Appeal, 2 Grant, 304.
Yohe's Appeal, 5 Smith, 121.
McConnell's Appeal, 1 Outerbridge, 31.

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and prudence, there being no evidence of wilful violation of the trust, but, on the contrary, that he acted entirely and always in good faith, he should not be deprived of his reasonable compensation.

Myers's Appeal, 12 Smith, 104.
Brennan's Appeal, 15 Smith, 16.

J. C. Neeley (*Edw. J. Cox*, with him), for appellee.

The Court set aside the auditor's findings of fact, not because they were wrong, but because they were defective and incomplete, and did not include proper evidence, which was available, of gross negligence by the trustee. The loss, arising from negligence by the trustee, should by him be made good.

Hill on Trustees, §§ 374, 447.
Jack's Appeal, 13 Norris, 367.
Hill on Trustees, §§ 281, 368, 379, 381, 394.

Action or inaction on the part of the trustee, by which the interests of the trust are impaired, will prevent the recovery of compensation by him.

Holman's Appeal, 12 Harris, 174.
Smith's Appeal, 11 Wright, 424.

October 1, 1883. THE COURT. The auditor, upon a review of this case, finds that there is no evidence of any wilful default or bad faith on the part of Edward G. Fahnestock, the trustee, and that the charge of gross negligence is not made out. The finding of an auditor is entitled to great consideration, and will not be set aside except for plain mistake; when this shown, as we have said in Chew's Appeal (9 Wright, 230), "like any other judicial proceedings it is subject to correction." Additional force is given to an auditor's report by the confirmation of the Court. (Bull's Appeal, 12 Harris, 286; Dellinger's Appeal, 21 P. F. S. 425.) The finding of an auditor upon the facts, which has been approved by the Court below, will not be disturbed on appeal except for flagrant error. (Gilbert's Appeal, 78 Penn. St. 266.) On the other hand, it must necessarily have less weight when that confirmation or approval is refused. (Bachman's Appeal, 38 Leg. Int. 393.)

In the present case the auditor and the Court have arrived at widely different conclusions, and, therefore, it is our duty, giving the report of the auditor that weight to which it is in itself entitled, to determine which view of the case best accords with the facts exhibited in the proof, and the law as declared in similar cases.

At the time of the appointment of Edward G. Fahnestock as successor to Benjamin Deford in the trust under the will of Joseph Baugher, deceased, the real estate had all been sold, according to the directions of the will, and the entire trust fund and property consisted of the following, viz:—

Mortgage, Sanford Schroder,	$2416 66
Note, Samuel Fahnestock,	5200 00
Three months' interest,	78 00
Check, Benjamin Deford,	2282 89
Total,	$9977 55

These were the assets which actually came into Fahnestock's hands as trustee; one-half of this was beld by him in trust for Annie M. Baker, the other half for Caroline Heiner, under the terms and conditions of the will. The principal of the trust fund being thus already invested, no duty of speedy collection or disbursement devolved upon the trustee; what was more desirable was a secure and continuous investment. If the investments already made were in his judgment safe and secure, it was his duty under the circumstances to leave them undisturbed.

The mortgage of $2416.66 was the first lien upon the mansion or home farm of Joseph Baugher, deceased, containing 155 acres, for which Schroder, the mortgagor, had paid at public sale $4000. This certainly seemed an ample security for the indebtedness, such as a careful and prudent man would have considered good, and we think the trustee was right in accepting the assignment as a safe investment. It is true Schroder had not been very prompt in the payment of interest, but he was then but little, if any, in arrears. After Mr. Fahnestock's appointment, however, the interest was not so promptly paid, and in 1877, when judgment was taken on the mortgage, the arrears of interest were $580. Schroder was a half-brother of Mrs. Baker and Mrs. Heiner, being a son of the widow of Jacob Baugher, deceased, by a previous marriage. The trustee testifies that he was induced by the exceptant, Mrs. Baker, not to enforce prompt payment of the interest by Schroder; this Mrs. Baker denies. The auditor says "the denial is as emphatic and positive as the trustee's assertion —a flat contradiction," and without passing on this disputed matter he finds that "the trustee suffered the unpaid interest to accumulate upon the honest belief that it was safe and in no danger of loss."

In the spring of 1877 Sanford Schroder made an assignment for creditors, and the farm was at that time appraised at the sum of $3000. The decrease in the valuation seems to have been the result of a general depreciation in real estate prior to 1877, attributable, perhaps, to the effect of the panic of 1873. It appears from the testimony, and the auditor so finds, that the trustee inquired from time to time of those residing in the neighborhood of this farm, and that they fixed the value at about $3000, and that, from information thus received, he was satisfied it was safe. After obtaining judgment upon his mortgage, Fahnestock pro-

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ceeded against the land, and on the 14th of April, 1877, purchased it at sheriff's sale, as trustee, at the sum of $2000. From that time he held the land as part of the trust estate, receiving the rents, paying for repairs, taxes, etc.

We are of opinion that the auditor was right in determining that there was no evidence of wilful default or *mala fides*; and that, in view of the positive testimony showing that the trustee made frequent inquiries and received estimates of the neighbors, satisfying him that the trust was safe, "and that he acted or rather rested in this belief," the charge of gross or supine negligence was not made out.

The purchase of the land at the sheriff's sale under the circumstances, was compulsory. If he could, by reasonable diligence, have known the actual depreciation earlier, and brought the land upon the market sooner, better results might probably have been obtained; but it is a fact known to all that there is no article which admits of so varied and uncertain judgment as to value, even among the well-informed, as real estate. There are so many elements or factors entering into a proper estimate, matters present and prospective, that a correct judgment is with difficulty formed. We are of opinion that this trustee acted in good faith, and that he should not be charged with interest on the mortgage debt beyond what he received. We think he should be held to account on the footing of his repurchase of the land for the benefit of the trust estate, and that, therefore, the costs of the levari facias, the taxes and repairs, the loss upon the mortgage debt, together with the amount invested in the purchase at the sheriff's sale, are proper credits to his account. We are of opinion also that he is entitled to commissions at the rate fixed in the will, and to reasonable expenses.

The measure of diligence and care required of a trustee is precisely that which a man of ordinary prudence would practise in the care of his own estate. This rule has been so often laid down in our books that it seems unnecessary to refer to any authorities on that point. A reasonable degree of vigilance and the exercise of good faith is the standard of the trustee's duty. The office is often a thankless one, and, as we said in Eyster's Appeal (4 Harris, 372) of guardians or trustees, "if they are to be held responsible for all negligence, and are not allowed the exercise of a reasonable discretion and prudential care in the management of their trusts, it will deter prudent men from assuming the office which in itself is sufficiently onerous, and already undertaken by such men with reluctance."

This practically disposes of all the matters covered by the exceptions, or which were submitted to the judgment of the auditor. The Court below, however, in the opinion and decree filed, took up other matters not in issue before the auditor, and, therefore, not referred to by him in his report, and these constituted the main features of the opinion of the Court in the discussion of the question of the trustee's liability. The Court held the trustee liable for certain portions of the principal which it is alleged and stated in the account were paid over, with the interest, by the trustee to Anna M. Baker, the exceptant, under "an agreement." As these payments of principal were not excepted to, were not examined nor considered by the auditor, were not embraced in the exceptions to his report, we cannot see how they became matters proper for adjudication. "The agreement" referred to is not produced or shown in evidence, the "bond and release" are not before us; no testimony was taken on that subject. We are necessarily confined in our investigation of the case to the issue distinctly presented. It may be that this application of the principal of the trust was an improper one, but we can only determine that question when it comes regularly before us.

The decree is, therefore, reversed, the report of the auditor confirmed, and it is ordered that the appellee shall pay the costs of this appeal.

Opinion by CLARK, J. P. C.

May, '83, 34. May 31, 1883.

Beaver, Bare & Co. v. Bare.

Parent and child—Emancipation of minor—Right of father to wages of minor—Assignment of—When good as against creditors of insolvent parent.

The right of a parent to the personal custody and services of a child is simply incidental to the duty of discipline and direction. A child is not the mere servant of the father, nor is the father bound to work the child for the benefit of his creditors; but may let him go when he will, whether he be solvent or not. Emancipation may be as perfect when they live together as if they were separated.

The right of a parent to the services of minor children is not, as such, absolute; but his right to their wages is vested, if the labor has been performed without any previous agreement or understanding to the contrary.

The release by a parent of his right to the wages of a minor child, executed to such child after a general assignment by the father and his partners in an insolvent firm for the benefit of its creditors, is of no validity as against such creditors.

The minor son of one of the members of a firm entered its employment, and the account for services was in the name of the son, who received all that ever was paid thereon; no credit was given to the father on account of

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the same, nor did he claim the benefit of the same. The firm made an assignment for creditors; the son rendered services thereafter during minority, and received wages to himself from the assignee. There was some parol evidence of practical emancipation at the inception of the services. The father, after the assignment, by deed of release, relinquished to his minor son his right to said wages. In an action by the son, after attaining his majority, against the firm and their assignee, for wages while a minor, the Court, disregarding the evidences of emancipation, directed a verdict for the plaintiff by virtue of the deed of release by the father:

Held, that such release was invalid; that there was evidence for consideration of the jury, and the withdrawal of the case from them was error.

Error to the Common Pleas of Franklin County.

Assumpsit, by Samuel J. Bare, against Jacob Beaver, John Bare, and D. F. Beaver, trading as Beaver, Bare & Co., with notice to S. B. Rinehart, assignee, for benefit of creditors. The narr. contained a special count for wages, for labor performed by plaintiff for the firm prior to April 5, 1878, and the common counts.

Pleas: non assumpsit, payment with leave, etc.

On the trial, before Rowe, P. J., the following facts appeared: Jacob Beaver, John Bare, and D. F. Beaver associated themselves as the firm of Beaver, Bare & Co. early in the year 1877, in the business of manufacturing agricultural implements. Samuel J. Bare, the plaintiff, is the son of John Bare, a partner in the said firm. As shown by his account for labor filed, and by the books of defendants, he worked in the shops of said defendants from March, 1878, until November 17, 1879, when the said firm made an assignment for benefit of their creditors to S. B. Rinehart. During all this time the plaintiff was a minor, and lived at the house of his father. He came of age March 24, 1881.

The testimony of the plaintiff, and his brothers, also minors, working in the same shops, showed that they were told by John Bare, a member of the firm, and by the foreman of the shops, that they were to receive the same wages as other apprentices. The books of the firm contained a separate account with plaintiff, showing credits received by him personally. No claim was ever laid by the father to the wages of plaintiff, nor was he credited with the same on the books of the firm.

On October 30, 1882, John Bare executed a deed of release, in favor of Samuel J. Bare, in which he did "remise, release, and quit-claim" all his interest in the wages due to said Samuel J. Bare from the firm of Beaver, Bare & Co.

The defendant submitted the following points:

(1) The wages sued for in this case having been earned by the plaintiff during his minority, and there being no evidence of the emancipation of the son by the father, the law gives the exclusive right of recovery therefor to the father, and this action cannot be maintained. *Refused.*

(2) The father being a member of the firm of Beaver, Bare & Co., the real defendants, the assignment by him of his right to these wages to the son himself, after the latter attained his majority, gives to the son no other right of action than the father himself had with respect thereto. And the partnership being insolvent, and its estate still in the hands of an assignee for settlement, this action of assumpsit will not lie for the recovery of these wages at the suit of either father or son, therefore the verdict must be for defendant. *Refused.*

(3) The father at most could only have maintained an action of assumpsit against his co-partners individually, and not against the firm, and the son having no other right of action than the father, the suit against the assignee of the partnership cannot be maintained. *Refused.*

The Court instructed the jury: "I am of opinion that the plaintiff is entitled to recover, on the ground that the father, John Bare, had the right to execute a paper, releasing and relinquishing his right to recover the wages in favor of his son, and thereby the son was put in a position whereby he might sue the firm defendant in his own name." The Court therefore directed the jury to find for the plaintiff for the amount of his claim. Verdict accordingly for plaintiff in $437.93, and judgment thereon. Whereupon the defendants took this writ, assigning for error the refusal of their points, as above.

John Stewart (*F. M. Kimmell* with him), for plaintiffs in error.

Joseph Douglas and *J. McD. Sharpe*, for defendant in error.

October 2, 1883. The Court. The exercise of parental authority is not necessarily for the profit of the parent, but for the advantage of the child; the duty of service by the child being deemed necessary to the proper exercise of parental authority for its own good. Although we still recognize the right of the father to the personal services of his children, that right is simply incidental to the duty of the father to discipline and direct them; his right to personal custody and personal service are secured to him, therefore, in order that through them, prompted by natural affection, he may successfully impart to them habits of industry, methods of thrift, and the means of personal success in life. Children are therefore not the mere servants of the father, nor is he bound to work them, as such, for the benefit of his creditors (McCloskey *v.* Cyphert, 3 Casey, 220); he may let them go free from his service, whenever he chooses, no matter whether he be solvent or insolvent. (Holdship *v.* Patterson, 7 Watts, 547; Brown's

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Appeal, 5 Norris, 524.) The right to their service, being merely for their good, whenever the father finds their interest, or his own, better subserved by their emancipation, he can liberate them. This emancipation may be as perfect when they live together, under the same roof, as if they were separated; for although the father thus relinquishes his right to their services, as a means of discipline, the duty of discipline still remains, and this duty can be better exercised in the family than elsewhere. (McCloskey *v.* Cyphert, *supra;* Rush *v.* Voight, 5 Smith, 437.)

In Brown's Appeal (5 Norris, 524), this principle was fully recognized, and it was there held that the services of a son, rendered during minority, under a contract previously made with his father, was as valid consideration for a judgment confessed as similar services rendered under a contract made afterwards, and that both, or either, were sufficient to sustain the judgment, even as against creditors. Thus then it appears that a father may not only relinquish his right to the wages of his minor son's labor, but he may, even as against his creditors, bind himself to pay his son for such services, pursuant to a contract previously made. If, however, the contract had not been made previous to the service, neither could the son recover for his labor, nor would a voluntary judgment, given by an insolvent man, on such a consideration, be of any validity as against creditors. (Hack *v.* Stewart, 8 Barr, 213.) Therefore we infer, that whilst the right of a father to the actual custody and services of his minor children is not, as such, an absolute or vested right, yet his right to wages for their labor is absolute and vested, if that labor has been performed without any previous act, agreement, or understanding otherwise. Of course he may, without intent to hinder, delay, or defraud creditors, assign or relinquish this debt as any other. In the case of Kauffelt *v.* Moderwell, (9 Harris, 222) we held that, when a minor is permitted by his father to make his own contract for services, it is fair to presume that he is allowed also to receive the wages for himself, and, so the law implies the contract, until a contrary purpose appears; but it is not so when the father makes the contract. "He has the right to command the services and receive the wages of his minor son, and when he makes a contract for them, there is no ground for the presumption that he is acting as an agent of his son, or that the other party knows it, and intends the contract to be with his son; and, therefore, the law cannot imply that such was the contract, as matter of fact, or impose it as a matter of duty. The private arrangement between the father and son, in this case, was a matter of their own, which constitutes no part of the transaction, and which is indeed revocable at the father's pleasure. To allow the recovery by the son in such a case might defeat just claims of Kauffelt against the father."

Was there any relinquishment by John Bare of the services of his son previous to his entering the employment of this firm, or at any time during its continuance, or afterwards, prior to the assignment? If not, then the father's right to these wages was vested and absolute at the assignment, and that right, passing under it, vested in his assignee for creditors. The paper dated, 30 October, 1882, is of no avail for the purpose intended; it came too late; that which he released or relinquished to his son, he had previously transferred to his creditors. This case should have been submitted to the jury on the question of emancipation, which was practically withdrawn from the jury in the trial below. "No evidence of that sort," says the Court, "was offered, so far as his wages was concerned, that he was allowed to receive his wages himself. I saw no evidence at all of that in the case; the wages, therefore, at the time they were earned, were by law due to the father." This was a practical withdrawal from the jury of that branch of the case. There was, we think, some evidence for the jury on this question. The account for these services was in the name of the son, not in the name of the father. No credit was given to the father for them, and the books were open to all the members of the firm. The plaintiff's charge for labor embraces two years and nine months, in which time there was no proof that the father claimed the benefit of them, whilst the son received all that ever was paid; he continued to labor after the assignment was made, during minority, and received to himself wages from the assignee.

These circumstances, taken with the testimony of the sons, were certainly proper matters for the consideration of the jury. What effect they might have had upon the minds of the jury is not for us to say, but we think the Court was in error in saying that there was no evidence on the subject.

The judgment is reversed, and a venire facias de novo awarded.

Opinion by CLARK, J.

MERCUR, C. J., and PAXSON, J., absent.

P. C.

July, '83, 28. May 10 & 11, 1883.

Weiskettle's Appeal.

Assignments for the benefit of creditors—Dismissal of assignee—Assignments outside the State.

In the supervison and control of trustees, especially assignees under deeds of voluntary assignment, Courts of Common Pleas are clothed with very large discretionary

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powers; and their orders and decrees in such cases should not be modified or reversed except for manifest abuse of such discretion.

An assignment for the benefit of creditors was dated, executed, delivered, and accepted in New York, but the assignors and the assignee were residents of Pennsylvania, and their principal place of business was in Bradford, Pa. The assignee duly recorded the assignment, filed inventories, gave bond, etc., in New York, but failed to comply with the law of Pennsylvania in these respects regarding such assignments:

Held, that the summary dismissal of such assignee, by the Court, upon petition of certain of the creditors, was in accordance with the provisions of the Acts of Assembly.

Error to the Common Pleas of McKean County.

Appeal of Henry Weiskettle, from a decree of the Common Pleas of McKean County, made upon the petition of Morris, Tasker, & Co., limited, Oil Well Supply Company, limited, *et al.*, removing the said Weiskettle from his trust as assignee for benefit of creditors of J. W. Humphrey and A. A. Aspinwall, partners, trading as J. W. Humphrey & Co.

The petition alleged that the petitioners were creditors of J. W. Humphrey & Co., J. W. Humphrey and A. A. Aspinwall. That on the 20th of January, 1883, said debtors made an assignment to Henry Weiskettle, in trust, for the benefit of creditors, which was delivered on the 21st of the same month. That the said assignment was filed in the Court of Common Pleas of McKean County, February 14, 1883. That the said Henry Weiskettle took possession of such trust estate or part thereof. That the assignee had neither filed inventory or bond in this State and was irresponsible. That he was mismanaging and neglecting said trust estate. That there was a large amount of property in the State of Pennsylvania belonging to said insolvents, and that the assignee had sold and disposed of portions of the same. The petitioners prayed that the assignee be dismissed from his said trust and some suitable person be appointed in his place.

The answer of the assignee admitted that the assignment had been made as alleged, but asserted that it was executed, delivered, and accepted at Olean, in the State of New York, and was drawn, executed, delivered, and accepted under and by virtue of the laws relating to voluntary assignments in the State of New York. after inventory filed, an order of the county Judge of said county of Allegany was made, fixing the amount of the bond required, and that afterwards and in pursuance of said order, bond was made, executed, and approved by said Judge, and duly filed in the proper office of said county, as provided by the laws of said State. That neither bond or inventory have been filed in Pennsylvania for the reason that respondent was advised and believed that the filing of bond and inventories in the county of Allegany, New York (which had been done in strict compliance with the laws of said State), was all that was required, and a full and complete performance of the duties of respondent in that behalf. That said assignment was not filed in the Court of Common Pleas of McKean County, Pa., but simply left for record in the recorder's office of said county. Then followed a specific denial of the other allegations of the petition, and a prayer that the petition be dismissed.

At the hearing on petition and answer (before WILLIAMS P. J.), it appeared that at the time of the assignment, the assignor's principal place of business was at Bradford, McKean County, Pa., that one member of the firm was then a citizen of that county and the other a resident of Erie County, Pa.

The Court granted the prayer of the petition, and it was adjudged and decreed that Henry Weiskettle be removed and discharged from his trust as assignee, and that J. M. Fuller be appointed in his stead. From this decree the plaintiff took this appeal, assigning for error the refusal of the Court to dismiss the petition for want of jurisdiction, and the decree removing him as assignee.

F. D. Reeves (*R. Brown* with him), for appellant.

The assignment having been executed, delivered, and accepted in New York, the legal presumption is that it was to be performed where it was made.

Speed *v.* May, 5 Harris, 95.

The assignee is in one sense an officer of the Courts of New York, who would not recognize this discharge. Pennsylvania Courts have not jurisdiction, nor was it conferred by the Act of May 3, 1855.

It would be no impeachment of the sovereignty

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The mere fact that the assignee is irresponsible of itself furnishes no ground for dismissal where the assignee has given bonds as required by law.

Pearce *v.* Beach, 12 How. Pr. 404.
In re Paddock, 6 How. Pr. 215.
Bishop on Insolvent Debtors, 129.

This is so, because the bond is the indemnity.

Then is there anything in the fact that no bond or inventories were filed in *this State?* This being the only fact alleged in the petition, not positively denied in the answer, is really the only important question, and this seemed to be the turning point in the mind of the Court. The assignee proceeded upon the theory that the filing of bond and inventories in Allegany County, N. Y., was all that the law required, and a full and complete discharge of his duty in this respect. How can it be possible a different rule can prevail? The assignment was *made* in New York, that being the place where it was executed, delivered, and accepted.

Lawrence *v.* Bassett, 5 Allen (Mass.) 140.

The validity of a voluntary assignment in trust is ascertained by the law of the place where it is made. The *lex loci contractus* determines its binding effect.

Law *v.* Mills, 6 Harris, 187.
Speed *v.* May, 5 Harris, 95.
Ockerman *v.* Cross, 54 N. Y.. 29.
Livermore *v.* Jenckes, 21 How. (U. S.) 126.

One of the necessary sequences of the rule that the *lex loci* determines the binding effect of the contract, is that the assignee in this case was bound to file bonds in New York, and will be compelled to account there, the property being largely there.

The contract was to be performed where made, and the mode of fulfilling a contract must be determined by the law of the place where it is to be performed.

Brown *v.* Camden & Atlantic R. R. Co., 2 Norris, 318.

Hamlin, Smiley, Brown & Roberts and *Berry, Elliot & Jack*, for appellees.

This Court will not reverse for a lawful exercise of discretion in the Court below.

Black's Case, 6 Harris, 434.
Piper's App., 8 Harris, 67.
Act March 21, 1831, § 2, P. L. 193.
Act June 14, 1836, § 11, 12, P. D. 1417.
Shaw Assignee of Bickham, 1 Ash. 382.
Estate A. W. Adams & Co., 1 Phila. 391.

The Act of May 3, 1855, P. D. 92, gives the Courts of this State jurisdiction over, and power

It is not true that the law of the place where the assignment is executed controls in the disposition of property conveyed to a trustee by insolvents. Our statutes forbid it, reason forbids it, and the decisions of the Courts forbid it. Independently of statutory enactments, the rule is firmly established, that the *situs* of realty, and the *domicile of the owner* of personalty, furnishes the test as to the control and disposition, and the *lex fori* the mode.

Story on Confl. L., §§ 363 and 367.
Id. § 376 and 382.
Speed *v.* May, 5 Harris, 91 *supra*.
Donaldson *v.* Philips, 6 Harris, 170.
Jeter *v.* Fellowes, 8 Casey, 465.
Williams *v.* Maus, 6 Watts, 278.
Bingham's Appeal, 14 Smith, 345.
B. & O. R. R. Co. *v.* Hoge, 10 Casey, 214.
Desesbats *v.* Berquier, 1 Binn., 336.
Guier *v.* O'Daniel, Id. 349 n.
Flanuery's Will, 12 Harris, 502.
Carey's App., 25 Smith, 201.
2 Par. on Contracts, 588.
U. S. Bk. *v.* Donally, 8 Pet. 361.
Wilcox *v.* Hunt, 13 Pet. 378.
Watson *v.* Brewster, 1 Barr, 381.
Thornton *v.* Ins. Co., 7 Casey, 529.
Barton *v.* Bolton, 3 Phila. 369.
Loveland *v.* Davidson, 3 Clark, 377.
Bank *v.* Earle, 13 Pet. 519.

The provisions of the Act to secure creditors in cases of assignments are applicable only to assignments by debtors residing in this (New York) State. The law of the place of the owner's domicile controls.

Ockerman *v.* Cross, 54 N. Y. 29.
Hoyt *v.* Thompson, 5 N. Y. 352.

October 1, 1883. THE COURT. In the supervision and control of trustees, especially assignees under deeds of voluntary assignment, our Courts of Common Pleas are wisely clothed with very large discretionary powers; and their orders and decrees in such cases should not be modified or reversed except for manifest abuse of such discretion. By the Act of June, 1836, assignees are required, within thirty days after execution of a voluntary assignment, "to file, in the office of the Prothonotary of the Court of Common Pleas of the county in which the assignor shall reside, an inventory or schedule of the estate or effects so assigned;" and, as soon as the inventory and appraisement are filed, to "give bond or bonds, with at least two sufficient sureties, to be approved by one of the Judges of said Court, in double the amount of the appraised

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and appoint other suitable persons in their places and stead, who shall cause to be made the inventory and appraisement, and give the security required by law." The first mentioned Act also provides that whenever it shall be made to appear to the proper Court that any assignee or trustee has neglected or refused when required by law to file a true and perfect inventory, or to give bond, or to file an account of his trust, or that he is wasting, neglecting, or mismanaging the trust estate, or is in failing circumstances, or about to remove out of the jurisdiction of the Court, it shall be lawful for the Court in any such case to cite the assignee or trustee to appear and show cause why he should not be dismissed, and on return of the citation to require such security as may be deemed reasonable, or the Court "may proceed at once to dismiss such assignee or trustee from the trust." (Pur. 1417, pl. 12 and 13.) It thus appears that Courts of Common Pleas are invested with ample power summarily to dismiss trustees whenever good reason is shown therefor, and among the recognized good causes for removal are mismanagement of the estate, failing circumstances, and neglect of duty. (Piper's Appeal, 8 Harris, 67.)

The petition presented by appellee two months after execution of the assignment charged, *inter alia*, that appellant is entirely irresponsible, and has not filed any inventory of the estate coming into his hands, nor given any bond in this State, as required by law, and is mismanaging and neglecting the trust estate; that there is a large amount of property in this State belonging to said insolvents, and said assignee has sold and disposed of portions thereof. If these averments were true, the Court, in the absence of full and satisfactory explanation by the assignee, was clearly justified in discharging him from the trust. The allegation that appellant is personally irresponsible is not denied in the answer. The charge that he has neither filed an inventory nor given bond in this State is admitted to be true, and the excuse given for the omission is that the assignment was "dated, executed, delivered, and accepted at Olean in the State of New York;" that it was "drawn, executed, delivered, and accepted under and by virtue of the laws of said State, relating to voluntary assignments," and that said laws have been fully complied with by duly recording the assignment in the proper county, filing inventories, giving bond, etc., in that State. This might, perhaps, be regarded as a sufficient answer if it had also been averred that J. W. Humphrey & Co., the assignors, or either of them, were residents of New York, but nothing of the kind was done. It is asserted by the appellee in his counterstatement, and not denied by appellant, that at the time of the assignment the assignor's principal place of business was at Bradford, McKean County; that one member of the firm was then a citizen of that county, and the other a resident of Erie County, Pennsylvania. For aught that appears, these facts were practically admitted in the Court below as they are here. If so, the Court was clearly right in refusing to sanction such a palpable evasion of our voluntary assignment law, and an assignee who would lend himself to such a transaction should be promptly removed. Voluntary assignments in this State are governed by the Act regulating them, and not by the general law of contracts. The Act of 1836, as we have seen, requires the assignee to file an inventory in the prothonotary's office of the county where the assignor resides, within thirty days after the execution and delivery of the assignment, etc. It also provides for the administration of the assigned estate, and the equitable distribution of the proceeds thereof. These and other provisions of our assignment law cannot be evaded by merely crossing the State line and undertaking to execute an assignment "under and by virtue of the laws of" an adjoining State, which may, perhaps, sanction preferences that are forbidden here. Nor does it appear that the provisions of the New York Act, under which the assignee claims to have acted in recording the assignment and proceeding to administer the trust in that State, are applicable to non-resident debtors. On the contrary, its provisions, like those of our own voluntary assignment law, are restricted to debtors resident within the State. (Ockerman *v.* Cross, 54 N. Y. Rep. 29.)

The record shows that appellant appeared in obedience to the citation, and filed an answer in which he either expressly or tacitly admits some of the charges contained in the petition, and attempts to meet others in the form of confession and avoidance; that a hearing was had in open Court, and, after arguments of counsel for the parties in interest, the decree was entered. The allegations contained in the petition are clearly sufficient to give jurisdiction, and in view of the large discretionary power with which the Court below is invested in such cases, considered in connection with what appears upon the face of the record before us, we are not satisfied there was any error in entering the decree.

Decree affirmed, and appeal dismissed at the costs of appellant.

Opinion by STERRETT, J. CLARK, J. absent.

J. H. M.

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Common Pleas—Equity.

C. P. No. 3. November 10, 1883.

White v. Davis.

Equity practice—Submission of cause, by agreement of the parties, to referees mutually chosen, whose decision of law and facts shall be final —Laymen as referees—Rule to set aside such reference—Under what circumstances such an agreement is an irrevocable contract with which the Court will not interfere.

Rule to set aside reference, and for the appointment of an examiner.

Bill in equity. After answer and replication filed the cause was referred to an examiner, but his appointment was vacated upon the filing of an agreement of reference, signed, sealed, and acknowledged by the parties, the material provisions of which were as follows:—

"Alexander M. White and John Hill his assignee, plaintiffs, and John F. Davis, defendant in a suit or proceeding in equity now pending in Court of Common Pleas No. 3, in and for the county of Philadelphia, of March Term, 1883, No. 677, hereby agree and oblige themselves, to submit the issue, disputes, and controversy set forth in the bill and answer filed in the said case and proceeding hereinabove mentioned to the decision and award of Joseph W. Lippincott and Justice Cox, Jr., of the city of Philadelphia, who shall be qualified by oath or affirmation to decide, determine, and settle the matter or matters in controversy in accordance with their understanding of justice and equity and best judgment of the merits of the questions, disputes, or matters submitted to them, and reduce their finding, decision, or award to writing, and file the same in said Court of Common Pleas No 3, by the tenth day of October, 1883. And it is hereby agreed that said finding or award shall be part of the record of this case.

"It is hereby further agreed that the proofs and testimonies shall be offered and received in the presence of the opposing party and counsel or upon satisfactory evidence of three days' notice to opposing counsel, of the time and place of taking the same; and that the same shall be under the sanction of the usual qualifications and subject to cross-examination. . . . . And it is hereby expressly agreed and understood by the parties to this suit that the said referees are to be judges both of the law and fact, and that their finding, decision, or award shall be final, binding, and conclusive upon the parties hereto; and both the plaintiffs and defendant hereby expressly renounce the right to file exceptions or to take a writ of error or appeal.

"And it is also further agreed that the said award when filed shall have all the force and effect of a final decree of a court of equity, and shall be drawn in proper form and entered as the final decree of the said Court of Common Pleas No. 3, in this case, and the said Court is hereby requested to enforce the same by any process available for enforcing decrees in equity.

"And it is hereby further agreed that if the said finding, decree, and award of the said referees and arbitrators above named shall be in favor of the said John F. Davis, that immediately thereupon the said Hill and White shall execute, acknowledge, and deliver a deed of conveyance in the nature of a quit claim to the said John F. Davis, conveying all the right, title, claim, and interest which they claim or may have claimed in the said property which is the subject matter of this dispute to him the said John F. Davis, absolutely. It is also agreed that the cost and expenses of these proceedings shall be paid by the party or parties to this agreement against whom the said referees and arbitrators shall so charge the same in their finding."

The referees accepted their appointment, and proceeded to take testimony in the case, but before they filed their report A. M. White filed in Court an affidavit that he had signed said agreement under a misapprehension of its contents; that the suit involves the title to a large amount of real estate, and that the referees being laymen, the reference to them of all questions of law as well as fact, without right of exception or appeal, was invalid.

The Court thereupon, on motion of plaintiff, granted a rule to show cause why the said reference should not be set aside, and an examiner be appointed.

C. H. Eimerman and *John L. Kinsey*, showed cause.

Although the Arbitration Act of 1836 applies only to common law actions, yet parties to a suit in equity, pending and at issue, may by agreement refer the matters in dispute to parties mutually chosen, and upon the filing of their report the Court will make a final decree in the cause in accordance therewith.

Where an agreement partakes of the nature of a contract whereby important rights are gained and lost respectively, and the submission is the moving consideration, it is irrevocable. Such agreements are compromises, and should be faithfully adhered to, unless there has been fraud or corruption on the part of the arbitrators. The agreement in this case is of such a character.

Paist *v.* Caldwell, 25 P. F. S. 161.
Lewis's Appeal, 10 Norris, 359.

Where the submission provides that it shall be made a rule of Court, it is irrevocable.

McAdam's Executors *v.* Stilwell, 1 Harris, 90.

J. M. West, for the rule.

The agreement makes the arbitrators, who are laymen, sole judges of all law and fact in the case, and denies the party against whom the decision may be any right of exception or appeal. Parties cannot thus by agreement oust the jurisdiction of the Courts. Such agreements are against the policy of the law.

Eo die. THE COURT. This is essentially a contract. The parties themselves could not revoke the agreement, and the Court cannot set it aside or strike it off the record.

Rule discharged.

[*Cf.* Rea's Appeal, 13 WEEKLY NOTES, 546.]

A. B. W.

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Common Pleas—Law.

C. P. of Dauphin Co. April T. 1883, No. 373.

Commonwealth v. Pennsylvania, Slatington and New England R. R. Co.*

Quo warranto—Jurisdiction of Court of Common Pleas of Dauphin County—Act of April 7, 1870—Construction of statute.

The Court of Common Pleas of Dauphin County has jurisdiction in all suits and proceedings in which the Commonwealth is the real plaintiff.

The words "all other causes of action, real, personal and mixed," in the Act of April 7, 1870, are not restricted by the enumeration of particular cases which precede them. They confer jurisdiction on the Court of Common Pleas of Dauphin County to issue a writ of quo warranto, in which the Commonwealth is real plaintiff, against a corporation not having its place of business, and not exercising, or claiming to have or exercise, any powers, privileges, or franchises within said county.

This Act of Assembly does not give jurisdiction over any new subject matter, it merely extends the territorial jurisdiction of the Court as to subjects over which local jurisdiction already exists.

Commonwealth *v.* Wickersham, 9 Norris, 311, distinguished.

Demurrer to writ of quo warranto.

The Attorney-General filed an information and suggestion for a writ of quo warranto to No. 373, April Term, 1883, against the Pennsylvania, Slatington, and New England Railroad Company, which claimed "to have, without any lawful warrant, within this Commonwealth," certain franchises, liberties, and privileges. To this suggestion the railroad company filed a demurrer, for these reasons: (1) because "the powers, privileges, and franchises of the said defendant corporation are not used or exercised, and the business of the said defendant not done or transacted within the jurisdiction of said Court and within the county of Dauphin, as is made to appear and shown by the said suggestion, information, and writ;" (2) because "the ordinary course of proceedings at law afford an adequate and complete remedy to recover damages in the matters suggested in the sixth count of said information," which set forth that the railroad company claimed the franchise, liberty, and privilege "to enter upon and take possession of land and other property within this Commonwealth belonging to citizens thereof, without ample compensation to the owner or owners thereof, or tender of adequate security therefor;" and, (3) because "the said information in the nature of a quo warranto is in other respects uncertain, informal, and insufficient."

At the same time, the railroad company filed a disclaimer of the right to construct a continuous line of railroad from Harrisburg, in Dauphin County, to the New Jersey State line, near Portland, in Northampton County, Pa.

Reeder & Reeder and *Weiss & Gilbert*, for the demurrer.

Lewis C. Cassidy, Attorney-General, and *Robert Snodgrass*, Deputy Attorney-General, contra.

The demurrer was overruled in the following opinion of the Court, filed Nov. 5, 1883.

SIMONTON, P. J. A writ of quo warranto was issued in this case, on the suggestion of the Attorney-General, averring that the defendant claimed to have, without any lawful warrant, within this Commonwealth, certain franchises, liberties, and privileges, in said suggestion set forth.

To this suggestion and writ defendant demurred, on the ground that, as the powers, privileges, and franchises of defendant are not used or exercised, and its business is not transacted within the county of Dauphin, this Court has no jurisdiction to hear and determine the case. Defendant at the same time files a disclaimer of the right to have or exercise the franchises and privileges set forth in the second count in the suggestion, to wit, the right to construct a continuous line of railroad from Harrisburg, in the county of Dauphin, to the New Jersey State line.

We think the demurrer, with the disclaimer, fairly raises the question whether this Court has jurisdiction to issue a writ of quo warranto, in a case in which the Commonwealth is the real plaintiff, and to hear and determine the questions raised by it, against this corporation not having its place of business, and not exercising or claiming to have or exercise, any powers, privileges, or franchises within the county of Dauphin.

Jurisdiction in such a case is certainly not conferred by the Act of 1836. But it is contended on behalf of the Commonwealth that it is conferred by the Act of April 7, 1870 (P. L. 57), the first section of which enacts: "The Court of Common Pleas of Dauphin County is hereby clothed with jurisdiction throughout the State, for the purpose of hearing and determining all suits, claims, and demands whatever, at law or in equity, in which the Commonwealth may be party plaintiff, for accounts, unpaid balances, unpaid liens, taxes, penalties, and all other causes of action, real, personal, and mixed."

In answer to this it is argued by counsel for the defendant, in their printed brief, that the jurisdiction throughout the State is limited to the

* From the "Chester County Reports." Reported by J. M. Lamberton, Esq., of Harrisburg.

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fiscal matters of the Commonwealth, claims, demands, etc., in the nature of choses in action, or rights and debts; and that a proceeding such as by writ of quo warranto is "neither within the spirit nor the letter of the Act." We must, therefore, determine the construction of this Act. In so doing let us endeavor to follow the rule laid down by the sages of the law, which is stated by GIBSON, C. J., in Commonwealth *v.* Burrell (7 B. 34), as follows: "In Heydon's Case (3 Rep. 7), the Judges resolved that the true way to arrive at a sound construction of a doubtful statute is to consider the old law, the mischief, the remedy, and the true reason of the remedy." What, then, was the old law, at the time of the passage of the Act of 1870?

Section II., Act of March 30, 1811, gave jurisdiction to the Court of Common Pleas of Dauphin County, of all appeals from settlements of accounts by the Auditor-General and State Treasurer against "any person or persons, body politic or corporate;" but did not extend it to actions brought by the Commonwealth. By section 12 of the Act of April 16, 1845 (Purd. 488; P. L. 535), it was made "lawful to commence and prosecute to final judgment and execution, in the Court of Common Pleas of Dauphin County, suits against any and all persons who are, or may hereafter be officers of any description within this Commonwealth, appointed by the Governor, or by the board of Canal Commissioners, or elected by either house of the Legislature, or by both houses on joint ballot, and who shall become defaulters, in not paying over or accounting for money in their hands, due and belonging to the Commonwealth, and against their sureties, in the same manner and with like effect as if the said defaulting persons and officers and their sureties, were residents of the said county of Dauphin."

This Act, it will be seen, extended the jurisdiction only to the case of defaulters appointed, or elected, by the Governor, Canal Commissioners, or Legislature. By the Act of April 21, 1857 (Purd. 489; P. L. 266), it was extended so as to include "all suits against defaulting public officers, or their sureties, within this Commonwealth." And by the Act of April 7, 1862 (Purd. 489; P. L. 304), it was further extended to "all suits by the Commonwealth against counties, corporations, and persons whatsoever."

This language is broad enough, in its terms, to embrace the present case, and would certainly do so, unless restricted by its title, which is: "An Act for the more efficient collection of debts due the Commonwealth." But, however that may be, it certainly confers jurisdiction upon this Court to hear and determine all suits, in which the Commonwealth is plaintiff, relating to the fiscal matters of the Commonwealth. Such, then, was the old law when the Act of 1870 was passed; and, if the construction contended for on behalf of defendant be correct, no change was effected by its passage, and we must impute to the Legislature the blunder of having passed an Act "to enlarge the jurisdiction of the Court of Common Pleas of Dauphin County," which did not enlarge it. This we cannot do if the Act can be fairly construed so as to effect the intent expressed in its title. Was there, then, any mischief to be remedied by this Act, and if so, what? Simply this: That while suits could be brought in the Court of Common Pleas of Dauphin County, by the Commonwealth, against either natural or artificial persons, resident or located in any part of the State, for any pecuniary demand, the Attorney-General might be put to the inconvenience of following the Supreme Court in its peregrinations, or of going into the remote counties of the State, to exercise the prerogative of the Commonwealth to call upon corporations to show their warrant for acts claimed to be usurpations of rights belonging to her alone. Here was a real mischief, which, if not remedied by the Act of 1870, still exists; and, as we have already seen, if the Act did not remedy this mischief, it did nothing. But, if the construction contended for by the Commonwealth be correct, the remedy is complete, and all suits and proceedings, in which the Commonwealth is the real plaintiff, can be instituted in the Courts of the county in which the seat of government is located, where the official records are kept, and where the chief law officer of the State is required by law to have his office. And, we have no doubt, "the true reason of the remedy" was, that the convenience of the Commonwealth required that a tribunal should be found, at the seat of government, to which her law officer could resort in all cases in which an appeal to the courts on her behalf should become necessary.

This is not a case for the application of the rule of construction that, if general words in a statute follow an enumeration of particular cases, the general words are to be held to apply only to cases of a like nature. The words which follow the enumeration of the particular cases, in this statute, are not general words, but are a second enumeration of particulars, and must, therefore, necessarily refer to cases which are not of a like nature to those first enumerated. Nor is there anything decided in Commonwealth *v.* Wickersham (9 Norris, 311), which is opposed to this view. In that case the Commonwealth was not the real plaintiff, and the question was not one of territorial jurisdiction, as it is here.

There the defendant was within the local jurisdiction of the Court, and the only question was one of jurisdiction over the subject matter. The

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Act of 1870 does not give jurisdiction over any new subject matter; it merely extends the territorial jurisdiction of the Court as to subjects over which local jurisdiction already exists. Hence, what was said by the learned President Judge of the Common Pleas, in that case, as to the construction of the Act of 1870, was not necessary to the decision of the case.

The conclusion to which we have come is in the line of the decision of this Court, which was affirmed by the Supreme Court, in Mahoney Mutual Assessment Life Association *v.* The Commonwealth of Pennsylvania, not yet reported.

There is nothing in the second ground of demurrer which calls for discussion at this time. The demurrer is overruled, and defendant is required to plead or answer within thirty days after notice, to its attorney, of the filing of this order.

Orphans' Court.

Oct. 18, 1883.

Fitler's Estate.

Decedents' estates—Jurisdiction—Waiver of exemption—Attachment execution—Rights of creditors.

Sur exceptions to adjudication upon the account of the executors of Elizabeth Fitler, deceased.

Elizabeth Fitler died March 30, 1880, and by her will duly proved, after certain specific bequests to her children and grandchildren, divided her residuary estate into six equal parts, one sixth part being given to her executors in trust to pay the net income to her son, Theodore Fitler, for life free from his debts and engagements, and after his death then—

"In trust to pay, convey, assign, divide, and distribute the principal of said one-sixth part to and among his three sons begotten of his deceased wife, Sarah, who may then be living, and the lawful children of such of them who may then be dead, their heirs and assigns forever, the children of any deceased son to take the share to which his, her, or their deceased parent would have been entitled to if living."

Fitler an assignment of one thousand dollars of his interest in the estate of the testatrix, and elected to take under the assignment, and discontinue the attachment.

Out of one third of the principal in the hands of the accountants, as trustees of the share of Theodore Fitler, the Auditing Judge directed "there will also be paid to the West Philadelphia Boat Club, assignee of Eugene B. Fitler, $1000, and the balance will be held subject to the attachments above mentioned, other than the attachment of the said boat club, which is to be discontinued."

Exceptions were filed in behalf of the estate of Thomas C. Cheston, deceased, because the learned Judge erred "(1) in not making a final distribution of the balance found to be in the accountants' hands; (2) in not adjudicating the questions and issues raised between the attachment creditors of Eugene B. Fitler, a legatee of the said Elizabeth Fitler, and making a final award between them; and (3) in not awarding a specific sum to exceptant."

Amos Briggs, for exceptant.

That the Orphans' Court has exclusive jurisdiction in the distribution of decedents' estates is now settled beyond all doubt.

Hammett's Appeal, 2 Norris, 392, and cases there cited.
Otterson *v.* Gallagher, 7 Id. 355.
Lex's Appeal, 1 Out. 289.
McGettrick's Appeal, 2 Id. 12.

The defendant in the attachments claims the exemption of $300, as to exceptant's attachment, and expressly waives it in the other. Now, in this Court, under the law of distribution this cannot be done to the prejudice of the exceptant, when he has waived the exemption in favor of another creditor.

Pittman's Appeal, 12 Wright, 320.

It is submitted that a right belonging to the exceptant will be denied unless the fund be distributed in this Court.

Charles H. Downing, contra.

After argument the account was recommitted to the Auditing Judge (PENROSE, J.), who, after a re-hearing, filed a supplemental adjudication, in which he treated of the attachments as follows:—

"It is conceded by Mr. Downing, on behalf of the attaching creditor under the Lewis judg-

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ed; and, second, because an acceptance of service of an attachment by or on behalf of a garnishee is invalid as against other attaching creditors. The Cheston judgment was regularly entered Sept. 24, 1881, for want of an affidavit of defence in a suit upon a promissory note, of which a copy had been filed under the provisions of the Act of Assembly. The allegation is that this note originated in a stock gambling transaction; but if this should be conceded it would by no means follow, that the judgment could be inquired into collaterally. (Bank's Appeal, 15 Norris, 460.)

The only remedy would be by a proceeding in the Court in which it was entered. Such a proceeding was in point of fact taken in that Court and resulted unsuccessfully; a rule to open the judgment having been obtained February 12, 1883, which was discharged February 24, 1883. It is true a bill in equity was afterwards filed alleging the invalidity of the note for the reason above mentioned, and asking that the plaintiff in the judgment might be restrained from execution thereon, and the judgment vacated and set aside; and that this bill, to which a plea and answer have been filed, is still pending; but it is well settled by recent decisions that after a rule to open a judgment has been discharged, a bill in equity setting up the same matter cannot be sustained. (Frauenthal's Appeal, 12 WEEKLY NOTES, 530.)

"The other ground of objection to the participation of the Cheston attachment in the distribution is, in the opinion of the Auditing Judge, equally untenable. Under the Act of Assembly when the object of the attachment is to reach a debt due or moneys or securities belonging to the defendant held by the garnishee, the writ is to be served in the same manner as a writ of summons. No one has ever doubted that service of a summons may be dispensed with by the defendant, and that a judgment founded upon an acceptance of service is quite as valid as if the writ had taken the usual course. It is not easy to discover any reason why the acceptance of service by the garnishee, should be less efficacious than if the sheriff had made it. The object of the law is to give notice to the garnishee and afford him an opportunity of denying the allegation of indebtedness. The manner in which this notice is given is immaterial: at least the garnishee is the only person having the right to complain with regard to it. If the service has [illegible] of service, or after a waiver of service, must have the same effect. In the present case the garnishees have entered an appearance and filed a plea of *nulla bona*.

"It may be added that a rule to set aside the return of the sheriff to the writ of attachment was discharged by the Court of Common Pleas (Cheston *v.* Fitler, 13 WEEKLY NOTES, 78), and the acceptance of service by the garnishee held to be good.

"A Louisiana case was referred to by Mr. Downing as establishing a contrary doctrine. But that decision as well as others that may perhaps be found, was based upon the peculiar provisions of a statute, and can have no weight in the consideration of the question in this State. The law here is settled by Lupton *v.* Moore, *supra*.

"Eugene B. Fitler, as appears by the sheriff's return and by a copy of the notice which was exhibited to the Court, claimed the benefit of the exemption laws as against the Cheston attachment; and Mr. Sloan on his behalf renewed the demand in this Court, and asked that $300 of the fund now for distribution should be awarded to him.

"The judgment upon which the Levick attachment issued is upon a judgment-note for $1463.87 at one day from Nov. 21, 1879, containing a waiver of the right of exemption. As against this creditor therefore the claim could not be made; but, as is well settled, it is not in the power of the debtor, by waiving the right of exemption in favor of one creditor, to change the law with reference to the distribution of his estate among his judgment or execution creditors. (Pittman's Appeal, 12 Wright, 320; Jimison's Appeal, 13 WEEKLY NOTES, 25.) The effect of a waiver as to one of several executions against property insufficient to pay them all is therefore practically the same as if it had been made in favor of all of them.

"In the present case, however, no objection was interposed by the creditor in whose favor the waiver had been made, to the allowance of the exemption; and it was claimed that if he did not, no other creditor could set up or take advantage of it. The question is not free from difficulty; but the result of the authorities seems to be that if the waiver of the waiver is withheld until the rights of other creditors have attached, it cannot take place at all. The demand for ex- [illegible]

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the principle does not apply. (Thomas's Appeal, 19 Smith, 120.)"

To this adjudication was attached a schedule of distribution awarding the balance in the hands of the accountants to the Cheston and Levick judgments *pro rata*.

Exceptions were filed by Eugene B. Fitler, because the Auditing Judge refused to allow the exemption of $300; and by George W. Hancock, the holder of the Levick judgment, because the Auditing Judge erred (1) "in making distribution before the final termination of the attachments in the Court in which they are issued;" (2) "in allowing a *pro rata* distribution of the costs on the attachment instead of allowing them as a whole;" (3) "in deciding that the administrator of Thomas C. Cheston had any right to a distributive share under his attachment;" (4) "in not awarding to exceptant the whole of the balance for distribution;" and (5) "in not deciding that the attachment of Thomas C. Cheston not having been served by the sheriff on the same day as the other attachment was postponed as to the distribution and in not awarding the whole fund to exceptant."

John H. Sloan, for exceptant, Eugene B. Fitler, cited—

Feak's Appeal, 32 Smith, 76.
Bowman *v.* Tagg, 6 WEEKLY NOTES, 220.
Smith *v.* Ackerman, 38 Leg. Intel. 394.

Charles H. Downing, for exceptant, George W. Hancock.

Amos Briggs, contra.

Oct. 27, 1883. THE COURT. Both attachments execution having been served upon the same day, the fund in the hands of the garnishee must be distributed *pro rata*. (Baldwin's Appeal, 5 Norris, 483.) But one of the judgments is accompanied with a waiver of the exemption, and as to the other, it is claimed by the defendant. The question now raised is, whether he is entitled to the benefit of the exemption. It seems that the waiver of the benefit of the Act of Assembly is not insisted upon by the creditor in whose favor it was made, but the allowance to the defendant is objected to by the remaining creditor. While a debtor may waive the exemption allowed him by law, yet it is well settled, he cannot, to the prejudice of other creditors. Thus in Knoll's Appeal (11 WEEKLY NOTES, 511), following Garrett & Martin's Appeal (8 Casey, 160), it is held, that a defendant cannot waive the benefit of the exemption law, if the result be to give a junior execution creditor a preference over a prior levy on the same property. And upon the same principle of injury to creditors, Jimison's Appeal (13 WEEKLY NOTES, 25) was decided. That was the distribution of the proceeds of real estate incumbered by liens. And the debtor who had assigned his real estate for payment of debts, reserving the $300 exemption, claimed to be allowed the exemption as against a lien creditor whose judgment contains a waiver of the exemption. This was denied him, the Court saying, "among creditors having existing liens on the same property, the law and not the will of the debtor regulates the priority of liens. Having waived the right of this exemption on the one lien, the appellant cannot claim it now out of the same land, to the injury of the other liens." But the principle here invoked, and upon which the other cases denying the right to the exemption were decided, does not seem applicable here. If the creditor did not relinquish his right to the waiver, and insist upon the disallowance of the exemption as to his judgment, and this should be recognized by the Court, then the remaining attaching creditor would clearly be prejudiced, the fund being insufficient to pay both attachments in full. But he waives the benefit of the contract of the defendant with him, whereby the other attaching creditor becomes the gainer, and the result is the same as if the claim of the exemption had been made as against both attachments. It is deducted *pro rata*. No change in the distribution is made by the act of the debtor. The fund is still to be distributed in proportion to the claims of the creditors. It was urged that the creditor having the waiver could not reliquish it, and thus allow his debtor an advantage he did not possess before the rights of other creditors attached. But we do not think this position can be successfully maintained. In Feak's Appeal (32 P. F. Smith, 76) it is held, the Court adopting the opinion of the Court below, "that the creditor whose contract contains a waiver of exemption is not bound to insist upon it for the benefit of subsequent creditors who have none." This would seem to be decisive here. The exemption is favored by the courts, for the reason it is for the benefit of the debtor and his family, and is always allowed, unless contrary to some rule of public policy, or inequitable as respects the rights of third parties. (Cornman's Appeal, 9 Norris, 257.)

Being of opinion, therefore, that the defendant in the attachments is entitled to the benefit of the exemption, his exception is sustained.

The remaining exceptions are dismissed and the adjudication corrected, as will appear from the decree filed herewith.

Opinion by HANNA, P. J. W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JAN. 10, 1884.* [No. 5.

Supreme Court.

May, '83, 22, 26. May 29, 1883.

Susquehanna Boom Co. v. Commonwealth.

Taxation—Boom companies—Tax on business under Act of April 6, 1870—Tax on capital stock under general revenue Acts.

The Susquehanna Boom Company is liable to the tax of $100 on each 100,000 logs annually rafted, imposed by the Act of April 6, 1870 (P. L. 52). Said corporation is also liable to the annual tax of one-half mill upon its capital stock for each one per cent. of dividends declared, etc., imposed by the general revenue Acts of 1874, 1877, and 1879.

The provision in the said Act of April 6, 1870, excepting all boom companies paying the tax thereby imposed on logs rafted "from the provisions of existing Acts of Assembly imposing taxes on them for State purposes" is inconsistent with the subsequent general revenue laws taxing the capital stock of all corporations (with certain exceptions, not including boom companies), and the *exception* in the prior Act must, therefore, be treated as repealed. The Act of 1870 in other respects, however, remains in force.

Error to the Common Pleas of Dauphin County. Two cases.

These were, in the Court below, appeals from three settlements made by the accounting officers of the Commonwealth against the above-named corporation, viz: (1) a settlement for *tax on logs rafted*, claimed to be due under the Act of April 6, 1870, for the years 1874 to 1880 inclusive; (2) and a settlement for the same tax for 1881; (3) the other settlement for *tax on capital stock* for the year 1881, claimed to be due under the general revenue Act of 1879.

It appeared that the company had paid, on account of the tax on logs for the years 1874 to 1880 inclusive, the sum of $4100, leaving a balance claimed in the settlement of $1579.46. It further appeared that the company had paid on

McPHERSON, J., without a jury, whose findings of fact and conclusions of law were as follows:—

These three cases were tried together under the Act of 1874, and require no separate finding of facts.

The charter of the defendant, passed March 26, 1846 (P. L. 190), and a supplement thereto, passed December 11, 1866 (P. L. 1867, p. 1535), were offered in evidence, and upon these private statutes, in connection with the tax Acts of April 6, 1870 (P. L. 52), and of June 7, 1879 (P. L. 112), the questions in the case arise.

The Act of 1846 authorized the defendant to erect and maintain booms in the Susquehanna River, and by section seven it was provided that if any persons should desire to drive their lumber below the booms, they should be allowed to do so, paying to the corporation, as toll, "eight cents for each and every board log turned through said booms. . . ." The Act of 1866 increased this toll to fifty cents, and provided further, "one-half of which sum shall be paid by the company to the State Treasurer, for the use of the Commonwealth, in half-yearly payments, in addition to other taxes now imposed by law." The "other taxes" thus referred to were imposed upon the capital stock of the company, under the Act of 1859 (P. L. 529). In 1868, by section four of the Act of May 1 (P. L. 108), the tax upon capital stock was reenacted, and the corporation was liable to two burdens, one under the Act of 1866 and the other under the Act of 1868.

In 1870, however, by the Act of April 6 (P. L. 52), all boom companies were required to report the number of logs annually rafted, and to pay to the Commonwealth a tax of $100 on each one hundred thousand of said logs; "*and said companies making such return and payment are hereby excepted from the provisions of existing Acts of Assembly, imposing taxes on them for State purposes.*" By this Act, therefore, a tax on logs, or, more accurately, a tax on the company's business, was substituted for the tax on capital stock, and the tax, so called, under the Act of 1866. Under this Act, returns were made during the years 1874 to 1880, inclusive, showing a total liability of $5679.46, upon which payments of $4100 are admitted. The balance, $1579.46, is claimed by the Commonwealth, and is the subject of the settlement in suit to No. 370, August Term, 1882. A similar settlement for

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pay a tax upon capital stock, and demand was made upon the defendant for payment under these Acts, from 1874 to 1880, inclusive, in addition to the tax on logs. The tax for these years has been paid, but from the settlement for the year 1881, amounting to $1018.08, an appeal has been taken, and is the subject of the suit to No. 451, April Term, 1882.

The specifications of appeal from the settlements of the tax on logs assert that the Act of 1870 was repealed by the Acts of 1874, 1877, and 1879, and that it was not the legislative intent to impose double taxation upon the company; while the appeal from the tax on capital stock asserts that the Act of 1870 was *not* repealed by the Acts of 1874, 1877, and 1879, and that it was not the intent of the later statutes to impose a second tax on the defendant. The objection that the Act of 1870 had been repealed was not seriously urged, however, and we think it clear that the tax imposed by this Act is still in force. Implied repeals are never favored, the principal being, "that the whole course of legislation, like the whole of a deed or other instrument of private parties, is to be so construed that every part and every word shall have its effect, if it consistently can, and thus the will of the Legislature he completely carried into execution." (Erie *v.* Bootz, 22 Sm. 199; Wright *v.* Vickers, 31 Sm. 128.) One Act of Assembly is held to repeal another by implication only in cases of very strong repugnancy or irreconcilable inconsistency. Brown *v.* Commissioners (9 H. 43), and we can see no inconsistency of any kind between an Act imposing a tax upon capital stock and one imposing a tax measured by the corporation's business. The settlements under the Act of 1870 must be sustained.

The real question is this: The tax upon the capital stock of boom companies having been taken off by the latter clause of the Act of 1870, did the Legislature intend to reimpose it by later Acts, and have they actually done so? In such case, the *exception* in the former Act is repealed to that extent, for then the inconsistency is plain and irreconcilable. Did the Legislature, by the Acts of 1874, 1877, and 1879, intend that boom companies should pay a tax on their capital stock, in addition to the tax levied in respect of their business? We must, of course, presume that they were aware of the tax imposed by the Act of 1870, and meant that it should continue, since they did not repeal it—although the succeeding Acts expressly repeal certain other taxes—or insert in the later statutes any provisions inconsistent therewith. Intending, therefore, that the tax on logs should stand, the Legislature did not except boom companies from the tax on capital stock, under the Acts of 1874, 1877, and 1879, although it did except banks, savings institutions, building associations, and foreign insurance companies, and, upon a familiar principle of construction, this exception "strengthens the force of the law in cases not excepted." (Potter's Dwarris, 221; Union Improvement Company *v.* Commonwealth, 19 Sm. 143.) It is enacted that *all* corporations, except those mentioned, shall pay the tax on capital stock, and where do we find any doubtful language or absurdity of consequence that might call upon us to declare that the words used ought not to have their ordinary meaning? The fact that the later Acts impose a tax upon a different subject of taxation is not unusual, and certainly does not of itself require us to limit the comprehensive words of the Act in order to avoid that result. It is not a case of double taxation; capital stock and business are subjects of taxation as distinct as capital stock and gross receipts, and the principle that in doubtful cases the construction which would produce double taxation will be avoided, does not apply. We regard the language of the Acts to be unambiguous, and to include boom companies among those taxed upon capital stock, and see nothing in the Act of 1870 which obliges us to give the words a narrower construction.

It has been repeatedly held in this State that statutes *increasing* a tax under similar circumstances are valid, and the reason of those decisions seems to us to apply with equal force to a statute *adding* a tax. (Easton Bank *v.* Commonwealth, 10 B. 442; Iron City Bank *v.* Pittsburgh, 1 Wr. 340; Commonwealth *v.* Fayette County Railroad Company, 5 Sm. 452; Erie Railway Company *v.* Commonwealth, 16 Sm. 84; Union Improvement Company *v.* Commonwealth, 19 Sm. 140.) A surrender of the taxing power, either total or partial, is not to be presumed, but must be evinced by terms so explicit as to leave no doubt of the legislative intention to part with it. (See cases just cited, and Erie Railway Company *v.* Sabin, 2 Cas. 26.) A suspension of the power is not a surrender, and the period of suspension may be ended whenever the Legislature sees proper.

This presumption against the surrender of this power is an answer, also, to the argument that the words "existing Acts of Assembly," in the Act of 1870, do not refer to the taxing statutes then existing, but to those "existing," year by year, when the tax on logs is paid. It is manifest that this construction amounts to a denial of the right to impose any other tax than that on logs, and would make this tax perpetual, since any tax subsequently imposed would, of necessity, "exist" when the company made its annual return and payment.

We find for the Commonwealth in each case, and direct judgment to be entered, in the usual course, against the defendant, as follows:—

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In No. 370, August Term, 1881, principal .	$1579 46
Interest from June 26, 1881, to May 9, 1882,	164 74
Attorney-General's commission . . .	78 97
Total	$1823 17
In No. 450, April Term, 1882, principal .	$1629 90
Interest from April 17, 1882, to May 9, 1882,	11 88
Attorney-General's commission . . .	81 49
Total	$1723 27
In No. 451, April Term, 1882, principal .	$1018 08
Interest from January 29, 1882, to May 9, 1882	33 90
Attorney-General's commission . . .	50 90
Total	$1102 88

Counsel for the company, in the appeal from the tax on logs, filed exceptions to the decision of the Court, that the tax on logs imposed by the Act of 1870 is still in force; and counsel for the company in the appeal from the tax on capital stock filed exceptions to the decision of the Court that the company is liable to tax on capital stock under the revenue Acts of 1874, 1877, and 1879.

Both sets of exceptions were overruled by the Court, and judgments were entered as directed in the opinion. Whereupon the said company took these separate writs of error, assigning for error, respectively, the overruling of the said exceptions in each case. The cases were argued together.

M. E. Olmsted (with him *A. J. Herr* and *William A. Wallace*), for plaintiff in error, in the case of tax on logs (May Term, 1883, No. 22), contended that the company, being liable to tax on capital stock, under the general revenue Acts, which Acts repeal all Acts inconsistent therewith, ceased to be liable to tax on logs under the Act of 1870. The Act of 1870 is totally inconsistent with the general revenue Acts, and is wholly repealed by them. No legislative intention is evidenced in the revenue Acts to impose double taxation on boom companies: on the contrary, the manifest design was to tax all corporations uniformly. The Court below held the *exception* in the Act of 1870 was repealed by the later Acts, but that the taxing clause remained in force, which we contend is error; the entire Act of 1870 was repealed, and the tax on capital stock is the only tax to which boom companies are now liable.

James W. M. Newlin (with him *Joseph M. Gazzam*), for the plaintiff in error, in the case of tax on capital stock (May Term, 1883, No. 26), contended that the exemption from other taxation provided in the Act of 1870, taxing logs, is not repealed by the general revenue Acts. The exemption was from other State taxes under "existing Acts." The then existing Act was the Act of 1868, imposing tax on capital stock of corporations, and the subsequent Acts of 1874, 1877, and 1879, so far as they relate to the question, are identical with the Act of 1868, and, in effect, but a continuance of that Act. "Boom companies" having been specially provided for under the Act of 1870, are not within the general words "all corporations" in the revenue Acts. The Commonwealth did not claim tax on capital stock for years, but did claim tax on logs after the passage of revenue Acts.

Robert Snodgrass, Deputy Attorney-General (with him *Lewis C. Cassidy*, Attorney-General), for the Commonwealth, contended that the company remained liable to the tax on logs under the Act of 1870, and became liable to additional taxation under the general revenue Acts, as held by the Court below.

[May Term, 1883, No. 22.—Log Tax Case.]

October 1, 1883. THE COURT. This judgment is affirmed on the clear and convincing opinion of the learned Judge in the Court below.

Judgment affirmed.

PER CURIAM.

[May Term, 1883, No. 26.—Tax on capital stock.]

October 1, 1883. THE COURT. In the Court below this case was argued with the one which we have just decided. They are both between the same parties. The opinion of the learned Judge covers all the questions presented in each case and is a correct statement of the law.

Judgment affirmed.

PER CURIAM. F. M. O.

Oct. & Nov. '83, 211. October 8, 1883.

Swan v. Commonwealth.

Criminal law—Burglary—Larceny—Evidence.

Evidence may be admitted in a criminal trial of any one of a system of crimes that are mutually dependent, to show that the defendant belonged to an organization banded together for the purpose of committing crime; but some connection must be shown to exist between the offences.

Where two persons are indicted for robbing the store of B., and one of the defendants has been found guilty of robbing the house of R. about the same time, it is error for the Court to refuse to restrict testimony relating to articles taken from the house of R., so as to affect the one guilty of that offence alone, unless some connection is shown to exist between the two offences. The collateral offence must form a link in the chain of circumstances relied upon to convict.

Error to the Quarter Sessions of Armstrong County.

Indictment against Charles Swan and F. E.

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Lynch for robbing the store of H. Bush & Son. Plea, not guilty.

Upon the trial, before NEALE, P. J., the following facts appeared: The store of H. Bush & Son was robbed on the night of September 13, 1882. About the same time the house of F. Reynolds was also robbed. Both store and house are situated in Kittanning, Armstrong County. Lynch was indicted for the latter offence and pleaded guilty. Some evidence had been given that the two defendants had been together about the time of the robbery. One witness said that the "size" and "hats" of the defendants answered the description of the men she saw coming out of Bush's store the night of the robbery. But it was not shown that Swan had anything to do with the robbery of Reynolds's house.

Ross Reynolds, a son of F. Reynolds, testified as follows: Q. Look at those articles and state whether you can recognize them as the property of your family? (Objection.) Ans. I identify these handkerchiefs as my sister's, this is my sister's, also. My father's house was robbed on Thursday, during fair week, in the afternoon. The first I saw of these articles after the robbery was at the squire's office.

Defendant's counsel asks the Court to withdraw evidence of Mr. Reynolds, as far as Swan is concerned, and tell the jury that it cannot in any degree affect Swan. By the COURT. I could not do that; they were together, they acted together, and the jury will have to determine that question. (Exception.)

The theory of the Commonwealth was that a number of persons had combined together for the purpose of robbing the people of Kittanning, and that these defendants belong to the band.

The jury found a verdict of guilty in manner and form as indicted.

A motion for a new trial and in arrest of judgment was made, which the Court overruled, and passed sentence, whereupon Charles Swan took this writ, and assigned for error, *inter alia*, the admission of the testimony of Ross Reynolds, the refusal of the Court to restrict the said testimony to Lynch alone, and the answer of the Court to Swan's request for the withdrawal of said testimony as far as he, Swan, was concerned.

David Barclay, for plaintiff in error.

M. F. Leason, for defendant in error.

October 29, 1883. THE COURT. We are of opinion that there was error in the refusal of the Court to limit the effect of the testimony of Ross Reynolds, Esq., and in allowing it to go to the jury to affect Charles Swan the plaintiff in error. Testimony had been received showing the perpetration of other similar crimes in the vicinity, and at about the same time. Lynch had pleaded guilty to one of these, the Reynolds robbery, and the testimony was admitted "to throw what light" the jury might "discover from it, of the parties charged, composing or being a part of an organization, banded together for the purpose of committing crime of the kind charged."

It is certainly true that, in a criminal trial, evidence may be received of any one of a system of crimes, mutually dependent, but there must be a system established between the offence on trial and that introduced, to connect it with the defendant. (Hester *v.* Commonwealth, 4 Norris, 139.) To make one criminal act evidence of another, some conection must exist between them: that connection must be traced in the general design, purpose, or plans of the defendant, or may be shown by such circumstances of identification as necessarily tend to establish that the person who committed one, must have been guilty of the other. The collateral or extraneous offence must form a link in the chain of circumstances, or proofs relied upon for conviction; as an isolated or disconnected fact it is of no consequence; a defendant cannot be convicted of the offence charged, simply because he is guilty of another offence.

In the case of Goerson *v.* Commonwealth (11 WEEKLY NOTES, 405), MERCUR, J., giving the result of all the cases upon the admissibility of such testimony, says: "Yet, under some circumstances, evidence of another offence by the defendant may be given. Thus it may be to establish identity; to show the act charged was intentional and wilful, not accidental; to prove motive; to show guilty knowledge and purpose, and to rebut any inference of mistake; in case of death by poison, to prove the defendant knew the substance administered to be poison; to show him to be one of an organization, banded together to commit crimes of the kind charged, and to connect the other offence with the one charged, as part of the same transaction."

The only connection shown between the two offences was the fact that they were committed in the same town on the same day. Lynch had confessed his guilt as to one of the felonies, and there was some proof as to his guilt in the other. But what evidence was this as to Swan, who as yet was presumably innocent of both? There was no system established or shown between the two offences, that could have raised any presumption of Swan's connection with the robbery charged in the indictment from the identification of the articles which Lynch confessed he had stolen from Reynolds. If these articles had been found wholly or in part in Swan's possession, that would have connected him with the Reynolds robbery, and this, taken in connection with Lynch's confessed guilt of that crime, would have shown such a confederacy in this character

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of crime, at the time and place of the offence on trial as would perhaps have rendered the evidence competent; but it is a rule of criminal evidence that an extraneous crime cannot be put in evidence against a defendant without proof in some form that he was concerned in its commission. It is said that Lynch and Swan were frequently seen together during the daytime of the 14th of September. This, as an independent fact, was properly for the consideration of the jury, but their association, so far as observed, was for lawful purposes, and formed no connection between the two offences. It was of course competent for the Commonwealth, as the defendants were jointly indicted and tried, to introduce any evidence tending to establish the guilt of either, although it might incidentally prejudice the other, but the testimony so introduced should be expressly limited in its effect. (Brandt *v.* Commonwealth, 13 Norris, 290.)

There was, we think, sufficient evidence in this case, as against Charles Swan, to justify a submission to the jury, although it certainly was very slight; inasmuch, however, as the record contains no bill of exceptions to the charge of the Court, that question is not properly before us.

Judgment can only be arrested in criminal cases for causes appearing upon the face of the record; this is a general rule, and is well settled; an exception exists when pardon is pleaded before sentence.

For the reasons assigned in the former part of this opinion the judgment is reversed, and a venire facias de novo awarded.

Opinion by CLARK, J. MERCUR, C. J., and PAXSON, J., absent. J. M. S.

Jan. '83, 49. April 27, 1883.

Llewellyn et al.'s Appeal.

Lien for wages—Act April 9, 1872, Purd. 1464 —Character of labor thereby protected.

C. leased an old mill property which had not been in use for many years, and was badly out of repair, and employed carpenters, millwrights, and blacksmiths, in making the repairs and improvements necessary before the mill could be put in operation for rolling iron. Upon a sheriff's sale of all the property on the premises under executions against C., and claims were instituted upon the fund thereby realized:

Held, that the labor bestowed upon such repairs being

Appeal of L. R. Llewellyn, John Keener, William McGregor, John Mayes, and Charles Parker, carpenters, and Gabriel O. and M. P. Stiver, blacksmiths, and Robert Miller, from a decree of the Common Pleas of Clinton County, dismissing their exceptions, and confirming the report of the auditor appointed to distribute the proceeds of a sheriff's sale of certain property of Austin Curtin & Co.

Before the auditor the following facts appeared:—

"On the 24th day of March, 1880, Austin Curtin & Co. became the lessees of the old Mill Hall Iron Furnace, in Clinton County. It had been abandoned for some twenty-four years, and in consequence the works were dismantled, the buildings decayed, and the machinery almost destroyed. The whole property was so dilapidated that it was unfit for use for the purposes for which it was originally designed. In order, therefore, that the furnace might be operated it was necessary that the property should be repaired and reconstructed.

"The works had been originally used, and were leased to A. Curtin & Co., to be used in the manufacture of pig metal from iron ore for rolling-mill purposes. These repairs were made from May 2, 1881, to December 20, 1881, inclusive, and were so completed by the 6th October, 1881, that about that time the works were started, and the manufacture of metal resumed. After the works were started, however, the old bridge-house, upon which was deposited the ore, coke, and limestone, used in the manufacture of iron, was found to be insufficient for the purpose, and it was rebuilt by the lessee.

"On the 21st day of December, 1881, the sheriff of Clinton County levied upon all the lessees' rights and personal property connected with the business upon a writ of fieri facias issued by the Bellefonte Nail Company, limited, against A. Curtin & Co., the lessees, and, on the 14th January, 1882, sold the levy for $2268.75, and this sum constitutes the fund for distribution.

"L. R. Llewellen, John Keener, William McGregor, John Mayes, and Charles Parker were carpenters, or millwrights, and Gabriel O. and M. P. Stiver were wagon-makers and blacksmiths, who had been employed by the lessees, and labored in making the repairs and improvements upon the furnace property above stated. They claim the right, under the Act of April 9,

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fifteen cents per ton to the owner of the quarry for the privilege thereof, and delivered the limestone to A. Curtin & Co. at $1 per ton, and that the said limestone was used in the manufacture of the iron.

The auditor reported that the labor of all the claimants except Miller was not such as would entitle them to the protection of the Act of April 9, 1872, and disallowed their respective claims upon the fund. As to the claim of Miller he reported that he was entitled to the price of the actual labor performed by his own hand.

To this report, exceptions being filed, the Court disallowed the claim of Miller, and dismissed the exceptions filed on behalf of the other claimants, whereupon the said Miller and others took this appeal, assigning for error the action of the Court in dismissing the exceptions and disallowing the claim of Robert Miller.

Seymour D. Ball, for appellants.

The Act of April 9, 1872, is a remedial statute favoring all who labor with their own hands at any labor, wherever and howsoever performed, necessary to carry on the manufacture of iron at a furnace, "or other business where clerks, miners, or mechanics are employed, whether at so much per diem or otherwise."

Seider's Appeal, 10 Wr. 57.
Wentroth's Appeal, 1 N. 469.

T. C. Kipple, for appellees.

The Act applies only to a business intended to be carried on indefinitely, permanently, and continuously. Miller performed no labor about Curtin & Co.'s property, the limestone not being theirs till delivered.

October 1, 1883. THE COURT (after stating the facts as above set forth in quotations). Were the appellants named, or any of them, of the class of mechanics or laborers embraced within the protection of the first section of the Act of 1872? We think the learned Court below was certainly right in holding that they were not.

It is admitted that none of these appellants were employed in the manufacture of iron, nor were they engaged in operating the works in any branch or department of the business to which they were especially devoted. The manufacture of pig metal was the particular, permanent, and continuous business of the works, and the class of laborers or mechanics within the meaning of the Act, we think, is such as is employed in this business.

In order to start the manufacture of iron it is works are designed. The construction of a manufactory is one thing, and the operating of it is another; the price of the materials furnished and labor done in the former is preferred under the mechanic's lien law, whilst the wages of the labor performed in the latter is covered by the provisions of the Act of 1872.

In Pardee's Appeal (4 Out. 408) we held that the business of cutting sawlogs and driving them to the place of manufacture is not such as is contemplated by the Act of 1872. Justice STERRETT, in delivering the opinion of the Court in that case says: "The words works, mines, manufactory, thus employed in the Act have a definite signification, well known in general and popular acceptation. *Ex vi termini*, the branches of business intended to be described by them are in a certain sense complete and independent, and of a fixed and permanet character, as opposed to a temporary employment that is merely incidental to any particular branch of business."

In the Gibbs & Sterrett Manufacturing Company's Appeal (4 Out. 528) we held that a person employed to drill oil wells at a certain price per foot, who had no interest in the land, nor the oil, but who was simply a contractor engaged in drilling wells for different persons, moving his tools from place to place as occasion might require, did not belong to either of the classes of employers designated by the Act; that the contractor mentioned in the Act must be the operator of the well, and his property, not that of the mere driller, is the property from which the laborer is to be paid. As the employer must be the operator, so the employé to receive the protection of the Act must be the operative.

It does not follow, however, that the labor preferred is that which is skilled in the particular art or craft pursued alone; all who are engaged as operatives, whether as ore diggers, teamsters, furnace-men, or common laborers.

A carpenter, a blacksmith, or machinist, regularly employed in a manufactory to conduct continuously the repairs and regulate the machinery, indeed, any laborer who by a continous employment contributes to the general work or manufacture, is within the meaning of this Act, but the labor of those who are only temporarily employed in repairing are in no sense operatives.

The claim of Robert Miller, one of the appellants, was for a balance owing to him for quarrying, hauling, and furnishing limestone. He paid fifteen cents per ton to Furst Bros. for the privilege of their quarry, and delivered the limestone

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company; he was an independent contractor, and although he delivered the limestone in part at least by his own labor, he is not entitled to preference under the Act of 1872.

The decree is therefore affirmed, and the appeal dismissed at the cost of the appellant.

Opinion by CLARK, J. J. P. K.

Jan. '85, 366. April 18, 1883.

Coleman's Appeal.

Execution—Exemption—Appraisement of real estate under Act of April 9, 1849—May be made on the morning of the sale.

Where a defendant in an execution made a claim for the benefit of the exemption Act before the return-day of the writ under which the levy was made, but, owing to delay on the part of the sheriff, no appraisement was made until the morning of the day of the sale:

Held, that defendant's right to the benefit of the exemption was not thereby defeated.

In such a case defendant is not relegated to a suit against the sheriff, but may claim the $300 out of the proceeds of the land sold.

Appeal of Peter F. Coleman, from a decree of the Common Pleas of Montgomery County, confirming an appraisement of real estate to the extent of $300, under the provisions of the Act of April 9, 1849.

The facts of the case were as follows: On April 19, 1880, Peter Coleman obtained judgment in the Common Pleas of Montgomery County against T. Coleman for $1300. On March 27, 1882, $700 of this sum remained unpaid, and plaintiff issued a fi. fa. to June Term, 1882, under which the sheriff levied on certain lands of the defendant. Before the return-day of the writ, to wit, on May 9, 1882, the defendant gave the sheriff a written notice that he claimed the benefit of the exemption law out of the said real estate levied on, and demanded an appraisement thereof. No notice was taken of this claim by the sheriff, who made return of the fi. fa., and a jury of inquisition condemned the said real estate, which the Court confirmed. The plaintiff then issued a writ of vend. ex. to sell the real estate levied on, and the sheriff accordingly advertised it to be sold on August 23, 1882. On the morning of the sale the sheriff appointed three appraisers, who certified that the said real estate could not be divided so as to set off a tract of the value of $300. No examination of the property was made, but it was in evidence that the appraisers lived in the vicinity of the property, and were familiar with it.

Exceptions to the appraisement were filed by plaintiff, claiming that it was illegal and void, and the Court was asked to set it aside. These exceptions were dismissed by the Court, in an opinion by BOYER, P. J., and the appraisement confirmed. Plaintiff thereupon took this appeal, assigning for error the dismissal of his exceptions and the decree of the Court.

B. E. Chain and *H. Freedley*, for appellant.

A term must necessarily intervene between the appraisement and the sale.

Bowyer's Appeal, 9 Harris, 210.

C. Hunsicker, for appellee, cited—

Seibert's Appeal, 23 Smith, 359.

Cornman's Appeal, 9 Norris, 257.

May 14, 1883. THE COURT. The appellee was entitled to claim the benefit of the $300 exemption law against the execution in favor of the appellant. He made that claim before the return-day of the writ, and in due form. The delay of the sheriff in causing the appraisement to be made was not caused by the appellee, and his right to the benefit of the exemption was not thereby defeated. Although the appraisement was unduly postponed by the sheriff, yet when made the benefit thereof vested in the appellee. He is not bound to resort to an action against the sheriff, but may claim the $300 out of the fund produced by a sale of the whole land. (Seibert's Appeal, 23 P. F. Smith, 359.)

Decree affirmed, and appeal dismissed at the costs of the appellant.

PER CURIAM. T. R.

Jan. '83, 410. May 22, 1883.

Petrikin v. Myton, to use, etc.

Bonds—Obligees—Joint or several—Tax sales—Surplus-bonds.

Where upon a treasurer's sale of unseated real estate for taxes, the purchaser gives bond for the surplus-money payable to the owners of the real estate, one of two tenants in common who were the owners of said real estate at the time of the sale cannot release the whole bond. Such tenant in common can only release such portion of the bond as he is entitled to by virtue of his undivided interest in the land.

Error to the Common Pleas of Huntingdon County.

Judgment was entered December 7, 1876, on a bond and warrant of attorney by J. W. Myton, treasurer, to use of H. S. Wharton's assignees, against R. Bruce Petrikin, for $686.08. A rule to open the judgment, etc., was taken by defendant, and an issue directed to determine how much, if anything, was due by defendant.

On the trial of this issue, before DEAN, P. J.,

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the following facts appeared: On June 11, 1866, R. B. Petrikin bought at treasurer's sale an unseated tract of land, of about 283 acres, for $700, sold for taxes in the name of John Light, and in August 18, 1866, gave his bond and warrant of attorney to the treasurer, for the surplus-money ($686.08), payable "to the owners" or their representatives. There was no redemption of the land. On October 20, 1870, Petrikin and wife conveyed to one F. Hefright (a joint owner of the land at the time of sale with H. S. Wharton) one undivided half of the land, and took from him a release, whereby Hefright released Petrikin from all liability on the bond, and agreed to save him harmless. On December 25, 1875, Wharton made an assignment for the benefit of his creditors, and on December 7, 1876, the assignees entered up the bond for surplus money. Defendant presented the following points:—

(1) That Henry S. Wharton and Frank Hefright, being the owners of the land at the time of the treasurer's sale, the bond given by R. B. Petrikin, the defendant, was, by the Act of Assembly, for the joint use of both of said owners, and the release of Frank Hefright, one of the said owners, to R. B. Petrikin, the obligor in said bond, is a release by both of said obligees and owners, and the plaintiff cannot recover.

(2) That whenever a right is given to two or more, it is a general presumption of law that it is a joint right, and a release by one of the parties, to whom the right or cause of action is given, is a release by all.

The Court reserved its answer to the points, and directed a verdict for plaintiff for $362.25, subject to the Court's opinion on the points reserved, and subsequently entered judgment for the plaintiffs on the verdict, DEAN, P. J., saying in an opinion filed: "The purchaser of land at a tax sale assumes the risks when he undertakes to settle the equities of the owners by payment to one to secure a release for all. The proper and only safe course is that suggested by the Supreme Court in Irish *v.* Johnston (1 Jones, 483), and Crawford *v.* Stewart (2 Wright, 34). Let him pay the amount of his bond into Court, that an auditor may hear and determine the rights of the owners. The defendant's points reserved are denied, and it is directed that judgment be entered on the verdict for plaintiff."

Whereupon defendant took this writ, assigning that either one of the obligees has entire control over it. As to this bond, these people were partners, and hosts of authorities could be shown to the effect that one's release was therefore valid as to both. The Court below argues, that as they were tenants in common of the land, the whole legal effect of the bond is changed, and that it becomes several, but the legal effect of instruments cannot be changed in that way. That the law is as we claim it to be, is settled by—

Murray *v.* Blatchford, 1 Wend. 583.
Decker *v.* Livingstone, 15 Johns. 479.

What consideration did we receive for conveying away one-half of the land, unless we were relieved from the surplus-bond?

Bailey (with him, *Brown & Brown*), for appellees.

The owners of land have nothing to do with the form in which a surplus-bond may be taken, and their rights cannot be prejudiced by its form. It is undoubtedly law that where parties *voluntarily* take a bond payable to them jointly a release by one is valid; but that where their action in so doing is not voluntary, this does not hold is equally certain and established long since.

Sheppard's Touchstone, 335.

If Wharton and Hefright had each owned one-half of this lot in severalty, and it had been assessed and sold as one tract, the surplus-bond would have been taken as the one here was; can it be seriously contended that one of them could then have released it? The surplus-bond is a substitute for the land sold, as was shown by the Court below.

October 1, 1883. THE COURT. This case was decided correctly. One tenant in common of the land had no power to release the half of the bond given and held for the benefit of his co-tenant. The judgment is affirmed on the opinion of the learned Judge, in directing judgment to be entered on the verdict.

Judgment affirmed.

PER CURIAM. GREEN, J., absent.

W. M. M.

Oct. & Nov. '83, 155. Nov. 2, 1883.

Jennings v. Hare.

Set-off—Certificate—Judgment—When not

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Error to the Common Pleas No. 2, of Allegheny County.

Debt, on a joint and several bond, by John H. Hare, for use of James McKay, against John Jennings, principal, and Israel Painter and Alfred Patterson, sureties. The death of Israel Painter being suggested, his administrators c. t. a. were substituted on the record.

Plea, payment with leave, and subsequently a special plea was filed, alleging and admitting certain facts, which were substantially as follows: In 1874 McKay brought an action of replevin in Allegheny County against Jennings for 119 barrels of whiskey. Jennings gave a property bond (the bond in suit) with Israel Painter and Alfred Patterson as sureties. Judgment was obtained in this replevin suit against Jennings for $14,477.29, and an exemplification of the record was entered in Westmoreland County, at November Term, 1877. This judgment was revived at November Term, 1882, for the sum of $20,277.75.

On November 20, 1877, Jennings brought an action of assumpsit in Westmoreland County against McKay to recover the price of the whiskey, which had been the subject matter of the replevin suit, and on December 5, 1882, McKay filed a special plea of set-off, in which he claimed to defalcate the amount of the revived judgment. This action was proceeded in, and the jury certified a balance in his (McKay's) favor of $1186.03, on which judgment was entered. The defendants averred that by reason of the foregoing facts the judgment in replevin had been extinguished, and that no suit could be now maintained on the property bond.

Plaintiff demurred to the special plea.

The Court sustained the demurrer and entered judgment thereon in favor of the plaintiff for the penalty of the bond to be released on payment of $1186.03, with interest from February 15, 1883, and costs of suit. The defendants thereupon took this writ, assigning for error the entry of judgment for the plaintiff on the demurrer.

Moorhead (*Head*, *H. W. Weir*, and *John F. Wentling* with him), for the plaintiff in error.

By setting off the judgment in replevin in the action of assumpsit, McKay became an actor in the suit; he proceeded to verdict and judgment, and therefore his judgment in replevin is merged in the judgment entered on the verdict in assumpsit, and he is estopped from maintaining another action on it. He cannot do so indirectly by maintaining this action on the bond.

Good *v.* Good, 9 Watts, 567.
McGuinty *v.* Herrick, 5 Wend. 240.
Case *v.* Wilder, 16 Wend. 583.

It is not contended that this would be a payment of the original judgment; but it would thereafter preclude McKay from maintaining any suit or legal process upon the original judgment so *merged*.

Ives *v.* Goddard, 1 Hilton, 434.

The equities are all with the sureties, plaintiffs in error.

Fitzsimmons (*Robb* with him), for defendants in error.

A surety is not discharged by a contract between his principals and their common obligee, which does not place him in a different position from that which he occupied before the contract was made.

Roach *v.* Summers, 20 Wall. 165.

A merger could not ensue unless the certificate was a security of a higher nature than the old security.

Jones *v.* Johnson, 3 W. & S. 278.

Was this judgment satisfied by satisfaction of the debt? This may happen indifferently between securities of the same or of different degrees, but being by act of the parties is the creature of their will.

Jones *v.* Johnson, *supra*.
Cro. Car., 85.
Moore, 872.
Cro. Eliz., 716–727.
Ligget *v.* Bank of Penna., 7 S. & R. 218.
Wolf *v.* Wyeth, 11 S. & R. 152.

The acts of all the parties clearly show that there was no intention to accept the certificate in lieu of the replevin judgment.

Jennings has not complied with the conditions of the bond, and his sureties cannot be released until he does.

November 12, 1883. THE COURT. In the case of Good *v.* Good (9 Watts, 567), Chief Justice GIBSON, in speaking of the difference in the practice under the British statute of defalcation and our own, says that where the defendant, on the trial of the case, follows up his notice of set-off with the requisite proof to sustain it, as well in the courts of Westminster as here, he is concluded by the verdict. But that the residue of a set-off, not exhausted in extinguishing the opposite demand, not being recoverable as with us, by the same jury, is, by the British practice, reserved for recovery by a future action or defalcation, whilst under our statute it must all be disposed of at one operation. He goes on further to say that the introduction of the set-off, being virtually a cross action for an entire demand, it must be prosecuted for the whole amount if at all. The legal principle here asserted renders the solution of the case in hand easy. Under the British statute, McKay could have used his judgment against the claim of Jennings only in the way of set-off, and the balance, after the extinguishment of that claim, would remain as before, part of the judgment. But in the case thus put there is no doubt as to the status of the

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surety in the replevin bond; he would still be held for this balance. On the other hand, under our statute, the cross demand cannot be used merely as a set-off *pro tanto*, but its assertion is in the nature of a cross action, in which the defendant becomes the actor. And herein is found the mistake of the defendants. They treat the certified balance in McKay's favor as something wholly foreign to the judgment used as a set-off, and as having no connection with it. But they seem to forget the fact that it results directly from the prosecution of that judgment in the way of a cross suit, and that, as to this balance, the case stands no longer Jennings *v.* McKay, but McKay *v.* Jennings, and that no change has been worked upon the replevin judgment save that of diminution. This certificate is, therefore, not less part of the original transaction than if McKay had brought an action of debt or scire facias on his judgment, and Jennings, admitting, for the sake of illustration, his right so to do, had interposed his demand by way of defalcation. The result would have been exactly what it now is, a judgment in favor of McKay for the balance. Nor is there any force in the argument that the replevin judgment is merged in the certified balance, for this results in the one case as well as in the other. In either the original judgment is merged in the subsequent one; in either the latter measures the liability of Jennings and his surety, and it is the one from which alone the subsequent process must issue. Thus, judgment results from the very same claim, and the difference is found only in the process by which it has been obtained.

We cannot see, therefore, that there was even a technicality in the way of the result reached in the Court below. Neither have the representatives of Painter, the surety, any equitable standing to defend against the balance of the replevin-judgment, as claimed in this suit, for not only have they been relieved to the amount of the set-off, some nineteen thousand dollars, but their rights as against the principal in the bond have not been in any degree abridged. On payment of the judgment, now had against them, they still have the right, as to Jennings, to have it marked to their use, and they may have process upon it as upon the original judgment.

Such, then, being the case of the defendants,

Common Pleas—Law.

C. P. No. 2. December 10, 1883.

Wilson v. City of Philadelphia.

Court stenographer—Councils—Appropriation—Under the Act of May 8, 1876, providing that court stenographers shall be paid by the county or counties forming the judicial district by which they are appointed, the counties are liable, although they have not made an appropriation to pay the stenographer.

Case stated.

Samuel G. Wilson was appointed stenographer of the Orphans' Court, on July 2, 1881, under the Act of May 8, 1876 (P. L. 140). The Act empowers the Courts of the Commonwealth to appoint stenographers, and, after making certain regulations, provides that, except in the case of the Supreme Court, the stenographers shall be paid by the county or counties forming the judicial district by which they are appointed. From the time of his appointment until April 1, 1883, Wilson was paid for his services by the city of Philadelphia. But for the time from April 1, 1883, to July 10, 1883, payment was refused on the ground that councils had made no appropriation for that purpose. He thereupon brought this suit against the city, and the above facts were submitted to the Court. If the Court be of opinion that under the law the plaintiff can recover, judgment to be entered for the plaintiff for $382.90; otherwise, judgment for defendant.

T. P. Matthews, for plaintiff.

The statute commands the county to pay the stenographer. It is, therefore, the county's duty to pay him, and it cannot excuse itself from that duty by saying it has made no appropriation.

C. B. McMichael and *W. N. West*, for the city, submitted the case without argument.

THE COURT. Judgment for plaintiff.

S. G. F.

C. P. No. 2. December 18, 1883.

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defendant did not exercise necessary care and in consequence the goods were destroyed by fire; that the defendant would not make good the loss, nor pay to plaintiff the insurance money he had received after the destruction of the goods.

The defendant demurred because the declaration should have alleged either that the defendant was a bailee for hire or was guilty of gross negligence and also because there was no allegation of an express contract to insure the plaintiff's goods.

George B. Carr, for plaintiff.

G. Heide Norris, for defendant.

THE COURT. Demurrer sustained with leave to plaintiff to amend. S. G. F.

C. P. No. 2. December 10, 1883.

Commonwealth v. Samuel Baker.

Discovery in aid of execution—Act of June 16, 1836—Bill must comply with Act and show failure of remedy at law.

The bill recited a judgment for $600 obtained against the defendant January 18, 1882, and a fieri facias returned *nulla bona* October 9, 1882; that the defendant was cestui que trust of a certain estate under the will of Mary Dixey, and was believed to be living on said estate, but plaintiff was unable to discover who was now trustee or how the trust was administered. Further that plaintiff had no means of knowing what other property defendant possessed. Discovery was prayed in these particulars.

The defendant demurred on the ground that plantiff had not alleged that there was reason to believe defendant had property sufficient to satisfy the judgment, and that such property had been concealed, transferred, or incumbered, or that such concealment or fraudulent transfer prevented plaintiff from having execution of his judgment, and that the plaintiff had not sworn to the truth of the bill; that the Act of June 16, 1836, providing discovery in aid of an execution, required these averments. Further, that it appeared by the plaintiff's own showing that he had a sufficiently accurate knowledge of the defendant's estate, and he did not allege that he believed the defendant to have any property besides that mentioned in the bill, or that he had no remedy at law.

Read and *Pettit*, for plaintiff.

Maxwell Stevenson, for defendant.

THE COURT. Demurrer sustained and bill dismissed. S. G. F.

C. P. No. 2. December 22, 1883.

Lea v. Love.

Lease—Merger—Satisfaction of covenant—A covenant which is executory is merged in a new covenant made in pursuance of the former, although its terms are different.

Case stated.

By an agreement under seal, dated October 21, 1880, defendant promised to sell and plaintiff promised to buy a certain house and land. After stipulations as to price, payment, and giving of title, which were all to be completed by the first of the following November, the covenant recited, that from and after the said first of November the defendant was to remain on the premises as tenant for *two years* at a rental of, etc. etc.

Title was made and purchase-money paid within the specified time, and on the day when the defendant's tenancy was to begin, to wit, November 1st, he signed a lease for *one year*. The lease was prepared and handed to him by a person who acted for both parties. One month before the end of the year the defendant notified the plaintiff that he would terminate the tenancy; and when the year closed he removed from the premises. The plaintiff refused to accept the key, and brought this suit for the next quarter's rent, claiming the defendant was bound by his covenant for a two years' tenancy.

No explanation of the inconsistency between the lease and the covenant was offered except that it was a mistake.

The case stated stipulated that if the Court be of opinion that the tenancy between the parties was for two years, as set out in the original agreement, judgment was to be entered for the plaintiff; if for but one year, as set out in the lease, then judgment for defendant.

John G. Johnson, for plaintiff.

A lease for one year cannot possibly be a satisfaction of a covenant for two years. There can be no merger here, because it would be a merger of the greater in the less.

Selden *v.* Williams, 9 Watts, 9.

Anderson *v.* Long, 10 S. & R. 60.

John M. Williamson, for defendant, was not called on by the Court.

THE COURT. The covenant to purchase was executory, and evidently contemplated other more formal instruments to be made to carry it out. These having been made, must be presumed to express the final intent of the parties, and the former covenant was merged or discharged.

Judgment for defendant.

Oral opinion by HARE, P. J. S. G. F.

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C. P. No. 2. December 15, 1883.

Coleman v. Clark.

Affidavit of defence law—Contract to buy shares of stock not within.

Rule for judgment for want of a sufficient affidavit of defence.

Plaintiff filed a written agreement by which he promised to sell and the defendant promised to buy certain shares of Rubberoid Company stock. The contract was also to be a cancellation of a former agreement which the plaintiff had with one A. Q. Nettleton, and a waiver of any forfeiture thereunder. Plaintiff averred tender of the stock to defendant, and his refusal to receive and pay for it.

Defendant's affidavit stated that he was advised that the instrument sued on was not within the affidavit of defence law.

G. S. Graham, for the rule.

W. H. Baker, contra.

THE COURT. Rule discharged. S. G. F.

C. P. No. 2. December 11, 1883.

Wurfflein v. Haines.

Administrator—Power to mortgage—A power to an executor to bargain, sell, convey, and absolutely dispose of real estate includes a power to mortgage, and survives to an administrator de bonis non c. t. a.

Case stated.

By the will of Mary McCauley it was provided *inter alia* as follows:—

"Item. I hereby direct, authorize, and empower my said executor to bargain and sell, convey and absolutely dispose of all, or any portion, of my real estate during the lifetime of my son, George Barclay Brown, either at public or private sale, as in his judgment and discretion he shall deem most advantageous to my estate, and to invest the proceeds of such sale, together with any moneys which may come into his hands, in some safe and profitable security or securities, and the said investments, from time to time, to exchange as to him may seem advisable and proper, and in case the real estate is not sold during the lifetime of my said son, George Barclay Brown, I will order and direct that my said executor sell and dispose of the same, or so much thereof as shall remain unsold, together with all and singular the securities belonging to my estate immediately upon the decease of my said son, and as to the real estate, giving and granting unto my executor full and complete power and authority to execute deeds, etc., clear of any trust, etc.

"Item. From and immediately after the decease of my *bonis non c. t. a.* were granted to Benjamin H. Haines, but he was not appointed trustee under the will. While administrator, and during the lifetime of the son, George Barclay Brown, Haines executed a mortgage on the real estate of the decedent to the plaintiff, and embezzled the money. Haines was afterwards dismissed by the Orphans' Court from his office of administrator.

The case stated stipulated that if the Court should be of opinion that Haines had power to make the mortgage, and that it was a valid lien on the premises, judgment should be entered for the plaintiff; otherwise, for the defendant.

John G. Johnson, for the plaintiff.

The power to sell and convey included a power to mortgage, and survived to the administrator.

Lancaster *v.* Dolan, 1 R. 231.
Zane *v.* Kennedy, 23 Sm. 182.
Watts's Appeal, 28 Sm. 370.
Lantz *v.* Boyer, 31 Sm. 325.
Jackman *v.* Delafield, 4 N. 381.

W. H. Staake and John M. Gest, for defendant.

The power to bargain, sell, etc., contemplated an absolute conversion, and was not a power to mortgage.

Haldenby *v.* Spofforth, 1 Beav. 390.
Phila. & Reading R. R. *v.* Lehigh C. & N. Co., 36 Pa. St. 204.

The power was given to the executor as testamentary trustee and not *virtute officii*. It cannot, therefore, survive to the administrator. It was not for distribution or administration, but was a trust during the lifetime of decedent's son.

Maus *v.* Maus, 30 Sm. 194.
Waters *v.* Margerum, 10 Sm. 39.
Ross *v.* Barclay, 6 Harris, 183.
Hepburn's Estate, 8 Phila. 206.
Gideon's Estate, 2 WEEKLY NOTES, 355.

C. A. V.

THE COURT. Judgment for plaintiff.

S. G. F.

Orphans' Court.

October 18, 1883.

Ketler's Estate.

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and widow of decedent, claimed credit for $401, counsel fees paid by her in a proceeding brought to recover from Samuel J. Kean, the son-in-law of decedent, and who had been his partner, moneys alleged to be due from the firm. The suit failed, the proofs showing that nothing was due. It had been commenced without consulting the children, three of whom were of age, and it was against their wishes. On these grounds the Auditing Judge disallowed the claim, and to this finding exceptions were filed.

J. H. Shakespeare, for exceptant.

John A. Brown, contra.

October 27, 1883. THE COURT. The decisions in this State have not yet gone so far as to say that an administrator who, in good faith, makes an effort to collect the assets of the estate by means of a suit, is not to be allowed for counsel fees if the effort should prove unsuccessful, and if the next of kin of the decedent, or some of them, have expressed their disapprobation of the litigation. It is the duty of the administrator to collect the debts due the estate, and his right to employ the means requisite for this purpose is a necessary result. That the next of kin may think that the attempt to collect should not be made is material only so far as it affords evidence of want of good faith on the part of the administrator; and in a case like the present, where the opposition came chiefly from the wife of the person whose liability as debtor the accountant was seeking to establish, but little weight is to be attached to it. In Ammon's Appeal (7 Casey, 311), counsel fees were allowed, although arbitrators had found against the estate, and the final result was also adverse in the Supreme Court, and the parties interested had, after the award, given written notice of their objection to further proceeding, and of their intention to oppose the payment of expenses.

The case is, we think, wholly unlike Rankin's Appeal (10 WEEKLY NOTES, 235); Yerkes's Appeal (12 Id. 398). These were cases of issues of *devisavit vel non;* the executor was regarded as a mere stakeholder, since creditors in the one case, and a widow in the other, who elected to take against the will, were wholly indifferent as to the question of testacy or intestacy; and it was not, therefore, so far as they were concerned, the duty of the executor to take part in the controversy.

But the obligation of collecting the assets of the estate is one which the administrator owes to creditors, and it would be no answer to an application to surcharge with an amount lost by the omission to sue, that the next of kin had forbidden the bringing of suit. In the present instance, the accountant was herself entitled as distributee to one-third of the estate, and the parties who opposed the suit represented but three-sevenths of the remaining two-thirds, or six twenty-first parts of the whole; and one of them, as already stated, was the wife of the person alleged to be the debtor.

The adjudication discloses no ground for the disallowance of the fees, except that as the accountant had not consulted with those of her children who were of age, and they were opposed to the proceeding, the case fell within the principle of Rankin's Appeal, *supra*. In this we think there was error. If the accountant acted honestly, and under the advice of counsel, she is entitled to credit for proper and reasonable counsel fees. As the facts with regard to the credit disallowed are not stated, we are unable to determine as to its propriety, and the account must be remitted to the Auditing Judge for further report and proceeding.

As to the credit claimed for payment to J. M. Houck, the question was one purely of fact, and we cannot say that there was not evidence which, if believed, would justify the disallowance. This exception is overruled.

The remaining exceptions relate to matters not passed upon by the Auditing Judge, and to which his attention can be called when the account again comes before him.

The second exception is dismissed. The remaining exceptions are sustained *pro forma*, and the account recommitted to the Auditing Judge for further proceeding.

Opinion by PENROSE, J. E. F. H.

November 20, 1883.

King's Estate.

Decedent's estate—Power of appointment by will and exercise of same by donee thereof—Creditors of donee—A grant of an estate for life with power of appointment by will does not render the estate liable for the debts of the donee of the power at the determination of his life estate—The doctrine prevalent in England that the creditors of the donee of a power to appoint by will who has fully exercised the same, have after his death a preference over his appointee, is not followed in Pennsylvania.

Sur exceptions to adjudication.

At the audit of the account of F. Gordon Dexter, executor under the will of William M. King, the decedent, the following facts appeared: Edward King devised the residue of his estate to trustees to collect the income and pay over the same to his nephew, William M. King, during his life, and at his death to convey the principal to such person or persons as the said William M. King should by will limit or appoint. William M. King died in 1880, leaving a will, by which, in exercise of the above power he devised the estate to F. Gordon Dex

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ter in trust, to pay over the income to his widow during her life, and at her death to convey in such manner as she should appoint by will.

At the adjudication of the final account of the estate of Edward King in 1882, the Auditing Judge awarded the balance in the trustee's hands, viz., $30,142.51 to F. Gordon Dexter, trustee under the will of William M. King, to carry out the provisions thereof.

At the audit of the executor's account of the estate of William M. King, it was agreed that the question should be argued as to whether the fund in the hands of the accountant received by him in trust from the trustees of Edward King's estate should not be liable for the debts of William M. King.

The Auditing Judge refused to surcharge the accountant with so much of the trust funds derived from the estate of Edward King as would pay the debts of decedent.

To which finding exceptions were filed in behalf of certain creditors of William M. King.

John Samuel and *George Sergeant*, for certain creditors of the estate of Wm. M. King.

The execution of a general power of appointment makes the appointed estate assets for the payment of debts, because the donor of the power has abdicated all dominion over his own property and has authorized the donee of the power to act with it as if it were his own, and a court of equity will not permit the donee to treat it as his own property for some purposes, and yet free from the payment of his debts.

4 Kent's Com. p. 339, 340.
1 Story's Eq. Jur., §§ 169, 170.
2 Sugden, p. 29.
Thompson *v.* Town, 2 Vern. 319.
Holmes *v.* Coghill, 7 Ves. 506.
Hobday *v.* Peter, 28 Beavan, 354.

In the United States—

Johnson *v.* Cushing, 15 N. Hamp. R. 298, 307.
Talmadge *v.* Hill, 21 Barbour, S. C. R. 34–50.
Smith *v.* Garey, 2 Dev. & Bat., Eq., N. C. 42.

Richard C. McMurtrie, for the executor of estate of William M. King.

December 1, 1883. THE COURT. The argument for the creditors was built upon the theory that English decisions, pronounced before the Revolution, and not since overruled in England or here, are binding upon American tribunals; and a dictum to that effect sometimes appears, with other legal crudities, in judicial opinions. The utterances of the Supreme Court, however, dence remained with us after the formal ties of allegiance to the country of its origin had been severed; but much also was discarded, which in the new political status was found inadequate to the demands of popular enlightenment, and, we may add, of the spirit of a larger humanity. The doctrine, for example, that a trust for a spendthrift son could not protect him against his creditors, never obtained a foothold in Pennsylsylvania, although it has always been, and still is the law of England. Such a trust, in this instance, with a power of appointment in the nephew, was created by the uncle's will, and the donee appointed to other than his creditors. So, the doctrine of illusory appointments was in full force in England until 1830, but it was expressly repudiated in Pennsylvania. (Graeff *v.* De Turk 8 Wr. 527.) There is a certain rude consistency in the English rule, which, true to the theory that the ownership of property must carry with it a corresponding liability for debt, would confiscate the estate covered by the power, although in that act it denies the rudimental principle that the appointee of the power takes by virtue of the original gift. But such a contradiction, with all its discordant results, is forbidden both by the text and spirit of our own decisions. The donee, a stranger in blood to the donor, may make his wife the beneficiary under the power; but the gift will be burdened with the collateral inheritance tax, because in law it is the gift of the original donor. (Commonwealth *v.* Duffield, 12 Har, 277; Commonwealth *v.* Williams, 1 Har. 29.) So a will may be made by a donee domiciled abroad, which fails under the foreign law to execute the power, but is effective under the law of the situs of the donor; upon the principle that the appointee takes under the original will, the attempted exercise of the power will be upheld. (Bingham's Appeal, 14 P. F. Sm. 345; Sewall *v.* Wilmer, 132 Mass. 131.) It is a solecism in morals to say that because the donor has parted with all dominion over his property, no regard shall be had to the terms which he has impressed upon its relinquishment. In the case before us, he gave to this decedent an estate for life, with a power to appoint, which, however, added nothing to the donee's right of possession. But it was only to property of the debtor, of which he had either actual possession or the right of possession, that the claim of the creditor could

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was expended by his death. What he never had he could not grant. He could not pass the estate by his will. He could only designate the person to whom the estate would pass *by his uncle's will.*"

The exceptions are dismissed and the adjudication is confirmed.

Opinion by ASHMAN, J. W. L. S.

[NOTE.—The above case must be distinguished from Bell's Estate (12 WEEKLY NOTES, 371), where the donee of the power limited the time of final distribution among her appointees (children), and the Court ordered in consequence, that the funds should remain in the hands of the trustee under donor's will until that period should arrive. —REPORTER.]

October 15, 1883.

Ryan's Estate.

Active and passive trusts—Power to sell and invest—Meaning of the word "heirs"—Right of widow to take as an heir of her deceased husband.

Sur exceptions to adjudication.

At the adjudication of the account of Samuel White, trustee, under the will of Letitia G. Ryan, deceased (before HANNA, P. J.), the following facts appeared.

The testatrix by her will, *inter alia*, devised to the accountant two certain parcels of real estate in trust—

"to suffer and permit my beloved husband to occupy or to rent either or both of said pieces of real estate, and to receive, take, hold, and enjoy the net rents, issues, profits, and income thereof, to his own use absolutely after the payment of all taxes, charges, assessments, repairs, and the charge hereinafter mentioned [a payment of eighteen dollars a year to the executor of testatrix's will] for and during all the term of his natural life."

This to be free from all debts made or to be made by her said husband, and, after his decease, one-third each to each of her three children, Caroline B. Dodge, Sarah V. Blake, and Edward W. Ryan for life, and after their decease "to vest absolutely in their heirs forever."

The husband of the testatrix died some years ago, and on January 10, 1883, Edward W. Ryan, one of the *cestuis que trustent*, died, and his widow, Amelia Ryan, took out letters of administration in Oregon, that State being his place of domicil.

The real estate was sold under proceedings upon mortgages which had existed on the premises before the testatrix took title; the surplus after satisfying the judgments was invested by the accountant in a mortgage. This mortgage is the *corpus* of the estate.

Amelia Ryan, widow of testatrix's son Edward, claimed as heir of her husband one-third of the income collected since the death of her husband as included in the account, and one-third of the *corpus* of the trust estate in the accountant's hands. The claims were resisted by the two sisters of Edward, who claimed to be the heirs as contemplated by the testatrix.

The Auditing Judge held that while there was no active trust created by the will, yet upon the death of testatrix's husband, the duties of the trustees as laid upon them by the will created an active trust, and therefore the three children of testatrix have no vested legal estate, but an equitable estate for life.

The Auditing Judge further held that the mortgage in which the trustee had invested the proceeds of the sale of the properties under the proceedings on the incumbrances of the real estate must be considered as real estate, and therefore the widow of Edward W. Ryan was not his "heir," and as his estate was only an equitable one for life, neither had she any dower therein, and her claim was therefore refused.

To these rulings Amelia Ryan filed thirteen exceptions.

H. L. Carson, for exceptant.

Edward W. Ryan was entitled to a vested legal estate under the rule in Shelley's Case. The language of the will does not create an active trust, nor does an *implied* agency to collect rents, etc., create one.

Yarnall's Appeal, 20 Sm. 335.

Where the entire beneficial interest is in the *cestui que trust*, without restriction as to the enjoyment of it, there is no reason why it should not be considered as actually executed.

Rife *v* Geyer, 9 Sm. 393.
Dodson *v.* Ball, 10 Id. 492.
Bispham's Equity, 64 N. 7.

The word "heirs" in Pennsylvania means statutory heirs, those who take under the intestate Acts, and includes Amelia Ryan, widow of Edward W. Ryan, and therefore she is entitled to one-third of the corpus and income of the estate.

Estate of Thos. Potter, 13 Phil. Rep. 318.
Clark *v.* Scott, 17 P. F. S. 446.

In this State a widow has an estate in the lands of her intestate deceased husband, and not a mere lien upon them.

Act, April 8, 1833, pl. 1 (Purd. Dig., vol. i. page 806).
Thomas *v.* Simpson, 3 Barr, 70.
Schall's Appeal, 4 Wr. 177.
Cote's Appeal, 2 WEEKLY NOTES, 251.
Com. *v.* Naile, 7 N. 433.

Her statutory interest is in the nature of a rent charge, and is an incorporeal hereditament ranking as real estate, and is subject to execution for her debts.

Shaupe *v.* Shaupe, 12 S. & R. 13.
Miller *v.* Leidig, 3 W. & S. 458.
Schall's Appeal, 4 Wr. 177.

Under the intestate Act the widow is designated as an heir, and in this case as one, therefore, on whom the testatrix's bounty falls. She

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takes under the will and not under the statute, and is entitled to one-third of one-third of the corpus and income of the estate.

J. Alexander Simpson, for trustee and sisters of Edward W. Ryan, deceased.

The intention of testatrix should govern this case. The whole fund arises from real estate. It is realty until final distribution, and it was the intention of the testatrix to give Edward W. Ryan a share in the *profits* of the property for his life *only*.

November 24, 1883. THE COURT. We are unable to see that, after the death of the husband, the trust created by the testatrix ceased to be active. The Auditing Judge rightfully held that the direction to pay over the *net* issues, profit, and income, implied a direction to manage the estate. But the will does not leave us to implications, for it expressly clothes the trustee with full power to sell and invest the proceeds. Precisely those duties, but without any formal words of trust, were imposed upon the executor in Sheets's Estate (2 P. F. Sm. 257), and the Court held that they constituted him a trustee, and the trust itself an active one. In every case the question for solution is, what was the purpose of the testator? According to the answer which may be given, the same words will denote either an active and continuing or an executed trust. Thus the will may show that the object of the trust was to preserve the estate of the wife from the husband's creditors; on the discoverture of the wife the trust will be at an end. Or it may show, in addition, a purpose to preserve contingent remainders; and the trust, although void as to the separate use, will be upheld to effectuate the ulterior design. Dodson *v.* Ball (10 P. F. Sm. 493); Ogden's Appeal (20 P. F. Sm. 507); Megargee *v.* Naglee (14 P. F. Sm. 216); Yarnall's Appeal (20 P. F. Sm. 335); Earp's Appeal (25 P. F. Sm. 125); and Bradley's Appeal (36 Leg. Int. 38) illustrate the first point; and Bacon's Appeal (7 P. F. Sm. 504); Springer *v.* Arundel (14 P. F. Sm. 218); Dunn & Biddle's Appeal (4 Nor. 94); and Ingersoll's Appeal (5 Nor. 240) are examples of the second. It is not necessary, because the motive for the trust for the husband is expressed, that a reason should be apparent for the trust in favor of the son. Nor is the fact that the latter trust was for a person who was *sui juris* a reason why it should fail. In Wickham *v.* Berry (5 P. F. Sm. 70) the trust as to part of the estate was for the maintenance of the son, and in case of his death without issue, then to the use of testator's sisters and brother, but as to one-third of the estate it was simply for the son for life, and at his death to his heirs in fee. Yet the trust for the entire interest was held to be active. In Barnett's Appeal (10 Wr. 392), where all the *cestuis que trustent* were *sui juris*, it was held "the error was in laying down as the law of Pennsylvania that a trust to receive rents and pay them to another is executed." In Ogden's Appeal, *supra*, the Court declared that "active trusts are sustained even as to *cestuis que trustent sui juris*, where the intent of the donor is to make the trust answer some useful and legal, but temporary purpose," and that the result in that case would perhaps have been different if the devise had been, as it is here, to the first taker for life only.

We have considered this point at some length, because it was made prominent in the argument, and because if the trust were executed, the absolute interest passed to the son, and the right of the widow was assured. The amount of his interest, however, is immaterial, if the widow shall be held to be entitled under the gift to his heirs. Her eligibility to take in the character of heir was regarded in Clark *v.* Scott (17 P. F. S. 446) as clouded with some doubt, but the doubt was so greatly in her favor, that, until a release of her interest should be forthcoming, the purchaser's title to the estate was held unmarketable. The reason of the thing seems to incline to her heirship, and is found in the very definition of the word. The heirs of a decedent are such persons as would be entitled to represent him by the law of the county (Patterson *v.* Hawthorn, 12 S. & R. 114). "In this State, when the word 'heirs' is used as a word of purchase, it means statutory heirs—those persons designated by the Intestate Act to take the estate." (Clark *v.* Scott, *supra*, 452.) At common law, neither the husband nor wife could be heir to the other. Our Statute of Distribution left the husband, as to the wife's real estate, in the position he held at common law. But it took away from the wife her dower, and gave her, as a substitute, an interest which is so far superior to her common law dower, that it has been held to attach to an estate in remainder which had vested in her husband, while the particular estate was still outstanding at his death. (Cote's Appeal, 2 WEEKLY NOTES, 251.) It is an estate and not a lien (Thomas *v.* Simpson, 3 Barr, 70; Schall's Appeal, 4 Wr. 177); and it may be sold on execution for her debts (Shaupe *v.* Shaupe, 12 S. & R. 13; Miller *v.* Leidig, 3 W. & S. 458; Schall's Appeal, *supra*). The wife's interest, therefore, unlike the husband's, is wholly a statutory interest, and she takes an estate of the same quality as that taken by the descendants. The question has been discussed in Potter's Estate (13 Ph. 318), and Abbey's Estate (13 WEEKLY NOTES, 535), and following the reasoning in those cases, we must hold that the exceptant is entitled to one-third of the share in dispute.

The first three exceptions are dismissed, and the remaining exceptions sustained.

Opinion by ASHMAN, J. W. D. N.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JAN. 17, 1884.* [No. 6.

Supreme Court.

Jan. '81, 274. February 19, 1883.

Sanderson and Wife v. Pennsylvania Coal Co.

Mines and mining — Riparian rights — Water-course — Damages — Set-off — Evidence — Nuisance.

In an action by a property owner against a mining company for polluting the waters of a natural stream flowing through plaintiff's land, and used by her for domestic purposes, it is error for the Court to leave the measure of damages entirely to the discretion of the jury without reference to the evidence on that head. The jury should be instructed that the plaintiff is entitled to such damages as they find from the evidence will compensate the loss she has sustained.

In such case the fact that the mining company has increased the flow of water in the stream is immaterial, and cannot be set up by way of set-off or recoupment.

In the above case the plaintiff was held entitled to recover damages not only for pollution of the water, but also for injuries done to a dam and other artificial constructions erected by her on her premises to enable her to make convenient use of the pure water.

Evidence in the above case that mining of the sort carried on by defendant was necessarily below water level, and involved the pumping up from the mines of water according to the ordinary, reasonable, and proper mode of working such mines, was held inadmissible to mitigate the damages.

Error to the Common Pleas of Lackawanna County.

Case, by J. Gardner Sanderson and Eliza McBrair, his wife, in right of said wife, against the Pennsylvania Coal Company, to recover damages caused by the pollution of a water-course running through the land of plaintiff, by the discharge therein of mine-water from collieries operated by defendant.

On the trial, before HANDLEY, P. J., the following facts appeared: The plaintiff is the owner of certain premises in the city of Scranton, occupied by her as a dwelling-house. Through this land ran a private stream of pure water. A considerable expenditure was had in making this stream useful for domestic purposes. The defendant owned and operated a colliery, situate about two miles farther up the stream, in such manner as to discharge the mine-water into the stream, thereby destroying it for all domestic purposes, although largely increasing its volume.

Defendant offered to prove that "considering the surroundings of the country through which this stream runs, its liability to be very low during the summer, the increase in its volume caused by the water pumped from the mine, is an advantage to plaintiff." Objected to by plaintiff as incompetent. Objection overruled. Evidence admitted. Exception. (Third assignment of error.) Defendant also offered to prove, "the cost to plaintiff of keeping up the water improvements." Objected to by plaintiff as incompetent. Objection overruled. Evidence admitted. Exception. (Fourth assignment of error.)

The defendant submitted, *inter alia*, the following point: 10. "All that the plaintiff in this case can claim, if anything, is the use as a riparian owner of the water in its natural state, and she cannot claim for the cost of, or damages to, any artificial construction put up by her for the use of the water from this stream, nor for the cost of introducing other water for such artificial purposes."

Answer. "This point we affirm with this qualification; while passing upon this part of the case it is your duty to take into consideration the evidence of Messrs. Mattes, Platt, and the several witnesses who were called, and the question put to each of them, whether the discharge of this water from the Gipsy Grove Breaker into Meadow Brook, was a benefit or damage to the plaintiff. You will bear in mind, that all of the defendant's witnesses called upon this point considered that the constant pumping and flowing of this water was a benefit to the plaintiff's property. Hence, if you should reach that part of this case it becomes your duty, while ascertaining what the damages are, to take into consideration whether the flowing of this water, as the testimony now shows it does flow from day to day, is a benefit or a damage to the plaintiff's property. If you should ascertain that it was a benefit, then it becomes your duty to ascertain how much that benefit is, and to award the damages less that amount." (Ninth assignment of error.)

The Court charged the jury, *inter alia*, as follows: "Now, you have it in your power, after you have examined all of the evidence in this case, to say what damage the plaintiff is entitled to recover. The amount of damages is altogether in your discretion; what damages you may award the plaintiff is purely for you. You may in your discretion, say that she is entitled to nothing more than nominal damage, which would be nothing more than six cents; you may say that she is entitled to $500; you may say that she is entitled to $1000; you may go as high as the amount named in the evidence, if you believe that is the plaintiff's actual damage, after ascertaining whether the flow of this water into the stream is a benefit to her or not. If you

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find it is not a benefit and that she ought to recover, then, of course, you will give to the plaintiff damages to that amount, if you please. Now, as I have said in the general charge, this is an important case, but notwithstanding its importance, it is simply reduced to a question of right or wrong. If the plaintiff is right, if the law is with her, under the evidence and circumstances, then she is entitled to your verdict. Keeping in view the industrial interests of this valley; keeping in view the large number of men that are employed by these mining and coal shipping companies; keeping in view the fact that by the least turn of this case, you may cripple, or not cripple the industries of this part of the Commonwealth, it becomes your duty to approach the evidence with great caution, and say whether the verdict ought to be for the plaintiff or the defendant." (Eleventh assignment of error.)

Verdict for plaintiff for $250, and judgment thereon. Whereupon the plaintiff took this writ, assigning for error, *inter alia*, the admission of defendant's offers of evidence; the answer to defendant's tenth point, and that portion of the charge hereinbefore set forth.

A. Ricketts, for plaintiff in error.

Set-off is unknown to the common law. It is only admissible by virtue of statutes, and these only provide for actions *ex contractu*. Set-off is therefore excluded in all actions *ex delicto*, and it cannot be admitted even in actions *ex contractu*, if the claim of either party be for unliquidated damages.

1 Chitty Plead., 571.

A comparison of advantages and disadvantages is likewise only by virtue of statute, in reference to streets, railroads, and the like.

1 Greenleaf, Ev., § 440.
1 Wharton, Ev., §§ 509, 513.
Rouch *v.* Zehring, 59 Penna. St. 74.

Where the language of the Court taken in connection with the circumstances of the case, may have misled the jury, it is error, and the judgment will be reversed.

Kissinger *v.* Thompson, 12 S. & R. 44.
Hersheaur *v.* Hocker, 9 Watts, 455.
Relf *v.* Rapp, 3 W. & S. 21.
Garrett *v.* Gouler, 6 Wright, 143.
Wenger *v.* Barnhart, 5 Smith, 300.
Gregg Township *v.* Jamison, Id. 468.
Penna. R. R. *v.* Berry, 18 Smith, 272.
Stall *v.* Meek, 20 Smith, 181.

Isaac J. Post (*Andrew T. McClintock* with him), for defendant in error.

April 16, 1883. THE COURT. The controlling principles in this case respecting the plaintiff's right to recover, if injury was caused to her by the defendant polluting the waters of Meadow Creek with water from its colliery, were stated in an exhaustive opinion by the late Justice WOODWARD (86 Pa. St. 404). Upon the second hearing there was quite as little recognition of a right in the owner of a colliery to materially injure the property of another by fouling a stream with mine water, as upon the first (94, Pa. St. 302). Now the question is, whether the plaintiff is entitled to compensation for the direct and immediate loss resulting from the injury.

In affirming the plaintiff's points, the Court ruled that if the defendant polluted the waters of Meadow Brook, thereby causing an injury to the plaintiff, she is entitled to recover damages, that the measure of damages is compensation for the injury resulting from the defendant's acts, and that the verdict should be for a sum that will compensate the plaintiff for the actual loss she suffered, caused by the defendant, previous to bringing the action. That was in accord with the general rule in actions of tort, where the injury was unintentional and unaccompanied with malice; but, though sound, it was frittered away by other instructions.

Near the end of the charge the Court said: "Now you have it in your power, after you have examined all the evidence in this case, to say what damage the plaintiff is entitled to recover. The amount of damages is altogether in your discretion; what damages you may award the plaintiff is purely for you. You may, in your discretion, say that she is entitled to nothing more than nominal damages, which would be nothing more than six cents; you may say that she is entitled to $500; you may say that she is entitled to $1000; you may go as high as the amount named in the evidence, if you believe that is the plaintiff's actual damage, after ascertaining whether the flow of water in this stream is a benefit to her or not. If you find it is not a benefit and that she ought to recover, then of course you will give to the plaintiff damages to that amount, if you please." All that was error. It gave the jury full liberty to give damages in their discretion, to do as they pleased. To exercise the power to find nominal damages, or a fraction of what was proved, was against law; their duty, under their oaths, was to determine from the evidence what sum would be a full compensation for the loss suffered by the plaintiff from the defendant's fouling of the waters of Meadow Brook, and they had no lawful power to find damages for less. They were bound to "go as high as the amount named in the evidence," if they believed she suffered so much damage. It was no matter of discretion, but a sum to be determined from the evidence that would compensate the loss, as clearly so as if the plaintiff's house had been destroyed, and the jury were to find its value from the testimony in the cause. Even if deduction could be made for benefits, the value of the loss should first be found.

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There was no allegation of injury from overflow or for swelling the waters of the stream; but the plaintiff complained that the defendant had made the water unfit for the uses she had enjoyed. "Though fouled there is more of it," is not a good answer. A large stream of impure and unwholesome water may be of greater market value than a small one that is pure and wholesome; and if the benefits of a large and constant flow of unwholesome water, which spoils a small pure stream for the uses of a dwelling-house, can be offset against the owner's claim for injury, he is without remedy. His property can be taken or injured against his will, with impunity, for private use. This is not the law. He may hold and enjoy his property so long as he chooses, except when taken, injured, or destroyed for use of the public. A man has no right to turn a stream out of its natural channel into another stream, thereby increasing the flow of the latter through another man's land; and though no appreciable damage could be proved, an action would lie. If it be conceded that the turning of water from a colliery into a stream is an exceptional case, for which an action will not lie, where it has done no injury in fact, yet if it has fouled the stream, the injured party is entitled to redress. The plaintiff avers that the defendant has subjected her to conditions that did not exist when she built the dams, laid pipes, improved her property, and began to use the water of the stream, not by increasing the quantity, but by spoiling the water for her uses. "There is no set-off or recoupment of damages, not founded on the undertaking or default of the party sought to be subjected to such adjustment, nor can he who has inflicted a wrong require the injured party to accept indemnity in any other way than such as the law provides." (Gerrish *v.* New Market Mf'g Co., 10 Fost. (N. H.) 478.) No infringement of the rights of another can be justified on the ground that the act is a benefit to the owner, if it is done against his will. (Tillotson *v.* Smith, 32 N. H. 90.) Benefit to a meadow below a dam by a ditch, dug at the time of the erection of the dam by the owner of the dam, through his own land, cannot be set off against damage to the meadow by subsequent overflowing occasioned by the dam; and the cost of the ditch is immaterial in assessing such damages. (Gile *v.* Stevens, 13 Gray, 146.)

A few cases may be found that are in seeming conflict with the rule that in the matter of nuisance there is no set-off or recoupment; but none in Pennsylvania. Where a case arises of permanent injury, where the measure of damages is the difference in the value of the land as affected by the nuisance, and what it would be worth if unaffected, in some sense it may be that benefits are properly considered; but the real question is, "What is the amount of loss?" Here the Court, upon the defendant's objection, properly overruled the plaintiff's offer to prove "what was the permanent injury and damage to the property itself, that is, the freehold, in the loss of value caused by the destruction of this water." It is not apparent that the destruction is permanent. The defendant may abate the nuisance.

We are also of opinion that it was error to affirm the defendant's tenth point. "All that the plaintiff in this case can claim, if anything, is the use as a riparian owner of the water in its natural state, and she cannot claim for the cost of or damages to any artificial construction put up by her for the use of the water from this stream, nor for the cost of introducing other water for such artificial purposes." If, before the defendant spoiled the water, the plaintiff had erected proper constructions for its convenient use, and the defendant injured or rendered them useless, the plaintiff is entitled to compensation. What rule limits the damages to the value of the water in its channels exclusive of all improvements for its convenient and reasonable use? As well might a court and jury in case of diverting the waters of a creek from a valuable mill property and consequent destruction for use as a mill, limit the owner's damages to the value of the mill-site in its natural state, exclusive of loss for injury to and uselessness of the dam, building, machinery, and other improvements. The point and its answer limited the plaintiff's damages to the water in the channel with instructions to deduct the amount of benefit, and the ninth assignment must be sustained.

Testimony was received to show that the mining of coal in the anthracite region is below water-level, that water is encountered wherever coal is mined in that region, and that what was done by the defendant in working its mines and pumping water therefrom was in the ordinary, reasonable, and proper mode of working its mines "for the purpose of mitigating damages in this case." It was offered for other purposes, for which it was rightly rejected; it should not have been received at all, for it was irrelevant lumber. This was a first suit for an alleged nuisance, and the unmistakable points raised in the proceedings were the plaintiff's right of recovery, if she was actually injured by the mine-water, and the amount of merely compensatory damages. When the measure of damages is compensation only for the loss by the injury, it is difficult to conceive how the mode of working a mine below the water-level would be a proper thing to consider in ascertaining the amount.

The third and fourth assignments are well taken. For reasons already stated, testimony of the advantages to the plaintiff resulting from the acts of the defendant, was incompetent. And respect-

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ing the fourth, there was no foundation laid for receiving the opinion of the witness as to the cost of keeping up the improvements. His knowledge was only "a part of the testimony by Mr. Anderson."

The fifth and sixth assignments are not sustained. Of the subject of the fifth, it is uncertain that the testimony related to matters below the reservoir. It will not be presumed that evidence of polluting the water by other people, below the reservoir, was received. And as to the subject of the sixth, the plaintiff has not shown the testimony proposed to be rebutted. That testimony should have been printed, that the pertinency of the offer in rebuttal could be determined.

Judgment reversed, and venire facias de novo awarded.

Opinion by TRUNKEY, J.

GREEN and CLARK, JJ., absent. H. J. S.

May, '83, 1. May 29, 1883.

Pennsylvania Railroad Company v. William Bost.

Contract—Infant—Construction of rules and regulations for minors in service of Pennsylvania Railroad Company.

A minor entering the employ of the Pennsylvania Railroad Company as a car-builder apprentice, signed a paper providing, *inter alia*, that "in case of absence during the term of service, unless such absence shall be occasioned by sickness," he should serve such additional time as would make up for the time lost; and that ten per cent. of his wages should be retained as security that he would remain in the service of the company until the expiration of his term:

Held, that the fair and reasonable construction of said contract would require the employé to account only for the time during which he was absent from work, and because of which absence the company lost his services when the company had work for him to do; but that, by reason of further provisions of the contract, the company was permitted to judge when to wholly or partially suspend work; and that in case of total or partial suspension of work, the employé should not lose more than his time—not be bound to make it up after the period of service has ended.

Error to the Common Pleas of Dauphin County.

This was, in the Court below, an appeal by the Pennsylvania Railroad Company, the defendant below, from the judgment of an alderman April 10, 1876, as a car-builder apprentice in its shops at Renovo, Pennsylvania, upon the terms set forth in the following paper, which was put in evidence by the plaintiff:—

"Rules and regulations for minors entering into the service of the Pennsylvania Railroad, Philadelphia and Erie Railroad Division, to work in the shops of said company.

"Minors employed by and under instruction in the workshops of the Pennsylvania Railroad Company, shall come under and be subject to the following rules until their term of service is completed:—

"1. If over the age of seventeen, upon entering the service of the company, they shall serve the full term of four years; if under the age of seventeen they shall serve until they are twenty-one years of age. *In case of absence during the term of service, unless such absence shall be occasioned by sickness, they shall serve such additional time as will make up for the time lost.*

"2. It is required of each to devote his whole time, during working hours, faithfully to his duty. Those not observing these rules will be liable to be discharged.

"3. The wages agreed to be paid by the railroad company to each person so employed, during his period of service shall be as follows:—

For the first and second years, . . .	Thirteen cents (13) per hour.
For the third year, . .	Fourteen cents (14) per hour.
For the fourth year, . .	Sixteen cents (16) per hour.

of which amount ten per cent. will be retained as security that such employé will remain in the service of company until the expiration of his term, at which time it will be returned to him with interest. He shall also receive, after a faithful term of service, a certificate stating the particular branch of the art he has learned, and his general conduct.

"4. The right to discharge any such employé for indolence, negligence, or bad conduct, is expressly reserved; and any one so discharged shall not be entitled to the percentage to be paid to those who faithfully discharge their duties.

"5. Should the company at any time see proper to suspend, wholly or in part, the work in their shops, the wages of such employé shall be suspended wholly or in part, according to the circumstances, until the company shall give them full or partial employment.

"No wages shall be paid when work is wholly suspended, and should there be a partial suspension, wages shall be paid at the rates herein fixed proportionate to the time worked.

"6. Minors in the service of the company will be required to improve themselves by reading, drawing, and attending night schools when practicable, and will be liable to be discharged for misconduct at, or when absent from the work-shops.

"7. Should the company at any time make a general reduction of pay, such minors or employés shall be liable to a proportionate reduction of their wages.

"This certifies, that I, William Bost, 19 years, entered into the service of the Pennsylvania Railroad company, on the 10th day of April, 1876, at Renovo Shops, as car builder apprentice.

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The paper was signed in duplicate by Bost alone, on blanks furnished by the company, and a copy was given to the company. Bost testified that he worked under that "writing" from April 10, 1876, to May 10, 1880, a period of four years and one month; and that he lost in all, 435 hours from scarcity of labor in 1876 (when he refused to work on half-time) and because the shops were closed during the strike in 1877, and also some time on account of "fun." He claimed to have made up the loss of time last mentioned, but admitted that he had not made up the 435 hours. His demand was for $125.42, being ten per cent. of his wages during his period of service retained by the company.

The Court instructed the jury in substance, that the paper was not properly executed, because not signed by both parties, and, therefore, there could be no recovery on it as a contract, that on equitable principles the jury could judge what damage the company suffered by reason of the loss of time, and deduct that from plaintiff's claim; but that the loss of time was not a bar, as it would have been if the article had been properly executed. Further, that the lost time for which they might deduct from plaintiff's claim, would include that lost for the sake of frolic; that lost by reason of the strike, as it was not the act of God nor of a public enemy; but that it might be fair to deduct only half the time, but no more, for the time when plaintiff stopped work, because only part work could be furnished, and he declined to work on half time; and that the jury must judge whether plaintiff had a sufficient reason for refusing to work half time, for reasons of economy in case he could not make expenses. (First, second, third, fourth, and fifth assignments of error.)

Verdict for the plaintiff for the sum of $104.05. Thereupon defendant took this writ, assigning for error the instruction of the Court as above stated, and the sustaining the declaration in the common counts.

Hall & Jordan for plaintiff in error.

An action would not lie for the breach of the written agreement, as such, it not being an *indenture;* but the action was for services rendered under this very paper, and neither party questioning its validity, the only question is its meaning.

By the contract all lost time was to be made up, except that lost through sickness. The contract was not void, but voidable. Bost affirmed it by remaining in service under it after arriving at age, and by bringing this action upon it. Where a party contracts to serve for a term, and to be paid at the end thereof, and is to forfeit his wages, or part thereof, in case he does not complete his term of service, such forfeiture attaches whenever he is discharged for cause; and he cannot recover the portion of his wages embraced in the forfeiture.

Wood on Master and Servant, 235.

George Kunkel, contra.

The fair and reasonable construction of the contract would require Bost to account only for the time during which he was absent *from work*, and because of which absence the company lost his services. How can the company complain of absence in any other sense? By absence when there was no work the company lost nothing. It had provided for such an emergency in Rule 5. The time which was proven to have been lost, was lost by the company. It had failed to supply work. It had closed its shops. Ought Bost to suffer for this loss? Surely, if he lost his wages, the company ought to lose the time.

October 1, 1883. THE COURT. Both parties agree that the only question in the Court below and in this Court is: What is the meaning of the paper signed by William Bost, the plaintiff, on April 19, 1876? At that time the plaintiff was a minor, but he ratified the contract after his majority and claims under it. The defendant had adopted rules and regulations for minors entering into its service, to work in its shops, and upon acceptance of a person under those rules they become a law unto the parties. Where, as here, duplicate copies are signed by the employé, he retains one, and the employer the other, *prima facie* the paper is their contract. As the case stood it was error to rule that the instrument was not binding on either party because it was not signed by the defendant. An oral contract in the same terms would have been binding; when reduced to writing and delivered as the contract, being a proposition held out by one party and accepted over the signature of the other, it binds both.

The plaintiff agreed to serve the full term of four years, and in case of absence during his term of service, unless such absence shall be occasioned by sickness, to serve such additional time as will make up for the time lost. He was to devote his whole time, during working hours, to his duty. Thus provide the first and second rules. Rule five stipulates that should the company at any time suspend, wholly or in part, the work in their shops, the wages of the employé shall be suspended accordingly; no wages shall be paid when the work is wholly suspended, and when partially suspended the wages shall be for the time worked.

On behalf of the plaintiff it is said: "The fair and reasonable construction of the contract would require Bost to account only for the time during which he was absent from work and because of which absence the company lost

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his services." This is the true view; by itself Rule 1 admits of no other construction. The letter and spirit of Rule 5 permit the company to judge when to wholly or partially suspend work, and restrict the right of the employé to wages for the time he works. Another rule fixes the rate of wages per hour. Though ready and willing to work the employé, when not furnished with work, is bound to lose his time; he shall receive no wages when idle because of the action of the company. It would seem to be enough to compel him to be idle and lose his time, and nothing but a plain agreement should bind him for the additional burden of making up such time. Notwithstanding the able and ingenious argument on part of the defendant, we think that in case of total or partial suspension of work, the employé shall not lose more than his time—that he is not bound to make it up after the period of service has ended.

But the plaintiff was bound to devote his whole time during working hours, and to work such time as was allotted within said hours, when the work was partially suspended. His time within such hours belonged to his employer, and if he was absent for his own purposes when there was work for him, he is bound to make up the loss, unless it was by reason of sickness. The second assignment of error is sustained. The jury ought to have been instructed that if the plaintiff refused to work on half-time during the partial suspension, such refusal was a violation of his contract, and he was bound to make up such time before he could recover the money held as security for the performance of his contract. There is nothing in that part of the charge set out in the third assignment of which the defendant can complain; we have already said that where there was total suspension there could be no loss of time which the plaintiff was bound to make up.

The contract is for the employment of a minor to serve under instruction in the work-shops of the company. Both parties are interested in the advancement he shall make in the art or trade he is learning, and it is contemplated that one shall endeavor to learn, and the other to teach. Wages are increased the third and fourth years. The teaching and opportunity to learn in the employer's workshops have value beyond the stipulated wages by the hour, and hence the agreement for making up lost time. Places for young men in these shops are desirable, and it is noteworthy that though a vast number are employed in the shops of the railroad companies of the State, very little litigation has grown out of the relation. An incentive to steady service is valuable to the employé as well as the employer. The security for the employé's faithful performance being ten per centum of his wages, to be retained until completion of his service, and then to be paid with interest, is reasonable and has no savor of hardship. It is an inducement to honest and steady service, and the money with interest is due the moment the whole service is completed, and not before.

In answer to the defendant's first point, the learned Judge of the Common Pleas said that if the parties were bound by the contract, he would instruct the jury that if the plaintiff lost time not occasioned by sickness which he failed to make up, he could not recover. This point assumes that the plaintiff's evidence shows the time was not made up, and if there was any doubt of that the fact was for the jury, and the point as made could not have been affirmed. The remarks of the Court set out in the first and fourth assignments were based on the opinion that the contract was void, and need not be further noted.

The fifth assignment is not sustained. Nor is the sixth; if the plaintiff had performed his contract before commencement of the action he may recover on the common counts.

Judgment reversed, and venire facias de novo awarded.

Opinion by TRUNKEY, J. F. M. O.

Oct. and Nov. '83, 37. October 25, 1883.

The Mutual Accident and Life Association of Pennsylvania v. Kayser.

Mutual insurance companies—Policy—By-law limiting right of action—Construction of—When not a bar to action after expiration of time named.

A policy in a mutual insurance company covenanted to pay the assured, in case of accidental injury, a certain sum for every week he might be disabled from following his usual occupation, not exceeding ten weeks. A by-law of the corporation provided that in case any suit was brought "after the expiration of six months next after the loss shall have occurred, the lapse of time shall be deemed conclusive against the validity of the claim." The assured suffered an accident, which disabled him from working for more than ten weeks. He brought this suit more than six months after the date of the accident, and less than six months after the expiration of ten weeks after the accident. The Court below instructed the jury that the limitation of six months named in the by-law did not begin to run until the cause of action was complete, which was not until the expiration of ten weeks after the happening of the accident, and that the action, therefore, was brought within six months after the loss occurred, within the meaning of the by-law.

Held, not to be error.

In a mutual insurance company the policy constitutes the agreement between the parties, and a by-law in force at the date of the policy limiting the right of action to six months after loss occurred, is not a bar to a member's

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suit upon his policy brought after that period, unless such by-law is made part of the policy.

Error to the Common Pleas No. 2, of Allegheny County.

Covenant, by Frederick Kayser against The Mutual Accident and Life Association of Pennsylvania, a mutual insurance company, incorporated under Act of April 29, 1874, on a sealed policy of insurance.

By the terms of the policy the defendant corporation "in consideration of the payment of the sum of $7 admission fee on application, and $2.75 annually thereafter from date hereof, with weekly and death assessments according to the charter and by-laws of the association and the terms stipulated in the application on which this insurance is based," promised to pay to the insured, in case of accident, $20 for every week he might be disabled from following his usual occupation, not exceeding ten weeks, and an additional $500 if death resulted therefrom. The policy made no other reference to the by-laws. The application and by-laws provided for the levying of pro rata weekly and death assessments upon the accidental injury or death of a member, and required payment within thirty days after notice to the insured under penalty of forfeiture of his membership.

On June 3, 1881, plaintiff was injured by an accident which disabled him until September 5, 1881. This action was brought December 27, 1881, to recover weekly benefits for ten weeks ending August 12, 1881. The defendant put in evidence by-law 16, adopted at the organization of the company, and in force at the date of the policy in suit, which contained the following clause:—

"In case any suit or action shall be brought against the association after the expiration of six months next after the loss shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim."

The plaintiff presented the following points:—

1. Where a person becomes a member of a mutual insurance company such as defendant corporation, and takes out a policy of insurance *under seal* in it, it is inadmissible in a suit upon such policy to vary, contradict, add to, or take from such contract of insurance by any by-law enacted by such company, either before or after the issuing of such policy, unless such by-law is embodied in such policy or otherwise made a part of the policy by the terms of the policy itself. *Refused.*

2. That the by-laws given by defendant in evidence are no part of the contract sued upon in this cause, except so far as they relate to the payment of the admission fee of seven dollars and the annual dues of $2.75, and the weekly and death assessments; and hence the clause in by-law 16 requiring a suit on policy to be begun in six months after loss, has no bearing upon the question at issue in this action of covenant. *Refused.*

7. This action was brought within six months after the loss occurred, within the meaning of by-law 16 and the terms of the policy. *Answer.* If brought within six months from the expiration of ten weeks after the accident, this point is affirmed.

The defendants submitted the following points:—

1. This suit having been brought more than six months after the accident or injury complained of, there can be no recovery under article 16 of the by-laws, and your verdict must be for the defendants. *Refused.*

6. That if the jury believe that the by-law No. 16 was in force when this policy was written, then the suit having been brought more than six months after the injury, the plaintiff cannot recover, and the verdict must be for the defendants. *Refused.*

The Court said in the charge: "The legal defence is that under the by-law all actions must be brought within six months after the loss occurred. I quote the exact words of the by-law. As has been suggested, I presume correctly, this language seems to have been taken from a fire insurance policy to meet a case where the loss occurred at the time of the burning and destruction of property, clear and unmistakably; and if that were this case the right of action would be utterly lost, and there could not be any recovery under the law by any possibility, for the reason that whilst the accident occurred on the 3d of June, 1881, the suit which you are now determining was not brought until possibly seven months after that time. But it is claimed by the plaintiff that that was not the date of the occurrence of the loss, and with that view I coincide, and so instruct you. Our theory is that the occurrence of the loss to the plaintiff terminated and became a complete occurrence at the expiration of the time during which his loss ran and his right of receiving benefits from the defendants existed; that is to say, that in place of having, as the learned counsel for the defendants claim, his right to bring an action limited to six months from the date of his injury, to wit, June 3, 1881, we instruct you, as we have done formerly in answer to the plaintiff's and defendants' points, that his right of action existed for six months after the termination of ten weeks from the date of injury; and this for the reason that he was entitled to receive benefits, and therefore had a right to sue for them after the time in which he was entitled to receive them was up."

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Verdict for plaintiff, $215.50, and judgment thereon, whereupon the defendants took this writ, assigning for error the affirmance of plaintiff's seventh point, the refusual of defendants' first and sixth points, and the portion of the charge above quoted.

Wm. A. Stone (*Geo. C. Wilson* with him), for plaintiff in error.

We submit that the by-law means six months after the injury, not six months after the right of action was complete, as ruled by the Court below. A person insured in a mutual company is a member of it, and bound by its rules and regulations.

Mitchell *et al.* to use *v.* Lycoming Mut. Ins. Co., 1 Smith, 402.
Northwestern Ins. Co *v.* Phœnix Oil and Candle Co., 7 Casey, 448.
Schrœder *v.* Keystone Ins. Co., 2 Phila. 286.
Waite *v.* Spring Garden Ins. Co., 1 WEEKLY NOTES, 155.
Waynesboro Mutual Fire Ins. Co. *v.* Conover, 2 Out. 384.

William Yost, for defendants in error.

The Court should have affirmed plaintiff's first and second points. By-laws may regulate corporate privileges but cannot affect covenant rights.

Insurance Co. *v.* Connor, 5 Harris, 136.
Rosenberger Light Co. *v.* Washington Fire Ins. Co., 6 Norris, 212.
York Co. Mutual Aid Society *v.* Myers, 11 WEEKLY NOTES, 541.
Kingsley *et al.* *v.* New England Mutual Ins. Co., 8 Cushing, 393.

By-laws are a part of the policy only when made so by express stipulation.

May on Insurance, p. 183, sec. 158.
Diehl *v.* Adams Co. Mutual Ins. Co., 8 Smith, 450.
N. W. Ins. Co. *v.* Phœnix Oil and Candle Co., 7 Casey, 448.

The Court construed by-law 16 correctly.

May on Insurance, p. 728.

Doubtful and ambiguous terms are to be construed most strongly against the company, even in a mutual company.

Met. Life Ins. Co. *v.* Drach, 12 WEEKLY NOTES, 378.
York Co. Mutual Aid Asso. *v.* Myers, 11 WEEKLY NOTES, 541.
Merrick *v.* Ger. Fire Ins. Co., 4 Smith, 284.

November 5, 1883. THE COURT. The policy constitutes the agreement between the parties. There is not a word therein indicating that a right of action thereon is barred in less than six years after the right of action accrued. While this view does not appear to have been distinctly presented on the trial of the cause, yet it is in the case, and fully justifies the judgment.

Judgment affirmed.

PER CURIAM.

GREEN J., absent.

January 10, 1884.

In re Application for Admission to the Bar.

Requisites to admission of attorney from another State—Recent evidence of good standing required..

Where an attorney-at-law of another State applies for admission as an attorney of this Court, it is not sufficient to produce his certificate of admission in the Courts of the foreign State. Recent certificates, or other satisfactory evidence of the good standing of the applicant as an attorney of the Courts of his domicile, will be required. A certificate of admission to the Supreme Court of the United States, of recent date, will not supply the place of such evidence of good standing.

Motion for admission to the bar.

It was stated, by the attorney making the motion, that the applicant is a native of the State of Pennsylvania, and had been admitted as an attorney of the Court of Common Pleas of Indiana County, Penna., about twenty years ago; that many years ago he removed to California, where he became an attorney of the Courts of that State, and where he still resides; that he had recently been admitted as an attorney of the Supreme Court of the United States, in order to argue a cause, the certificate of said Court being exhibited here to the Court; and that he desired, while *en route* for California, to be admitted to the Supreme Court of his native State.

In reply to a question by the Chief Justice, it was stated that the applicant had not prepared himself to produce evidence of his present good standing as an attorney in the Courts of California.

THE CHIEF JUSTICE (after consultation with the Justices). We see no reason in this case to depart from our established practice, which is, that where an attorney of another State applies for admission to this Court, he must submit, in addition to his certificate of admission to the bar in the foreign State, *recent* certificates or other satisfactory evidence from the Courts of such State, of his present good standing in those Courts.

The certificate produced of recent admission to the Supreme Court of the United States does not supply the place of such evidence. We do not know the requirements of that Court.

Motion refused.

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Common Pleas—Law.

C. P. No. 2. December, 1883.

Gibb v. Mershon.

Special partners—What will render them liable as general partners.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a book account.

The defendant, Albert H. Mershon, together with Henry Gruber and William P. Hoopes, had formed a limited partnership under the Act of 1836, the defendant being a special partner, and the other two general partners under the firm name of Gruber, Hoopes & Co.

The affidavit of defence set out the special copartnership of the defendant, with copy of articles, and of the recording of the same.

Thorn, for the rule.

THE COURT. The construction given to the Limited Partnership Acts in the opinion of THAYER, P. J., in Metropolitan Nat. Bank *v.* Gruber (14 W. N. C. 12), appears to be rather strict, but we will not make a departure from a considered judgment of the Court of Common Pleas No. 4, and therefore on that precedent the rule is made absolute. T. B. S.

C. P. No. 2. December, 1883.

Bank v. Baker.

Affidavit of defence—The ledger of a bank is not a book of original entries within the Act of Assembly for the purpose of charging a depositor for an overdraft.

Rule for judgment for want of a sufficient affidavit of defence.

The copy of book entries filed by the plaintiff was as follows:—

"Abram Baker, in account with Second National Bank of Philadelphia:—

Dr.			Cr.		
1883.			1883.		
Feb. 25.	Check,	$100 00	Feb. 22.	Balance	$1267 79
" 27.	"	141 00	M'ch 3.	Notes,	213 75
			" 12.	Notes,	175 00
* * * *			* * * *		
				Balance,	129 86
		$4808 65			$4808 65

Balance due bank $129.65.

The affidavit suggested that these book entries were copied from the ledger of the bank, which was not such a book of original entries as was contemplated by the Act of Assembly, and that, further, the items were all cash, which is not the subject of a book entry.

J. H. Shoemaker, for the rule.

Stover, contra.

THE COURT. Rule discharged. T. B. S.

C. P. No. 2. October 13, 1883.

Wilson v. Morrow, Defendant, and Matchett, Garnishee.

Attachment execution—Answers to interrogatories—Garnishee's admissions, when not sufficient to authorize judgment for specific sum.

Rule for judgment against the garnishee for amount admitted to be due by him to the defendant, in his answers to interrogatories filed.

In his answer the garnishee said: "In the year 1882 the defendant was employed by me to paper certain houses at a stated price per house, part of which aggregate prices was to be paid in cash, and part, to wit, the sum of $325, was to be paid by the conveyance of a two-story brick house No. 1444 Mount Holly Street, subject to a ground-rent of $52.50, to such person as the defendant requested; the cash payments were paid to the defendant from time to time until a final settlement was had on February 15, 1883, when the entire balance of cash then due the defendant was paid to him, and I then offered to convey said house subject, as aforesaid, to him or to any person he might name, but he requested me to allow said house to stand in my name until he could sell the same. I have always been ready and now am to convey said house to the defendant, subject as aforesaid, or to any person he may name. He has notified me that he claims the benefit of the $300 law out of any property belonging to him subject to execution. This notice was given me before the return day of the attachment."

Gangewer, for the rule.

Hannis, contra.

THE COURT. Judgment cannot be for money, but only that the garnishee has a certain house in which defendant has an equity.

Rule withdrawn. J. D. B. JR.

C. P. No. 2. December 7, 1883.

Stevenson v. Anderson and Wife.

Married women—Necessaries—A married woman may bind herself to the payment for services of an attorney who prepares a will disposing of her separate estate.

Motion for rule for new trial.

Declaration, that "the said Sarah Anderson, so being a married woman, and possessed of

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property as aforesaid, and being desirous to dispose thereof by will . . . employed the said plaintiff to draw and prepare and write the said will, then and there agreeing and promising to be personally responsible for and to pay the sum of one hundred dollars for his said services. . . . [The said services being] for the protection and benefit of her separate estate."

FELL, J., left the question to the jury whether the services were "necessary" under the circumstances of the defendant.

Verdict for the plaintiff, $50.

R. Ingram, for the motion.

The preparation of a will does not come within the "necessaries" for which a married woman can bind her separate estate.

THE COURT. Rule refused.

[*Cf.* Guyer *v.* Harrison, 13 WEEKLY NOTES, 537.]

C. P. No. 2. December 10, 1883.

Matsinger et al. v. Covenant Publishing Company, Limited.

Wages—Execution—Act April 9, 1872—A claim for wages under the Act of April 9, 1872, is not limited to wages earned before the levy, but includes wages earned up to the day of sale.

Sur exceptions to auditor's report.

This was a claim, under the Act of April 9, 1872 (P. L. 47), for wages out of the proceeds of a sheriff's sale. The defendants were engaged in publishing a religious journal, and a judgment was entered against them by the plaintiffs, January 22, 1883. On the same day a fi. fa. issued, and a levy was made by the sheriff on the personal property. The sale took place March 5, 1883. On March 3, two days before the sale, a notice was served on the sheriff by certain laborers claiming a preference for their wages under the Act of 1872. The names of the laborers, the character of the work, and the amounts due were stated in the notice, but there was no statement of the dates at which the wages accrued, except the general one that they had accrued within six months.

From the testimony taken, the auditor, to whom the fund was referred for distribution, found that the work for which wages were claimed was done both before and after the date of the levy. Although there was testimony tending to show that after the levy the defendant had asked permission of the plaintiffs to go on publishing some other journals, instead of closing the shop and stopping work altogether, yet the auditor found that there was no agreement by the laborers to take their wages out of this continuance of the work, and that they had not waived their rights under the Act.

It was argued before the auditor that no wages could be paid which were earned between the levy and the sale, but only those which were earned before the levy, citing—

Shrader *v.* Barr, 10 Phila. 620.
Schwartz *v.* Banks, 34 Leg. Int. 250.
Kindig *v.* Atkinson, 13 Phila. 540.
Schnapp's Appeal, 2 WEEKLY NOTES, 149.
Act April 9, 1872, especially sec. 4.

It was also argued that the notice should have stated the dates when the wages accrued.

The auditor decided that the form of notice was immaterial provided it set forth the essential facts, which was done by the notice given in this case—

Allison *v.* Johnson, 11 Norris, 314.

—and that payment should be made of the wages earned both before and after the levy, and up to the day of sale; that the cases cited by counsel against this view were decisions of Schuylkill County, and that Philadelphia County had a different rule.

Askam *v.* Wright, 1 WEEKLY NOTES, 156.
McCuttle *v.* Fitzgerald, 2 Id. 396.
Graham *v.* McLean, & B. Co., 35 Leg. Int. 70.
Nogle *v.* C. O. B. Co., 1 Chest. Co. R. 491.
Troubat & Haly, Prac., sec. 1165.

Counsel for plaintiffs in the execution filed exceptions to the auditor's report, because he held the notice sufficient; because he did not find that the laborers had waived their rights under the Act; and because he held that payment should be made of the wages earned between the levy and sale.

William Henry Lex, for the plaintiffs in the execution, cited—

Batdorff *v.* Focht, 8 Wr. 195.
Bain *v.* Lyle, 18 Smith, 65.
Welsh *v.* Bell, 8 Casey, 15.
Glass *v.* Gilbert, 8 Smith, 288.
Hinds *v.* Scott, 1 Jones, 25.
McMillen *v.* First Nat. Bank, 1 WEEKLY NOTES, 55.

A. B. Guilbert, contra.

THE COURT. Exceptions dismissed and report confirmed. S. G. F.

C. P. No. 3. November 17, 1883.

Craven v. Coates.

Trover and conversion—Capias—Sufficiency of affidavit—Certainty required in.

Sur rule to show cause of action.

A capias was issued November 7, 1883, in an action of trover and conversion against Ashton Coates.

The plaintiff in his affidavit deposed that he

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gave to the defendant, who was a stock broker, $1000 for the "purpose of buying for the deponent certain stocks of the Philadelphia and Reading R. R. Co. and the Central R. R. Co. of New Jersey, and then and there deponent directed the said Ashton Coates to buy for deponent the said stocks, which the said Ashton Coates undertook to do; but one James N. Stout, who was then employed as the bookkeeper of the said Ashton Coates, on the 11th day of July, 1883, stated to deponent that the said Ashton Coates had never invested the said money, but had converted it to his own use." It further set forth that Coates had refused to deliver the stock or its proceeds on demand, but declared that he had sold the stock for $1025.27, but was unable to pay the said sum or any part of it to deponent.

Smith, for the rule.

The affidavit is not sufficiently certain. The rules of Court provide that in all actions of trover and conversion the affidavit shall fully and explicitly set forth the cause of action. "Certain stocks" only are mentioned, and not what stocks; certain money was said by the defendant's clerk to have been appropriated and converted but the amount was not given. This was nothing more than a gambling operation and if the affidavit had set forth the details in full, this would have been apparent, and it would have been evident that there was no such cause of action as the Court could have supported.

Guilbert, contra.

The affidavit sets forth a case of mandate. The facts establish a case of embezzlement by a broker. There was no relation of debtor and creditor. The affidavit does not set forth that the money was given to defendant to be used as margins in a gambling transaction, but on the contrary asserts that the plaintiff directed the purchase of stocks, and demanded their delivery. It would not, however, affect the right of action if the money had been deposited as such margins, since trover lies for money deposited on an illegal wager.

Parker *v.* Morrison, 26 Pitts. L. J. 85.

The cause of action and affidavit are similar to the cases of—

Murphy *v.* Elder, 4 WEEKLY NOTES, 212.
Emerson *v.* Dow, 11 WEEKLY NOTES, 270.
Dow *v.* Emerson, 11 WEEKLY NOTES, 267.

In Bowen *v.* Burdick (5 Pa. L. J. 113) Judge SHARSWOOD said that a capias will not lie in a case "arising from contract expressed or implied when the plaintiff may in fact have given credit to the defendant." In the present case no credit was given to the defendant, but he was directed, and undertook to purchase for the plaintiff.

Eo die. THE COURT. Rule discharged.

C. P. No. 3. November 10, 1883.

Reaney v. Fannessy.

Landlord and tenant, what will constitute a surrender of the term—Request by the landlord for the keys followed by an acceptance of them.

Rule for judgment for want of a sufficient affidavit of defence.

Suit was brought against defendant, as surety, for rent under a lease from plaintiff to John Naulty, for a term of one year beginning April 12, 1883. Naulty, in a supplemental affidavit of defence which the Court allowed, deposed that he had paid all the rent due on the premises up to June 12, 1883, that on June 7 he vacated the premises and surrendered up the possession of the same to the plaintiff, who accepted the surrender and entered into possession; that on the 7th of June when the deponent was about removing from the premises the plaintiff came to him and asked if he was going to leave; the deponent replied that he was; plaintiff then asked him to give up the keys. Deponent replied that he would but did not have them with him then, but would send them to him. Plaintiff then said, "very well." On June 11, he received and accepted the keys in accordance with his said request and he took possession of said premises and rented the same to other parties.

W. Gorman, for the rule.

There is nothing in the affidavit of defendant that constitutes a legal surrender or acceptance. The fact that plaintiff, after the removal of defendant received and accepted the keys is not an acceptance of the term. After an abandonment of the premises the landlord should not sit idly by and allow his house to go to ruin; in fact he was morally if not legally bound in this case to endeavor to take possession and attempt to rent it so that the surety might be relieved of the rent, and such taking and renting is not an acceptance of the term. The landlord may accept the keys, take possession, put a bill on the house, and at the same time hold the tenant for rent.

Marseilles *v.* Kerr, 6 Whar. 500.
Brueckmann *v.* Twibill, 8 Nor. 58.
Auer *v.* Penn, 11 WEEKLY NOTES, 213.

Randall, contra.

THE COURT. A surrender and acceptance of the keys is not necessarily a surrender of the term. But where there is a precedent request by the landlord for the keys, his acceptance of them is an acceptance of the term.

Rule discharged.

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C. P. No. 3. December 29, 1883.

Gray v. Bradley.

Practice—Interpleader—Severance of issues.

Rule for separate issues.

On October 31, 1883, a verdict was obtained against John J. Bradley and W. J. Bradley, trading as J. J. Bradley & Bro., and a fi. fa. exit against the firm assets of Bradley & Bro. and the individual property of J. J. Bradley. The partnership property was claimed by the Southwark Cooperage Co., Limited, and the individual property was claimed by three women. A joint narr. was filed on behalf of all the claimants of both partnership and individual property.

A. T. Freedley, for the rule.

The issues should be severed, and the claimants of the firm assets and those of the individual assets should separately interplead. Much confusion will otherwise result. The matter rests in the discretion of the Court.

Act of April 10, 1848, § 9, Pl. 450; Purdon, 643.
Cocklin *v.* Sayers, D. C. (Oct. 10, 1848), 1 Tr. & Haly, § 1142.

Van Winkle *v.* Young (1 Wright, 214) simply decides that all claimants in the same right should be parties to the issue.

H. G. Ward, contra.

One fi. fa. was issued. The issue is whether all the goods levied upon belong to the claimants. The issue should be single and settle every claimant's right.

Van Winkle *v.* Young, 1 Wright, 214.

THE COURT. Rule absolute. And it is ordered that two issues be framed, one issue wherein the claimants of the firm assets shall be plaintiffs, and another issue wherein the claimants of the individual property shall be plaintiffs. C. P. S.

C. P. No. 4. Oct. 27, 1883.

In re Massassoit Tribe.

Practice—Trustee for unincorporated society—Appointment of trustee by the Court—When security will not be required.

Sur petition for appointment of a trustee without security.

The petition set forth that certain moneys had been deposited in the Western Savings Fund by the Massassoit Tribe, an unincorporated society, in the name of George Senior, trustee, that Senior having died, the society had elected a new trustee, but the Savings Fund refused to recognize any one as trustee unless appointed by the Court. The Society prayed for the appointment of the trustee elected without security.

De F. Ballou, for the petitioners.

Courts of Common Pleas No. 1 (M. T. 1882, 476), No. 2 (S. T. '76-447), and No. 3 (D. T. '78-527), have, under similar circumstances, appointed trustees without requiring security to be entered.

THE COURT. Prayer of petition granted.

C. P. No. 4. Oct. 27, 1883.

Bank of the Republic v. Carpenter.

Affidavit of defence—Promissory notes—Accommodation maker—Holder for value when given as collateral for an antecedent debt by payee—An affidavit of defence by the maker of an accommodation note averring want of consideration as a defence against it in the hands of one to whom it has been pledged as collateral security for an antecedent debt is insufficient.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit by the National Bank of the Republic against John Carpenter upon a promissory note for $1500, drawn by said Carpenter to the order of one Hooton, and by said Hooton indorsed.

Defendant filed an affidavit of defence as follows:—

"The note in question was given to G. F. Hooton without any consideration. He had indorsed a note by myself to the order of my father Francis Carpenter, which was discounted. This note was for $1500, of this sum my father and I had received $1200; and said Hooton had received $300. He asked me to give him a note to show the transaction. I therefore gave him the note sued upon. My note to my father was duly paid by the latter. Thereafter nothing remained due to said Hooton, while on the contrary he was indebted to my father. I am informed, believe, and therefore expect to prove, that my note in suit was never discounted by the plaintiffs, but that the same was deposited with them by said Hooton as collateral security for an indebtedness to them then existing, and they gave no value therefor."

Chas. E. Pancoast, for the rule.

The maker of an accommodation note cannot set up want of consideration as a defence against it in the hands of a third person to whom it has been pledged as collateral security for an antecedent debt.

Twining *v.* Hunt, 7 WEEKLY NOTES, 223.

Frank P. Prichard, contra.

One who takes an accommodation note as collateral security for an antecedent debt, is not a holder for value.

Royer *v.* Bank, 2 N. 248.

THE COURT. Rule absolute.

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Orphans' Court.

November 18, 1883.

Smith's Estate.

Estate of minor—Investment of funds by guardian—Supine negligence—When charged with—Costs—When to be borne by accountant.

Sur exceptions to adjudication.

The facts appearing before the Auditing Judge (ASHMAN, J.) at the audit of the account of Joseph H. Lambert, guardian of Benjamin B. Smith, late a minor, are fully stated in the opinion of the Court (*infra*). A petition for a review was presented in behalf of the late minor, and an examiner appointed, before whom testimony was taken, showing facts which are also fully set out in the opinion of the Court, and upon argument the prayer of the petition was granted and the account recommitted to the Auditing Judge, who in his readjudication charged the guardian with $1821.32, with interest, and also with the examiner's fee and Court costs, amounting to $142.

To this finding exceptions were filed on behalf of Joseph H. Lambert.

J. D. Bennett, for the guardian.

A. J. Maloney, for the late minor.

December 1, 1883. THE COURT. That a loan of $1809 for fifteen years, upon mortgage of a property assessed at $3500, and already subject to a ground-rent, the principal of which was $1487.57, was, *prima facie*, an improper one to be made by a trustee, cannot be seriously questioned; and the burden of showing sufficiency, and that ordinary care was exercised in accepting it, is therefore thrown upon the accountant, by whom, in the case before us, such an investment has actually been made.

The facts relied on in justification are, that having told an attorney that he wished him to procure a safe investment of the amount, and having afterwards been informed that this had been done, he gave the money to the attorney without making any inquiry as to the value of the property proposed to be mortgaged; that he did not learn until afterwards, when the papers were delivered to him, that it was subject to the ground-rent, or that the mortgage had fifteen years to run, and that his objections on these grounds were quieted by the assurance of the attorney that the approval of the investment by the Court would be, and subsequently that it actually had been, obtained.

When the case was first before us, the approval of the security was assumed as a fact, of which the effect had been avoided by the Auditing Judge on the theory that it was incredible that it could have been obtained unless fraud or imposition had been practised on the Court. It now appears, however, that the assumption was unfounded; that in reality the records show no application ever made to the Court upon the subject; and the question presented by the exceptions is, therefore, now to be considered with this feature entirely eliminated.

A trustee, exercising ordinary prudence, will be protected, where, in good faith, he has acted under the advice of counsel. But it is manifest that such protection can only extend to matters properly falling within the scope of professional advice. Questions of title or of priority of lien are properly submitted to counsel by trustees seeking to make investments of trust funds; but the value of lands, or the sufficiency of the proposed security, is a pure question of fact, as to which the opinion of counsel, as such, can have no special weight or importance. It was for the accountant, therefore, before parting with the moneys of his ward, to have made inquiry from some other source upon such points as these, and to have fully satisfied himself that the opinion of the attorney upon the sufficiency was well founded. Conceding, for the sake of argument, that the existence of a prior ground-rent did not, *ipso facto*, make the mortgage an improper investment, and that the advice of counsel, as to this, would protect him, it still leaves the fact that the property, at its assessed value, was barely enough to cover the principal of the ground-rent, and of the mortgage, and that the accountant entirely failed to make any examination or outside inquiry whatever. This is not the conduct of prudent men, or even of men in general, in the management of their own business.

But there was much more than this. When the papers were delivered he saw that, instead of being made directly to him as guardian, as it should have been, the mortgage was in the name of the attorney, with an assignment by the latter. This was an extraordinary circumstance, and one calculated to excite suspicion, where the amount of the alleged loan was precisely the sum called for by the face of the mortgage. The accountant was, as the adjudication finds, and as his own testimony shows, not a novice in transactions relating to the investment of money. He knew that this multiplication of papers, which added to the expense, must have had some purpose; but what that was, according to his testimony, he regarded as too unimportant to be the subject of consideration. There could have been but one purpose. The borrower received but eighty-five per cent. of the amount called for by the mortgage, and it was sought to give to the transaction the shape of a sale, and

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thus to prevent the possibility of a defence on the ground of usury when the loan should mature.

The attorney swears that one-third of the discount went into the pocket of the accountant. This, however, is most emphatically denied by the latter, who declares that, until he heard the evidence before the examiner on the application to open the original adjudication, he was not aware that there had been any discount whatever. We need not go into the question of veracity thus raised, and the honesty of the accountant may be conceded; the fact still remains that the shape of the transaction was one to at least suggest inquiry, and that inquiry would have led to the disclosure, 1st, that his ward's estate was paying fifteen per cent. more than was actually invested; and 2d, that the validity of the security, as the borrower was not receiving the full amount, would possibly, for that reason, at some future time be impeached. That the borrower was willing to submit to so large a discount would at once have further suggested and called attention to the insufficiency of the security, apart from any question as to its validity. If the accountant chose under these circumstances to close his eyes and his lips, the consequences must fall upon him and not upon his innocent ward. The protection of "professional advice" cannot avail in a case like this. (See Dietterich *v.* Heft, 5 Barr, 87; Gilbert's Appeal, 28 Smith, 266.)

It would be unjust to the ward to compel him not only to accept as a proper investment a mortgage thus tainted, but to pay, in order to procure its transfer, a considerable sum in cash. There has as yet been no loss upon it, and it may after all turn out to be, as the accountant professes to believe, a good investment; he cannot complain, therefore, that we permit it to remain in his hands, and that he is obliged to pay his ward in cash only the precise amount found to be due him.

As the case is now presented, we do not see any reason why the expenses of the proceeding for review should not be borne by the accountant. It is very clear that the original decree would not have been made had the Auditing Judge been informed as to the true character of the mortgage, and that the ward had distinctly refused to take it. There was a want of fairness and candor on the part of the accountant in his dealing with the ward in this respect. He as-

Upon the whole, we are of the opinion that the readjudication, corrected in its statement of fact with regard to the approval of the investment by the Court, should be confirmed.

The exceptions on the part of the accountant are dismissed.

Opinion by PENROSE, J. W. L. S.

November 20, 1883.

Clark's Estate.

Decedent's estate—Will—Construction of—Gift to class—Time of vesting.

Sur exceptions to adjudication.

Before the Auditing Judge (PENROSE, J.) the following facts appeared:—

Hugh Clark died in 1862, unmarried and without issue. By his will he devised and bequeathed the residue of his estate to his brothers, Patrick, James, and Thomas, in trust, to apply so much of the income thereof as would be sufficient to maintain his mother, a brother, Edward, and Ellen, a sister, during the lives of the said mother and brother and the survivor of them, and at the death of the said survivor, he directed the sale of his real estate, and the proceeds thereof with any accumulated income, to be divided among his "brothers and sisters, and the issue of such of them as may be deceased, such issue taking only such share or part as his, her, or their parent or parents would have taken if living, to be equally divided share and share alike between them absolutely."

The testator survived his mother. The present account, being of the proceeds of the sale of real estate as directed by the will, was filed by the Guarantee Trust and Safe Deposit Company, administrators, the trustees and executors under testator's will being all dead. Ellen was the sole survivor. Charles, a brother, died in 1878, leaving issue.

Before the Auditing Judge it was urged in behalf of the accountants that by the terms of testator's will, Charles took a vested estate which did not terminate by reason of his death in the lifetime of the surviving tenant for life, and it was asked that from his share should be retained the sum of $9837.15 with interest from 1869, being a note under seal given in 1869, by Charles to Thomas, Patrick, and James, then executors and trustees of the decedent.

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December 15, 1883. THE COURT. The question, within which lies the secret of the testator's intention, is whether he fixed the date of death of the survivor as the time when his donees were to be paid, or the time when they were to be ascertained as well as paid. This can only be answered by finding whether his gift was to the brothers and sisters as a class. If it was, then his beneficiaries were already known, and they took at his death an absolute interest, whose only uncertainty was the date of its payment. But if he meant to select from the class those of his brothers and sisters who should be living at the death of the second life-tenant, the gift would await those only who should answer the description at that time. The rules for interpreting testamentary gifts are necessarily so flexible that under them words possessing, in a deed, a special technical value which is always the same, are accorded in a will only that degree of importance which the testator has himself assigned to them. He may use language which, taken by itself, describes a whole class of persons, while the context of his will may show that he did not intend to speak of them collectively at all. Similarity of expression accompanies so often the utmost diversity of meaning, that SHARSWOOD, C. J. in Mickley's Appeal (11 Nor. 517), said that "decisions on the language of wills are not to be too closely followed:" and in Provenchere's Appeal (17 P. F. S. 466), the same Judge utters this caution with greater emphasis.

Manderson *v.* Lukens (11 Har. 31), Womrath *v.* McCormick (1 P. F. S. 504), and Crawford *v.* Ford (7 WEEKLY NOTES, 532), were cases of vested gifts to classes of devisees, conveyed in language which bore a strong likeness to the language of this will. But in each of those cases the provisions of the will were in harmony with the theory that a class gift was intended. In this, such a theory would defeat the twofold purpose to protect the interest of Edward Clark against his creditors, and to secure it to his issue. If all the brothers and sisters took a vested estate, then the share of Edward, if he proved to be insolvent, would go at his death in satisfaction of his debts. If to avoid this result it be held that only the *other* brothers and sisters are to take. then the issue of Edward will be excluded. In that event, not only must a word ["then"] be imported into the will, which the testator did not see fit to employ, but the theory of a gift to an entire class will be destroyed.

Whether the cases which have been cited shall be accepted as the rule by which the present will is to be interpreted, ought to depend in some degree upon the consequences which will ensue. We have already seen that if the principle of those decisions is applicable, the issue of one of the brothers who were equally with the brothers the objects of the testator's regard, will be disinherited. Another result will be that one of the first takers, whose portion was explicitly limited to a life estate, will be brought into the class to whom an absolute estate was given. These conditions separate this from preceding cases, but there is a third and not less material distinction. Under the conversion which was wrought by the express direction to sell, the gift over was of personalty, and in a bequest "issue" is a word of purchase. (Myers' Appeal, 13 Wr. 111; Sheets's Appeal, 2 P. F. S. 257.)

We are of opinion that the Auditing Judge properly ordered distribution between Ellen, the sole survivor of the brothers and sisters, and the issue of the deceased brothers and sisters. We therefore dismiss the exceptions and sustain the adjudication.

Opinion by ASHMAN, J. W. L. S.

U. S. Circuit Court—Admiralty.

October 30, 1883.

The Scots Greys v. The Santiago de Cuba.
The Santiago de Cuba v. The Scots Greys.

Admiralty—Collision—Meeting of vessels in narrow channel—Light and heavy steamers—Duty arising from special circumstances—Crossing courses—Manœuvre in extremis.

These were appeals from the decree of the District Court. The facts are fully stated in the opinion.

Curtis Tilton and *Henry Flanders*, for the Scots Greys.

John G. Johnson, for the Santiago de Cuba.

October 30, 1883. THE COURT. These are cross libels, in which the District Court adjudged the Santiago de Cuba in fault, in a collision between her and the Scots Greys, and decreed damages against her accordingly.

The evidence, touching the position, course, and government of the vessels before and about the time of the collision, is of unusual volume, and consists, chiefly, of the testimony of the officers and crews of the respective vessels. Hence, as is almost always the case under such circumstances, it is conflicting and contradictory, and any attempt to reconcile it would not advance the decision of the case. It can only be dealt

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with by adopting such conclusions of fact of material import as may seem to be supported by a preponderance of the probabilities of their truth.

Finding of facts:—

1. About midday on the 19th of July, 1879, a collision occurred between the steamer Scots Greys and the steamer Santiago de Cuba, in the Delaware River, a short distance above the Horseshoe buoy, on the western side of the channel, by which considerable injury was caused to both vessels.

2. The Scots Greys was an iron steamer, about three hundred feet in length, was loaded, and drew twenty-one feet of water, and was ascending the river towards the port of Philadelphia.

3. The Santiago de Cuba was a wooden steamer, was light, and drew thirteen and one-half feet of water, and was descending the river.

4. The tide was flood, and the current, deflected by the Horseshoe shoal, tended strongly to the eastern or New Jersey shore of the river.

5. This shoal is somewhat in the shape of a horseshoe, with its base on the Pennsylvania or western shore, and its apex in the river, leaving a channel about four hundred yards in width between it and the New Jersey shore. Near this apex, on the eastern edge of the shoal, a buoy is anchored to indicate the turn of channel.

6. Both vessels were in sight of each other for such a distance before they met as to involve no danger of collision, if they had been carefully and skilfully navigated.

7. The Scots Greys first reached the buoy, and put her helm to starboard to make the turn of the channel, and when she rounded the buoy, straightened up to proceed on the western side of the channel.

8. At this time the Santiago de Cuba was several hundred yards above the Scots Greys on the western side of the channel, but her course was eastward of that of the Scots Greys and to her starboard.

9. At the Horseshoe shoal, the narrowness and shape of the channel, and the tendency of the tide, impose upon vessels sailing in opposite directions the duty of observing special caution as a necessary condition of their safety in passing each other.

10. In starboarding her wheel to carry her past the buoy, and in straightening up after she rounded it, that she might pursue the western port, indicating an intention to pass the Scots Greys on her port bow, and which gave her a direction across the track of the Scots Greys.

12. Whether this signal was or was not heard on the Scots Greys, it was not answered, but she kept her course up the western side of the channel.

13. The speed of the Santiago de Cuba was not diminished—at least not soon enough. If she had stopped or slowed down when the Scots Greys was rounding the buoy and straightening up, the collision would not have occurred, because the Scots Greys would have passed the place of the collision before the Santiago de Cuba reached it. Nor would it have occurred if the Santiago de Cuba had not hard ported her helm and sought to pass the Scots Greys on her port side.

14. If, in response to the Santiago de Cuba's movement, the Scots Greys had hard ported her helm, the vessels would probably have been brought together head on, with more disastrous consequences. But the impact of the former's bow was upon the starboard side of the latter, about thirty feet from her bow, thus indicating that if she had kept her course the vessels would have passed in safety.

Conclusions of law:—

Considering the condition of navigation at the locality in question, the size and depth in the water of the Scots Greys, the direction in which she was sailing, and the difficulty of controlling her movements, she was not in fault in adopting a course up the western side of the channel and in pursuing it without deviation.

In view of the same considerations, of the size and draft of the Santiago de Cuba, that she was light, that she was descending the river with the tide towards her head, and her movements completely under command, and that the passage of vessels such as the two in question at the Horseshoe buoy is attended with risk of collision, it was incautious in the Santiago de Cuba to pass the Scots Greys at that point, if she could avoid it.

It was the duty of the Santiago de Cuba to stop or slow down when she observed the Scots Greys rounding the buoy. Failing to do either, and in porting her helm and attempting to run across the track of the Scots Greys, when the vessels were in such proximity to each other, she was in fault and must be held responsible for the collision.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JAN. 24, 1884.* [No. 7.

Supreme Court.

Oct. & Nov. '83, 136. October 2, 1883.

Pierce et al. v. The Commonwealth ex rel.

Corporation—Private corporation—Cumulative voting—Quo warranto.

In an election for directors or managers of a corporation formed since the adoption of the Constitution of 1874, the shareholders may cumulate their votes upon less than the whole number of candidates.

The provisions of Article XVI. section 4, of the Constitution, relative to cumulative voting do not require legislative action to carry them into effect.

Cumulative voting is a constitutional right and a stockholder, in the exercise of it, is not bound to make known his intention in advance.

A railroad company is a private corporation, and is embraced within the provisions of Art. XVI. sect. 4, of the Constitution.

Error to the Common Pleas of Venango County.

Quo warranto, by the Commonwealth *ex relatione* Wallace Pierce, Jas. B. Pierce, Frank Pierce, and James L. Deeter, against Jonas J. Pierce, Enoch Filer, B. H. Henderson, Jos. Forker, and John Phillips, commanding them to show by what warrant they exercise the office of directors of the Sharpsville Railroad Company. The respondents filed an answer and an issue was framed, and the cause transferred from the Common Pleas of Mercer County, where the proceeding was begun, to the Common Pleas of Venango County.

On the trial, before TAYLOR, P. J., the following facts appeared:—

The Sharpsville Railroad Company was incorporated March 6, 1876. A meeting of the stockholders was called for January 8, 1883, to elect a president and a board of directors, and was duly advertised in the papers of Mercer County. At the election, the relators abstained from voting until the respondents had cast their ballots, and then cumulated their votes on four of the six directors, without making known their intention. The relators voted their stock in the usual way—folded their ballots and indorsed thereon the number of shares held by the individual. The judges of election refused to count the votes as cumulated by the relators, and issued their certificate to the respondents, who held the larger number of shares, declaring them elected.

The respondents requested the Court to charge as follows:

(1) That stockholders of railroad companies chartered for general public use have no legal right to cumulate their votes at any corporate election held by said stockholders, and if such corporations are included within the provisions of Art. XVI. sec. 4, of the Constitution of Pennsylvania, the Legislature has not passed any law for carrying into effect the provisions of said article so far as relates to such corporations. *Refused.* (Fourth assignment of error.)

(2) That in order to avail themselves of the right of cumulative voting, the stockholders desiring to do so, must claim the right openly; and if the plaintiffs in this case, together with any other persons, concealed from the defendants and those acting with them, their intention to cumulate their votes on less than the whole number of directors to be elected, and thereby misled the said defendants and those acting with them, as to their intentions so to do, it was such a perversion of Art. XVI. sec. 4, aforesaid, and such a fraud upon the defendants and those acting with them, as to forbid the votes of the plaintiffs and those acting with them to be counted cumulatively; and the verdict should be for the defendants. *Refused.* (Fifth assignment of error.)

Verdict in favor of the relators, and judgment of ouster entered thereon against the respondents. The respondents thereupon took this writ, assigning for error, *inter alia*, the refusal of the Court to affirm their first and second points.

John P. Vincent (*J. Ross Thompson* and *Miller & Gordon* with him), for plaintiffs in error.

Railroads incorporated for general public use are not included within the provisions of Article XVI. section 4, of the Constitution of 1874. Railroads are public corporations; Foster & Co. *v.* Fowler & Co. (10 Sm. 27), and Art. XVI. should be construed in the light of the definition given in that case. The General Assembly has not passed any law to carry into effect the provisions of this section. The debates in the constitutional convention show that the advocates of the system of cumulative voting never intended that it should place the control of a corporation in the hands of a minority. (4 Debates, 592, *et seq.*; 5 Id. 761–763, 765.) Cumulative voting is a privilege and must be claimed openly. Courts will not allow one person to obtain an advantage over another by a trick or by the use of a legal privilege in a manner not intended by the law.

Rex *v.* Gaborian, 11 E. 77.
King *v.* Commissioners of St. Martins in the Fields, 1 Term Rep. 148.
People *v.* Albany and Susquehanna Railroad, 55 Barb. 363.

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J. H. McCreery (*L. Griffith* and *Jas. A. Stranahan*, with him), for defendants in error.

A corporation is called public when it has for its object the government of a portion of a State, and even if the Commonwealth became a stockholder it would not change its character. All the books agree in placing railroads among private corporations.

Pierce on Railroads, 1.
1 Redfield on Railways, 62.
Morawetz on Corporations, sec. 2.
Railway Case, 3 Hill, 570,
Eustis *v.* Parker, 1 N. H. 273.
Rundle *v.* Del. & L. Canal Co., 1 Wallace, Jr. 275.

Article XVI. sec. 4, of the Constitution evidently applies to private corporations.

1 Debates, 52, 110; 4 Ed. 592, 604.
Hays *v.* Commonwealth, 1 Norris, 521.

There is no necessity for legislative action to carry the provisions of this article into effect.

City of Reading *v.* Althouse. 93 Penn. St. 404.
McCafferty *v.* Guyer, 9 Smith, 112.
Cooley on Constitutional Limitations, 99.

Neither Article XVI. sec. 4, of the Constitution, nor any Act of Assembly relative to cumulative voting, requires that the right should be openly claimed and exercised.

October 22, 1883. THE COURT. About the correctness of the ruling of the learned Judge of the Court below, in this case, we have no doubt. It seems to have been admitted, in the outstart of this trial, that the election of the 8th of January, 1883, was properly called, was held at the proper time, and was conducted in an orderly and regular manner. Nor is there any doubt but that the relators received the highest number of votes cast for directors at that election. It is said, however, that this result was brought about by the cumulation of the votes of the relators upon four out of the six candidates proposed for election. But this they certainly had a right to do, or we fail correctly to read the Constitution of 1874. "In all elections for directors or managers of a corporation, each member or shareholder, may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer." (Art. XVI. sec. 4.) This section to us seems very plain and unambiguous. If there are six directors to be elected, the single shareholder has six votes, and, contrary to the old rule, he may cast six votes for a single one of the candidates, or he may distribute them to two or more of such candidates as he may think proper. He may cast two ballots for each of three of the proposed directors; three for two, or two for one, and one each for four others, or, finally, he may cast one vote for each of the six candidates. Now as this Sharpsville Railroad Company was incorporated since the adoption of the new Constitution, it is necessarily subject thereto, and must be governed by its provisions. But the provision above cited vested in the relators, as stockholders, the absolute right to vote as they did, and if, as a consequence of the exercise of such right, their candidates had the highest number of votes cast at that election, they are the rightful directors of the corporation.

But, it is said, this provision is but directory, and it cannot go into effect without some legislative action directing the manner of its exercise. To this proposition we cannot assent. There is no alteration required in the mode of conducting corporate elections; each company continues to use that method prescribed by its charter, and the constitutional right is one that belongs solely and exclusively to the individual shareholder. He may exercise it or not as to him may seem proper, but whether he does so exercise such right or not, the ordinary manner of conducting the corporate election is in no wise interfered with. Legislative action is, therefore, uncalled for; it would be useless to alter the present mode of election, and with the right itself the General Assembly cannot meddle.

Again, it is urged, that from the heading of this section, it is obviously intended to apply only to private corporations, and as a railroad company is not a private but public corporation, therefore, it applies not to the case in hand. To the first part of this proposition we assent, but dissent as to the second part. Railroad and canal companies are private corporations. This we have decided in point twice within the last two years; once in the case of Timlow *v.* The Philadelphia and Reading Railroad Company (3 Out. 284), and again in the case of the Pittsburgh and Lake Erie Railroad Company *v.* Bruce, argued December 7, 1882 [12 WEEKLY NOTES, 554]. If, however, these are not enough for the establishment of the point in issue, we may cite Pierce on Railroads, p. 1; Morawetz on Private Corporations, sec. 2; and Redfield on the Law of Railways, vol. 1, 52–3. The last-named author cites many books for the position assumed, which any one curious about such matters may consult for himself. So in the case of the Trustees of the Presbyterian Society *v.* The Auburn and Rochester Railroad Company (3 Hill, 367) it is said that a railroad company is not public, nor does it stand in the place of the public; it is but a private corporation over whose rails the public may travel, if they choose to ride in its cars. Indeed we regard it as a misnomer to attach even the name "quasi public corporation" to a railroad company, for it has none of the features of such corporations, if we except its qualified right of eminent domain, and this it has because of the right reserved to the public to use its way for travel and transportation. Its officers are not public officers, and its business transactions are as private as those of a banking house. Its road

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may be called a quasi public highway, but the company itself is a private corporation and nothing more. We have, therefore, no hesitation in saying that it is embraced by the provisions of the 4th section of Article XVI. of the Constitution.

Finally, we have the allegation of fraud in this, that the relators did not give the respondents notice in advance, that they were going to cumulate their votes on four candidates. But as this was simply the exercise of a constitutional right, of which the respondents were presumed to be as well informed as the relators, and as the Constitution placed its exercise entirely within the volition of the individual stockholder, we do not see who has the right to restrain that volition by the imposition of any condition whatever, or to compel the voter to say in advance whether he will or will not use that privilege. Up to the very moment of voting he has the positive right to exercise his own will in this matter, and to us that sounds like a strange allegation which charges the plaintiffs with fraud upon the ground simply that they did that only which the supreme law of the State authorized them to do, that is, quietly and according to their own will, distribute their votes upon four candidates instead of six. With the learned Judge of the Court below, we must agree, that in this there has been no wrong committed upon the respondents.

Judgment affirmed.

Opinion by GORDON, J. D. Q. E.

Oct. & Nov. '83, 108. October 16, 1883.

Moninger v. Ritner.

Ejectment—Curtesy—Feme sole trader—Act of May 14, 1855.

Where a husband wilfully abandons his wife, and she, having been declared a feme sole trader, sells real estate which she acquired during coverture, the husband's right as tenant by the curtesy is gone.

The feme sole trader Act of 1855, allowing a married woman to convey real estate, is constitutional.

Error to the Common Pleas of Washington County.

Ejectment, by Henry Ritner against George W. Moninger, for a lot of ground situate on West Chestnut Street, in the borough of Washington. The plaintiff claimed title as tenant by the curtesy in the real estate of his deceased wife, of which the property in question was part.

On the trial, before HART, P. J., the following facts appeared: Henry Ritner married Ellen Jones, in 1834. Ellen Ritner, the wife, acquired the property in dispute from Martha Pool, by deed dated July 30, 1860.

The defendant offered to prove, "That at No. 63, December Term, 1873, of this Court, Mrs. Ellen Ritner, wife of the plaintiff, presented her petition to the Court, alleging that Henry Ritner, her husband, had, without cause, wilfully abandoned her, about 1867; that the said petition was supported by her own oath and the evidence of two disinterested witnesses; that in pursuance of said petition, after notice by publication, the Court, upon the 21st of October, 1873, . . . made a decree and granted the said Ellen Ritner a certificate that she shall be authorized to act and have the power to transact business as a feme sole trader, and that creditors, purchasers, and all persons may with certainty and safety transact business with her the same as though she had never been married; "to be followed by evidence that in pursuance of this decree, Mrs. Ellen Ritner, by deed dated January 29, 1874, . . . conveyed the property in dispute to David Aiken; to be followed by evidence that David Aiken erected valuable improvements thereon, and that on the 6th day of April, 1875, he sold and conveyed the same property to George W. Moninger, . . . to be followed by evidence that the plaintiff deserted his wife in 1867, that he left the State and lived in adultery with another woman; that the desertion continued on down to the date of the death of Ellen Ritner in 1880; this, for the purpose of showing that the plaintiff has no title to the property in question."

Objected to by plaintiff. Objection sustained. Exception.

Verdict for the plaintiff and judgment thereon. Defendant thereupon took this writ, assigning for error the action of the Court in sustaining the objection to his offer.

A. W. and *M. C. Acheson*, for plaintiff in error.

The Act of 1855 does not divest Ritner's estate by the curtesy, for his wife did not acquire the property in question until 1860.

Young *v.* McIntyre, 6 WEEKLY NOTES, 252.
Washburn on Real Property, *11.
Cooley on Constitutional Limitations, cited in 10 American Decisions, 134.

The curtesy initiate of the plaintiff vested in 1860, and the Legislature had full power to declare by the Act of 1855 that he should take that estate subject to forfeiture if he deserted his wife.

Burson's Appeal, 10 Harris, 167.
Millinger's Administrator *v.* Bausman's Trustee, 9 Wright, 528.
Melizet's Appeal, 5 Harris, 455.
Monroe *v.* Van Meeter *et al.*, 100 Ill. 352.

The case of Ayetsky *v.* Goery (2 Brewster, 302) does not rule the present contention.

In Sidney *v.* Sidney (3 Peere Williams, 277) Lord Chancellor TALBOT said: "The reason of the difference why a wife, in case of an elopement with an adulterer, forfeits her dower, and yet the husband, leaving his wife and living with

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another woman, does not forfeit his tenancy by the curtesy, is because the Statute of Westminster (2 cap. 34) does, by express words, under these circumstances, create a forfeiture of dower, but there is no Act inflicting, in the other case, the forfeiture of a tenancy by the curtesy." In Reel *v.* Elder (12 Smith, 316) this statute is recognized as in force in Pennsylvania. The Act of 1855 corrects this inequality, and places husband and wife on the same plane.

If the Court should not protect purchasers the Act would prove a snare to innocent persons who have paid out their money on the faith of a decree which has been held to be conclusive.

Foreman *v* Hosler, 13 Norris, 418.

Braden & Miller (*John M. Braden*, with them), for defendant in error.

Prior to the Act of 1855 a married woman in Pennsylvania could not convey her separate estate, unless her husband joined in the deed.

Thorndell *v.* Morrison, 1 Casey, 326.

Foreman *v.* Hosler (13 Norris, 418); Black *v.* Tricker (9 Smith, 13); and Wilson *v.* Coursin (22 Smith, 306) do not decide the doctrine contended for by the plaintiff in error.

A wife can no more convey her husband's interest than she can that of any other person.

Ayetsky *v.* Goery, 2 Brewster, 302.

Husbands on Married Women, p. 129, sec. 148.

Curtesy, like dower, exists by virtue of the marriage contract, and in no way depends on the performance of marital duties by the husband, but exists and grows out of said relation. By that relation the husband acquires a vested right to the use of any real estate, during his life, of which the wife was seised at any time during coverture.

Crow *v.* Kightlinger, 1 Casey, 344.

Harris *v.* York Mutual Insurance Co., 14 Wright, 341.

Lefever *v.* Witmer, 10 Barr, 505.

November 5, 1883. THE COURT. The plaintiff below claims title to the property in controversy by virtue of his right as tenant by the curtesy in the estate of his deceased wife, Ellen Ritner, who died some time in July 1880. As she was seised of the lot in dispute during her coverture, were there nothing else in the case, his right to have and hold it, during the term of his natural life, could not be successfully controverted. But on the part of the defence there was an offer made to show that, on the petition of Ellen Ritner setting forth the fact that her husband had, without cause, wilfully abandoned her, the Court of Common Pleas of Washington County had, in pursuance of the Act of the 14th of May, 1855, made its decree, on the 21st of October, 1873, constituting her a feme sole trader, and had issued to her a certificate to that effect. That being thus fully empowered to dispose of her property as though she were sole, she on the 29th of January, 1874, conveyed the lot in dispute to David Aiken in fee, who afterwards conveyed to George W. Moninger, the defendant. This offer was refused, and the jury were instructed to find for the plaintiff.

In this interpretation of the law, and disposition of the case, we cannot agree with the Court below. Taking that offer as proved, we cannot see why it should not determine the controversy in favor of the defendant. The Act of 1855 is so plain, positive, and unambiguous in its terms, that no one need, for one moment, hesitate concerning its design and intention. It secures to the deserted wife not merely the rights and privileges of a feme sole trader, under the Act of 1718, but it also confers upon her the absolute and unqualified right to dispose of her own property, real and personal, as to her may seem best, and further provides, that in case she dies intestate, such property shall pass to her next of kin as though her husband were previously dead. About the fact, therefore, that Mrs. Ritner had the right so far as it could be conferred upon her by this statute, to sell the property in question, unincumbered by her husband's curtesy, there can be no doubt. Moreover, of her power so to sell and dispose of this property, the certificate issued to her by the Common Pleas, is, by the sixth section of the Act above recited, made conclusive evidence, and so continues to be until it is revoked by the authority from which it emanated. It follows, that the Court below, in ruling out the offer of the defendant, disregarded a plain and positive injunction of the General Assembly.

But the counsel for the plaintiff below interposes the plea that Ritner, having been married to his wife, Ellen, before the passage of the Act of 1855, had such a vested right not only in the property which she had, but also in that which she might afterwards acquire during their marriage, that the Act of 1855 was, as to him, unconstitutional and void. In other words such was the inherent power of the marriage contract, that without regard to the performance of that contract on his part, the peculiar rights acquired at its inception could not be abridged, altered or modified by any power short of his own will. But the statement of this proposition is its own refutation. The very premises on which the Act is founded is that the marriage contract has been violated; that the husband has deserted his wife and refuses to support and maintain her. It is, therefore, a curious travesty on the constitutional powers of this Commonwealth to say that the Legislature can make no provision for the support of an abandoned wife, if such provision happens to infringe upon some marital right of the derelict husband.

But independently of the arguments which may

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be drawn from the nature of, and duties involved in, the marriage contract, in favor of the constitutionality of the Act of 1855, there is, in fact, no foundation on which to rest the attempted justification of the judgment of the Court below. Ritner's right to curtesy in his wife's estate was no part of the marriage contract, but it resulted from the operation of statutory enactments existing at the time of her death. This point was expressly ruled, in reference to a wife's dower, in Melizet's Ap. (5 Har. 449), and we may take it for granted that no one will insist that the right of curtesy is superior to that of dower. In that case it was contended that the Act of 1848 was unconstitutional, in that the rights of the wife are fixed and vested at the time of marriage, and that this Act essentially changed and interfered with those rights as well as with those of the husband.

But, in answer, it was objected, that, in this Commonwealth, laws had, from time to time been passed altering the statutes of distribution, and the manner of making of wills, and that such laws had always been considered sound and good, if in operation at the time of the decedent's death, without regard to whose inchoate interests they might affect. It was further said, that the Legislature might, at its discretion, altogether abolish the common law right of dower, and repeal the statute of wills. But this doctrine has peculiar force when applied to the facts in the case in hand, and the error of the Court below becomes all the more obvious.

Mrs. Ritner's title to the property in dispute had no existence until after the passage of the Act of 1855, and until the acquisition of that title Ritner had no right in the premises inchoate or otherwise. The Act of 1855 could, therefore, not interfere with Ritner's vested rights in and to the subject matter of this controversy, for in it he had no such rights. On the other hand, whatever rights he may have had therein he held in subjection to the then existing laws. Whether, then, we adopt the full text of the case above cited or not, the Act of 1855 certainly is, as to the plaintiff's right, constitutional and of full force, and ought so to have been regarded in the Court below. Our attention has been called to the case of Ayetsky *v.* Goery, reported in 2 Brewster, 302, as ruling the contention in hand in favor of the judgment below. But as the facts of that case are not given it is impossible to say whether it has any applicability to the case before us or not. If, indeed, the counsel for the plaintiff in error has properly stated the facts upon which that case was based, it certainly does not, as to the present contention, support the argument of the counsel for the defendant in error.

The judgment of the Court below is now reversed, and a new venire is ordered.

Opinion by GORDON, J. D. Q. E.

Oct. '83, 123. October 11, 1883.

Halderman's Appeal.

Lunatics—Jurisdiction of Common Pleas over lunatics' estates—Acts of June 13, 1836, and April 20, 1869.

The Act of April 20, 1869 (P. L. 78), entitled, "An Act to provide for the admission of certain classes of the insane into hospitals for the insane in this Commonwealth, and their discharge therefrom," does not supply or modify the provisions of the Act of June 13, 1836 (P. L. 589), so far as it relates to the disposition and control of the estates of lunatics.

The title of the Act of 1869 forbids its construction so as to give the Court of Common Pleas jurisdiction over the management of lunatics' estates by virtue of proceedings under its provisions. Such jurisdiction can only be acquired and exercised under and by virtue of proceedings in conformity with the Act of June 13, 1836, or similar statutes.

Appeal from the Common Pleas of Armstrong County.

Petition of J. W. Halderman setting forth: (1) That on the second of October, 1880, petitioner was found to be insane by the report of three examiners appointed by the Court, one of said examiners being a physician, and another a lawyer, and upon confirmation of their report he was directed to be confined in the West Pennsylvania Hospital; that said examiners were appointed upon petition and single affidavit of Jeremiah Halderman, and without notice to petitioner. (2) That upon these proceedings Conrad Snyder was appointed committee of petitioner and took charge of his estate, personal and real, the latter consisting of 162 acres of land, which said real estate the committee sold under order of Court, but against the protest of petitioner's friends, at much below its real value. (3) That said proceedings were irregular and void, and praying that they may be set aside. (4) That petitioner has been restored to a sound state of mind.

The petitioner prayed the Court to receive proof of the facts and to direct the committee to pay over to petitioner the moneys received from the estate, other than the proceeds of real estate.

Pursuant to this petition the Court appointed a Commissioner to report facts as to petitioner's sanity. The Commissioner's report finding the facts to be as alleged, was approved by the Court, and it was ordered that the commission and appointment of the committee and all proceedings thereunder be altogether suspended and determined.

On December 22, 1881, the petitioner obtained a rule to show cause why the appointment of the committee and all acts performed by him as such should not be set aside, and after argument, the Court discharged the rule at costs of

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petitioner, NEALE, P. J., saying in an opinion filed, *inter alia*, as follows:—

"That J. W. Halderman was a lunatic at the time of the finding of the inquisition does not appear anywhere to be disputed. The exceptions presented seem to be framed with reference to the validity and regularity of the proceedings under the Act of June 13, 1836. . . . The second exception, 'that no jury was empanelled and no commissioners appointed,' applies to the mode of proceeding under the Act of 1836. The record shows the appointment of three persons, a physician, a lawyer, and another. The presumption is in favor of the regularity of their proceedings afterwards confirmed by the Court. . . . The third and fourth exceptions are, 'that no notice was given to lunatic or any of his kin, except those concerned in the proceeding, and that the Court directed no notice to be given; that the return of the pretended inquisition was in four days after their appointment, and was acted on without giving time for exceptions or objections; that said report should not have been confirmed till four days after the first day of the Court following said appointment.' These exceptions, like the preceding, go to proceedings under the Act of 1836, and do not apply to the provision of the Act of 1869.

"The Act of 1869 appears to be an original Act founded upon a different state of facts than those which existed at the time of the passage of the Act of 1836, which contemplated the actual care and custody of the objects of its provisions by the committee when public hospitals and asylums had not been provided, as they have been subsequently. The care of the lunatic was in the discretion of the committee, and often greatly neglected. Under the late law the Court directs where he shall be kept and treated, and in the confidence of an honest and faithful attention to his physical and mental condition, may have less hesitation in promptly committing him to such an institution provided by the State. The extent of the proceedings under the Act of 1869 is explained in Brickway's Case, 30 Smith, 69.

"It appearing then, under the Act of 1869, that the proceedings have been regular as to the adjudication of lunacy, it remains to be considered further whether the exceptions should be sustained applying to the subsequent proceedings. . . .

"The evidence shows that at the time of the of the Act of April 28, 1876, 'to validate sales,' etc. (P. L. 50), are sufficiently broad to cover all grounds of exception in that respect.

"Therefore, under all the facts we are constrained to deny the petition of the said Halderman. If he has any remedy, it must be in another form."

The petitioner thereupon took this appeal, assigning for error: (1) The appointment of the committee on the proceedings then had, and without notice. (2) Granting an order of sale of real estate on these proceedings. (3) The refusal to grant the prayer of the petition, that the committee be directed to pay to petitioner all money received by him from petitioner's estate, other than the proceeds of real estate. (4) Discharging the rule above mentioned.

George A. Jenks (*M. F. Leason* with him), for appellant.

The Court of Common Pleas can acquire and exercise no jurisdiction over a lunatic's estate, other than by and in the manner prescribed by the Act of June 13, 1836. In this case it is admitted that the proceedings were commenced under the sixth section of the Act of April 20, 1869 (P. L. 78), entitled, "An Act to provide for the admission of certain classes of the insane into hospitals for the insane in this Commonwealth, and their discharge therefrom." This Act refers only to the disposition of the lunatic's person, and does not repeal or modify the Act of 1836, nor furnish a substitute for it in relation to lunatics' estates.

Brickway's Appeal, 30 Smith, 65.

The sale of appellant's realty was made without jurisdiction, and is therefore void.

Roberts *v.* Orr, 6 Smith, 181.

E. S. Golden, for appellee.

In Pennsylvania the Constitution commits to the Courts of Common Pleas the powers of a Court of Chancery, as to the care of the persons and estates of the insane and the mode of procedure prescribed by the Act of 1836, is but directory. The Common Pleas, like the Chancellor, may adopt rules to meet frequently occurring emergencies, and when the fact of lunacy is once ascertained, either under the Act of 1836, or that of 1869, the jurisdiction is complete as well of the person as of the estate of the lunatic.

Yaple *v.* Titus, 5 Wright, 203.

November 10, 1880. THE COURT. Most of

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who had lands was a lunatic, in order to ascertain the existence of the fact of lunacy, was on petition to the Chancellor to issue a writ to the sheriff or escheator of the county where the alleged lunatic resided, to try by jury and personal examination whether the suggestion was true or not. This was superseded by a commission appointed by the Chancellor, and the commisioners issued their precept to the sheriff requiring him to cause a jury of the county to come before them to inquire of the matters and things given them in charge by virtue of the commission. At an early day, by statute, the right to traverse the inquisition and to a trial by jury in a court at law, was secured to the alleged lunatic. After the inquisition and finding that the person was a lunatic, a committee of his estate was appointed, who was considered the mere bailiff of the crown. He could make no contract binding upon the person and estate entrusted to his care, unless warranted by an Act of Parliament, and the previous direction of the Chancellor was generally required. The rules for ascertaining the fact of lunacy were conservative of the rights of personal liberty and the property of the subject, and though instances are not wanting where the Chancellor called before him the alleged lunatic, in person, and decided the question of fact, such instances were exceptional, for what was deemed sufficient cause; but were they more frequent the fact would not be authority in this State for proceeding in any other mode than is directed by our statutes.

The Court of Common Pleas has the power of a Court of Chancery as to the care of the persons and estates of persons *non compos mentis*. By the Act of 1836, the jurisdiction shall be exercised, upon proper application alleging that a person is a lunatic, by the issuing of a commission in the nature of a writ *de lunatico inquirendo*, to inquire into the lunacy of said person, which writ shall be made according to a prescribed form, specifying therein the subjects of inquiry, namely, whether the said person is a lunatic or not, and if he be a lunatic, then how long he hath been so, and if he enjoys lucid intervals; what lands and tenements, goods and chattels he was seised or possessed of, or entitled to, at the time of his becoming a lunatic, and the value thereof; and whether he hath since disposed of part thereof, and to whom; and how old he is, and who are his heirs or next of kin; and the ages of said heirs or next of kin, respectively.

For certain causes named in the Act, the Court may direct an inquest to be impanelled from the jurors attending the Court to be held by one of the Judges thereof, and the inquisition so made shall have like effect as if held by a commission. After the inquisition, finding the person therein named is a lunatic, it shall be lawful for the Court to commit the custody and care of the person or estate or of both, of such lunatic to a suitable person or persons according to the rules heretofore practised and allowed. The duties of the committee are plainly defined. No order of sale of real estate shall be made, unless upon application and statements as directed in the Act. These provisions are imperative, they give the mode in which the jurisdiction shall be exercised by the Court of Common Pleas. A door is not left open for the Court in the exercise of its chancery powers, to call in a person and summarily determine that he is insane, and thereupon appoint a committee of his person and estate.

Acts of Assembly have been enacted clothing the criminal courts with power to inquire into the fact of insanity of any person alleged to be insane, and upon finding that he is insane, to commit him to a hospital, or other place of confinement. Provision is made in the Act of 1860, relating to criminal procedure, whereby a person who is indicated, or charged with crime, may be found insane in the Court of Quarter Sessions, or the Court of Oyer and Terminer, and the Court before whom the trial was had, may order the insane person to be kept in strict custody, so long as he shall continue of unsound mind. It is obvious that none of these Acts, vesting power in the criminal courts to ascertain the fact of insanity of any person, and to commit such person to a place of confinement, repeals, supplies, or modifies any of the provisions of the Act of 1836.

The proceedings in this case to ascertain the fact of lunacy were under the Act of April 20, 1869, P. L. 78, entitled, "An Act to provide for the admission of certain classes of the insane into hospitals for the insane in this Commonwealth, and their discharge therefrom;" the subject of the Act is expressed in the title; this is essential; the title is a part of the Act and aids, if need be, in its construction; and if there were any provision foreign to the subject named, it would be void. In the section directing the procedure to ascertain the fact of insanity of any person jurisdiction is given to any Court or Law Judge, and "on statement, in writing, that a certain person is insane, and that the welfare of himself or of others requires his restraint," the Judge shall immediately appoint a commission, composed of three persons, to inquire into and report upon the facts of the case. In their inquisition they shall hear such evidence as may be offered touching the merits of the case, and if, in their opinion it is a suitable case for confinement, the Judge shall issue his warrant for such disposition of the insane person as will secure the object of the measure. Only one fact is made essential—that it is a suitable case for con-

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finement. All the provisions of the Act relate to committal of the insane into hospitals and their discharge therefrom. In terms it is not supplementary to the Act of 1836, is not so in fact, and its title forbids latitude of construction that a criminal court or a Judge thereof, may exercise the powers of a Chancellor. True, the person who makes the statement may do so before the Court of Common Pleas, or a Judge thereof; but the purpose of the proceeding and the extent of power are the same in the criminal court as in the civil. Whether the proceeding, by accident or design, is before any law Judge, or in either a civil or criminal court, there is precisely the same measure of jurisdiction, and it is manifest that the Act of 1869 neither supplies nor repeals any part of the Act of 1836. The object of one widely differs from the object of the other, and so, also, the mode of procedure.

The Act of 1869 authorizes and requires any Judge, or any Court, upon complaint respecting an insane person, or upon statement respecting an alleged insane person, setting forth certain facts, to take speedy action for a hearing and ascertaining of the facts, and thereupon to make the proper order, as the case may demand, either for the committal or discharge of such person.

It was passed for the purposes therein expressed; not to simplify the cumbrous and dilatory proceedings under the Act of 1836, nor to confer jurisdiction over the estate of the lunatic. It provides nothing respecting the care of the lunatic's estate; nor for notices, nor for inquisition of material facts respecting the lunatic, his estate, his heirs or next of kin, for information of the Court, and of the committee to be appointed. "The charge of the property is in the Court, though administered by a committee. After the return of an inquisition, finding lunacy, the jurisdiction over the property of the lunatic is complete, either for custody, for management, or for sale." (Yaple *et al. v.* Titus *et al.*, 41 Pa. St. 195.) But the inquisition must be made under the statute regulating the proceedings of the Court of Common Pleas in the exercise of its chancery powers for the care of lunatics and their estates.

Although a summary inquiry had resulted in the lawful confinement of Halderman in a hospital, that did not stand in the way of an inquisition under the Act of 1836. Such inquisition is not superseded by any statute, when the purpose is to provide for the care of the estate of an insane person; if the welfare of the lunatic, or of others, requires that he be immediately committed to a hospital, his estate is in no worse condition during the confinement than if he were at large. In either case he is incapable of its management; when confined he is not so likely to waste or destroy it. The first step in the exercise of jurisdiction by the Court of Common Pleas is the issuing of a commission in the nature of a writ *de lunatico inquirendo*. The appointment of Conrad Snyder as committee of the estate was error.

Whether, under the Act of April 28, 1876 (P. L. 50), the sale of the real estate is valid, is a question that cannot be determined till all interested parties have opportunity to be heard.

At present a decree will not be made that all acts of the committee be set aside. The rulings of the Court below were on the basis that the committee was appointed as provided by law, and doubtless that Court will hereafter make the proper order respecting the Auditor's report and the money in hands of the committee. The requisite facts for such orders are not set out in the paper-books.

The decree that Conrad Snyder be appointed committee of the estate of James W. Halderman, is reversed, at the costs of the appellee, and record remitted for further proceedings.

Opinion by TRUNKEY J.

MERCUR, C. J., and PAXSON, J., absent.

T. W. B.

Jan. '82, 458. April 23, 1883.

Wagner's Appeal.

Laborer's lien for wages—Act of April 9, 1872—Right of labor claimant to appropriate payments made within six months to wages due prior to the six months.

A laborer claiming $200 wages out of the proceeds of an execution, under the Act of April 9, 1872, may appropriate payments for wages made to him within six months preceding the sale to wages due him prior to the six months.

At the time of a sheriff's sale of personalty the defendant in the execution was indebted to a laborer, for wages earned prior to the six months immediately preceding the sale, in the sum of $355, and in the further sum of $525, for wages earned during said six months. The laborer had been paid during the six months, weekly, sums for wages aggregating $426.94. The laborer claimed $200 from the fund:

Held, that in the absence of a specific appropriation of the sums so paid during the six months, the claimant was entitled to apply them to the earliest indebtedness, including wages due prior to the six months, and to recover from the fund the full amount of $200, if so much remained due on account of wages earned within the six months.

Error to the Common Pleas No. 4 of Philadelphia County.

Appeal of William Wagner, from a decree of said Court, distributing the proceeds of personalty sold under an execution issued upon a judgment obtained by said Wagner against one Charles W. Wright.

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The material facts were as follows: The sheriff paid into Court a certain fund, being the balance of the proceeds of an execution against personal property belonging to Charles W. Wright, and an Auditor was appointed to report distribution thereof. At the audit, one Anthony Huver (who had filed with the sheriff, prior to the sale, a labor claim) claimed $200 out of the fund in Court. The Auditor found that Huver had been in the continuous employ of the defendant in the execution for a period exceeding six months immediately preceding the sheriff's sale; that at the commencement of six months preceding the sale a balance of $355.67 was due him for wages; that during said six months he earned the sum of $525, and that during said six months he had been paid sums for wages aggregating $426.94—no specific appropriation of these sums having been made at the times of payment by his employer or himself.

Huver claimed to appropriate said sum of $426.94 to the earliest indebtedness, including the wages due prior to the six months, and to be awarded from the fund the full limit of $200, allowed by the Act of Assembly. The Auditor allowed his claim, and awarded him $200, and awarded the balance of the fund to Wagner, plaintiff in the execution.

Exceptions filed by Wagner to the award, on the ground that the payments made to Huver during the six months preceding the sale should be deducted from the wages earned by him during the same period, thus reducing his lien on the fund to the sum of $98.06, were dismissed by the Court, and the report was confirmed; whereupon Wagner took this appeal, assigning for error said action of the Court.

Charles P. Sherman, for the appellant.

The Act of 1872, unlike the Wages Act of April 2, 1849, and the Rent Act of June 16, 1836, § 83, expressly limits the time within which wages earned shall be a lien, the effect being the same as if the laborer had commenced work exactly six months prior to the sale. Prior transactions must be ignored, and payments made within the six months should be credited to wages earned within that period. The doctrine of appropriation of payments cannot apply to the Act of 1872.

Charles L. Smyth, for the appellee, cited—

Pierce *v.* Sweet, 9 Casey, 151.
Hollister *v.* Davis, 4 P. F. Smith, 508.
Diehl *v.* Myers, 1 WEEKLY NOTES, 628, and cases cited.
McKee's Ex'rs *v.* The Commonwealth, 2 Grant, 24.
Speck *v.* The Commonwealth, 3 W. & S. 328.
Logan *v.* Mason, 6 W. & S. 9.
Watt *v.* Hoch, 1 Casey, 411.
Berghaus *v.* Alter, 9 Watts, 386.
Smith *v.* Brooke, 13 Wright, 147.
Reed's Appeal, 6 Harris, 235.
O'Brien *v.* Hamilton, 12 Phila. 387.
Reed *v.* Ward, 10 Harris, 144.

April 23, 1883. THE COURT. This distribution arises under the Act of April 9, 1872 (Purd. Dig. 1464). It is conceded that the wages of the appellee for the six months immediately preceding the sheriff's sale exceeded $200. It is admitted that the appellee sustained such a relation to the defendant in the execution, and to the fund, as to entitle him to claim the $200, if so much of the sum earned within said six months, remained unpaid.

It appears that the appellee had been in the employ of the defendant in the execution for some time prior to the preceding six months. His wages during that time, added to those earned within the six months, amount to $887.64. Different sums, amounting in the aggregate to $426.94, had been paid to the appellee within six months prior to the sale. The contention is whether this sum must be applied on the wages earned within the six months preceding the sale, or whether the appellee may apply on the previous indebtedness so much as is necessary to satisfy the same.

The general rule of law as to the application of payments is well settled. It is this: When one indebted to another on several accounts makes a payment, he may direct on which it shall be applied. If he omits so to do, the creditor may apply the payment as he sees proper. When no specific application has been made by either debtor or creditor, the law will apply it in the way most beneficial to the creditor, or in discharge of the earliest liabilities of a running account. (Pierce *et al. v.* Sweet, 9 Casey, 151; Smith *v.* Brooke, 13 Wright, 147; Hollister *v.* Davis, 4 P. F. Smith, 508.) The creditor may reserve his election until he is called on to report his action. (Wharton on Contracts, § 932.)

When the debtor paid the several sums aggregating $426.94, he made no specific application of any of them. His indebtedness prior to the six months was not only the earliest, but it was the least secured. It was therefore most beneficial to the appellee to apply the payments thereon. The elder debt lacked the security of lien given by the Act cited. The appellee, therefore, had a right to apply the payments thereon. If he had not so elected prior to the levy on the property he might then make the election. He did make it, and gave due notice of his claim prior to the sale. On what principle, then, shall the sum due him for wages within the six months, not exceeding $200, be disallowed? His claim is meritorious. Under the well recognized rules controlling the application of payments, all the money paid was correctly applied on the earlier indebtedness.

The Court committed no error in adjudging it to be so applied, nor in the disposition made of the costs.

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Decree affirmed, and appeal dismissed at the costs of the appellant.

Opinion by MERCUR, C. J.

PAXSON and STERRETT, JJ., absent. A. A. O.

Quarter Sessions.

Q. S. November 26, 1883.

Commonwealth v. Casperson.

Criminal law—Malicious mischief—Common law—Private trespass.

An indictment charging that A., "with force and arms, etc., unlawfully, wilfully, and maliciously did break and destroy a certain chair, then and there the property of B.," does not set forth an offence indictable at common law.

Motion to quash an indictment for malicious mischief, charging that the defendant "with force and arms, etc., unlawfully, wilfully, and maliciously did break and destroy a certain chair, then and there the property of B."

The grand jury having found a true bill, defendant's counsel moved to quash, and assigned as reason that the indictment did not set forth an offence punishable by indictment either at common law or under any statute of Pennsylvania, and the injury, if any, constituted merely private trespass.

Albert B. Guilbert, for motion.

To constitute malicious mischief at common law, it is necessary that the offence should be committed either secretly or in the night time, or marked with malignant cruelty to animals, or accompanied with a breach of the peace.

Wharton's Crim. Law, § 2003.
Respublica *v.* Teiseher, 1 Dall. 335.
Comth. *v.* Taylor, 5 Binney, 277.
Comth. *v.* Cramer, 2 Pearson, 441.

An injury committed to inanimate property, without such circumstances of malice or secrecy, will not constitute malicious mischief, unless so provided by statute.

Davis *v.* Commonwealth, 6 Casey, 421.
Comth. *v.* Burton, Susquehanna Legal Chron. 66.
Kirkpatrick *v.* The People 5 Denio, 277.
People *v.* Moody, 5 Parker, 574.

Charles F. Warwick, Assistant District Attorney, contra.

Eo die. THE COURT. Motion granted and indictment quashed. A. B. G.

Common Pleas—Equity.

C. P. No. 2. December, 1883.

Heinicke v. Krouse.

Equity—Statute of Frauds—Agreement for sale of land made by agent who was not authorized in writing.

Sur demurrer to bill.

The bill recited that defendant had entered into a written agreement to convey a house and land to the plaintiff; averred part payment of purchase money, tender of remainder and of a deed to be executed by defendant, and refusal of defendant. Specific performance was prayed.

The agreement was as follows:—

"This agreement, made the fourteenth day of August, 1883, witnesseth that G. C. Seidel, agent for Godfrey Krouse, agrees to sell, and William Heinicke agrees to purchase, the house No. 121 Green Street," etc.

It was signed and sealed by the plaintiff and by Seidel, the agent, in his own name.

The defendant demurred among other grounds, because (1) the contract was not signed by defendant, and (2) because Seidel did not appear to be authorized in writing by defendant to make the contract.

R. P. White, for demurrer.

Statute of Frauds, P. D. 723.
Bellas *v.* Hays, 5 S. & R. 427.
Hefferman *v.* Addams, 7 Watts, 116.
Grove *v.* Hodges, 5 Smith, 515.

Joseph L. Tull, for complainant.

THE COURT sustained the demurrer on the grounds above reported, and it being conceded by plaintiff that he could not amend so as to obviate these objections the bill was dismissed.

C. P. No. 3. December 15. 1883.

Annie Monroe v. The Mechanics and Workingmen's Building Association.

Equity—Practice—Testimony before an examiner—Books and papers—Subpœna duces tecum—Attachment.

In equity.

Rule for an attachment against Anthony Minnick, secretary of the corporation defendant, for not producing before the examiner, the books and papers of the association, in obedience to a *subpœna duces tecum.*

Minnick appeared at a meeting before the Examiner on November 22, with the books called for in his possession. Proof of service of the subpœna was made, and plaintiff's counsel called Minnick to the witness stand, and demanded that

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he produce the books and papers asked for; this the witness declined to do, stating that he was not authorized by the board of directors of the association so to do; whereupon plaintiff obtained the above rule.

J. Joseph Murphy, for rule.

The *subpœna duces tecum* is process of this Court, and the witness Minnick is in contempt, having disobeyed it.

Edward C. Quin, contra.

THE COURT. The application is not in accordance with the practice of this Court. Upon a report of the Examiner filed, an order of Court should be asked for directing the production of the books and papers required.

Rule discharged.

Per FINLETTER, J.

LUDLOW, P. J., absent. A. M. B.

C. P. No. 3. October 27, 1883.

Monroe v. The Mechanics and Workingmen's Building Association.

Practice—Evidence—Subpœna duces tecum—Books of a corporation—How far they must be identified by testimony before they can be examined.

In equity.

Sur rule for an attachment against Anthony Minnick, secretary of the Mechanics' and Workingmen's Building Association for not producing the books of the Association before Charles F. Corson, Esquire, Examiner, in obedience to a *subpœna duces tecum*.

J. J. Murphy, for rule, contended that he was entitled to have the books produced without swearing the witness.

E. C. Quinn, for the witness. The power of the Court over a person is derived from its inherent authority to compel him to appear and testify. He cannot be compelled merely to produce a book, and if he produced it, it could not prove itself.

The Highland Turnpike Co. *v.* McKean, 10 Johns. 154.

Pittsburgh Coal Co. *v.* Foster, 59 Penna. State Rep. 365.

Mnrray *v.* Elston, 8 E. C. Green, 212.

An officer of a corporation is not obliged to [illegible]

November 3, 1883. THE COURT. From the report of the Examiner in this case, we assume that, at the suit of the plaintiff, a *subpœna duces tecum* was served upon a witness, that he appeared at the hearing with certain books in his possession, that the counsel for the plaintiff refused to call and permit the witness to be sworn, but requested him to state "whether the books which witness has brought here, and now holds and retains in his possession, are not the books of the building association brought by witness in obedience to the subpœna, and, if so, to produce said books before the Examiner," and that the counsel for defendant declined to permit the witness "to say or do anything until he is first called and sworn as a witness."

This rule for an attachment was then granted, has been submitted to us, and is now to be decided.

As a general principle, books and papers, even in the possession, custody, or control of an *adverse* party, may be brought into Court by virtue of a *subpœna duces tecum*, but it does not follow that in every case that result will be accomplished. Public records cannot in general be produced, they not being in the power of the public custodian, but other books and papers, being in the possession of a witness, though the right belong to other persons, must be produced in answer to the command of the subpœna. (Wharton on Ev., § 378, and authorities cited.) These general principles, however, seem by the authorities to be modified by the circumstances surrounding each cause, and in the case of the Bank of Utica *v.* Hilliard (5 Cowan, 153), the doctrine is stated to be, not that the word "possession" meant mere manucaption, but actual *control*. The learned Judge who decided that cause doubtless stated the principle correctly (and is sustained by the authorities) when he said, "the cases in which the papers may be coerced by a subpœna are where they are the property of a competent witness, or at least where they do not belong exclusively to the adverse party. When he cannot say "these are my papers," we will not compel one who happens to have the temporary possession of them, in the right of the party, to produce them on the subpœna. The question is not now what order this Court, or a Judge of this Court, might make upon the bank touching the production of these papers within [illegible]

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additional evidence as to who had the actual control of them; and even then circumstances might exist, and be developed by testimony, which would require the Court to make a special order to meet the requirements of justice.

If we are correct in the views heretofore expressed, it becomes perfectly apparent that before books or papers can even be examined they must be identified, and it must be made to appear that they are under the control of the witness; and as the burden of proof is upon the plaintiff, he must for this purpose call and swear a witness or witnesses, but the witness or witnesses thus called must be confined in their testimony and upon cross-examination to the points named, for he or they are not general witnesses in the cause.

For the reasons stated we decline to make this rule absolute.

Rule discharged.

Opinion by LUDLOW, P. J. A. M. B.

Common Pleas—Law.

C. P. No. 3. December 18, 1883.

Bruggeman v. Larzelere & Co.

Sale of goods—Contract—What constitutes an acceptance of an offer—Acceptance of part of the offer—Agency—Merchandise broker.

Sur rule to take off nonsuit.

On the trial, before FINLETTER, J., the testimony on behalf of the plaintiff was to the following effect:—

John S. Clark, who was a merchandise broker, received from the defendants in the spring of 1881 a postal card, in which they offered for sale after September 1st, *inter alia*, 1000 cases of table peaches, and 500 cases of pie peaches. The peaches were stated to be yellow table peaches, yellow peaches at $1.60; pie peaches at $1.00 a dozen. Clark testified that on the day he received the postal card he called on the plaintiff and sold him 100 cases of yellow peaches and 50 cases of pie peaches, giving him at the same time, the prices, terms, and date of shipment. On the same day he sent the defendants the order. Eight or ten days after the order was sent Clark received a letter from the defendants, stating that they could not fill Bruggeman's order, as the market had advanced and they could not get the peaches. He never notified Bruggeman of this letter. Clark also testified that in the spring of 1881 he was selling goods for defendants as a broker, but without any specified agreement to sell for them.

The Court entered a judgment of nonsuit.

Henry M. DuBois, showed cause.

Clark was without authority to sell goods for the defendants. The postal card was a mere price list of various kinds of goods, and did not confer authority to sell. A broker differs from an agent or factor in that his power is not to treat but to explain the intentions of the parties.

Story on Sales, 65.
1 Domat, p. 492.
Keys *v.* Johnson, 18 Sm. 42.
Reed's Exec. *v.* Reed, 1 Norris, 425.
Workman *v.* Cullberg, 12 WEEKLY NOTES, 189.

Clark had no possession, management, control, or disposal of the goods, and consequently had no special property or lien in them, and he could not sell or agree to deliver the goods to plaintiff.

11 WEEKLY NOTES, 449.
Story on Agency, § 34.

Williams, for the rule.

An offer for the sale of the peaches was made by the defendants and accepted by the plaintiff.

[FINLETTER, J. The offer was not accepted in its entirety. The offer was for the sale of a thousand cases, and the plaintiff agreed to take only a hundred. The defendants have a right to say whether they will accept this or not. They cannot be bound unless their entire offer was accepted.]

That depends on the custom of merchants. Here the authority was to sell up to a certain amount. It was not necessary that the whole offer should be accepted.

December 18, 1883. THE COURT. Rule discharged. A. B. W.

C. P. No. 4. December 29, 1883.

Coffey, to use of White, v. White, Executor.

Right to sue in another's name without consent—Liability for costs in such suit—Warrant of attorney, what is sufficient—Equitable owner of a chose in action can bring action for the chose in the name of the legal plaintiff, who cannot prevent such use of his name. Such use plaintiff, however, is alone liable for the costs if defeated—In a suit upon a chose in action, a warrant of attorney filed by a use plaintiff is sufficient, although the suit was begun without the nominal plaintiff's consent, and an express disclaimer was filed by him protesting against the action itself as fraudulent.

Sur rule to strike off warrant of attorney and narr.

The facts of the case were as follows: This action was brought upon three sealed notes (amounting in the aggregate to the sum of

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$9869.34) made by Thomas White, deceased, and payable to Titian J. Coffey, his heirs, executors, administrators, or assigns. The action was brought by the use plaintiff, Thomas White, in the name of the payee, Coffey, the legal plaintiff, to the use of Thomas White, without the consent and against the wishes of Coffey, who filed of record a disclaimer, in which he declared that his name was used as legal plaintiff without his knowledge or consent, and that he disclaimed and protested against the said action and all responsibility therefor. The plaintiff's attorney having been ruled to file his warrant of attorney, filed a warrant from Thomas White, the use plaintiff, and depositions were taken for and against the present rule, from which it appeared that Thomas White, the use plaintiff, claimed to be the owner of the notes in suit under an assignment of them in writing and under seal made to him by his father, Alexander M. White. Thomas White further claimed that the sealed notes in suit, so assigned to him, were taken up by his father, Alexander M. White, at the request of the maker, Thomas White, deceased, who was the father of Alexander M. White; that he took them up with his own money, paying Coffey the whole amount of the notes, and with an understanding between himself and his father that he should hold the notes instead of Coffey. In other words, that his father, Alexander M. White, was the purchaser of these notes for value, and that he, the use plaintiff, was the holder of them by virtue of the assignment already mentioned. On the other hand, the defendant claimed that Alexander M. White took up the notes from Coffey as the agent of his father, Thomas White, and with his money; that the notes were, in other words, paid by the maker, Thomas White, through the agency of his son Alexander.

J. H. Sloan (with whom was *Geo. W. Biddle*), for the rule.

The warrant of attorney filed by the plaintiff's attorney, in answer to rule upon him was signed by Thomas White only, the nominal plaintiff having filed a disclaimer, so that if the defendant were to plead to this narr. he would not be permitted to show on the trial want of title in Thomas White.

Montgomery *v.* Cook, 6 Watts, 238.
Hamilton *v.* Brown, 6 Harris, 87.
Blanchard *v.* Com'th, 6 Watts, 309.
Armstrong *v.* Lancaster, 5 Watts, 68.
Commonwealth *v.* Lightner, 9 W. & S. 117.

If the use plaintiff, upon demand, shows no authority from the legal plaintiff, his warrant of attorney is insufficient.

Mississippi R. R. Co. *v.* Southern R. R. Ass'n, 9 Phila. 108.

If the nominal plaintiff interferes in the matter for the purpose of preventing the use of his name, the use plaintiff must seek his remedy in equity.

Bispham's Equity, § 172, and cases cited.
1 Parsons on Contracts, p. 224, and cases cited.

The legal plaintiff would be liable to costs if the action went on, which would be a great injustice in view of his express repudiation of the action.

The only remedy of A. M. White was assumpsit for money laid out and expended, if brought in time, or a suit in equity.

Theodore F. Jenkins, contra.

The notes having been taken up at the request of the defendant's decedent, A. M. White was not a volunteer.

Kelchner *v.* Forney, 5 Casey, 417.

Hence no actual assignment to A. M. White was necessary.

Foster *v.* Fox, 4 W. & S. 92.

The person having the beneficial interest is considered as the substantial plaintiff, and the defendant may plead that the action was for the use of such beneficial plaintiff, and set off a debt due from him.

Bury *v.* Hartman, 4 S. & R. 175.
Fetterman *v.* Plummer, 9 S & R. 20.

In all questions of substance and justice, he is the real plaintiff, for whose use the suit is brought. He is responsible for costs, and the continuance of the case depends upon his authority, and not upon that of the nominal plaintiff.

Jones *v.* Martins, 1 Harris, 614.
Fetterman *v.* Plummer, *supra*.

If the use plaintiff could maintain a bill in equity, he can maintain the present suit.

January 5, 1883. THE COURT (after stating the facts, *ut supra*). The question is upon the above state of facts, whether one who claims to be the equitable owner of a chose in action not assignable at law, and upon which he cannot maintain a suit at law in his own name, is entitled, without the authority and against the wishes of the party having the naked legal title, and in whose name alone an action at law can be maintained, to use his name as the nominal plaintiff in the action, to sue for the chose in his name to the use of the party claiming to be the equitable owner of the chose. If he is, the warrant of attorney filed in this case is sufficient. If he is not, it is insufficient, and the present action cannot be further prosecuted.

The practice in Pennsylvania of bringing actions in the courts of law in the name of a legal or nominal plaintiff to the use of the equitable owner of a chose is very ancient, and arose out of the absence of courts of chancery, in which such equities could be enforced. It is one of the earliest forms of the administration of equity by common law proceedings. There has never been a time, so far as I can as-

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certain, when, if B. purchased a debt which was due by C. to A., an action could not be maintained in the courts of law of this State by B. in the name of A. to his use against C. Either he must be permitted to do that or to lose his claim altogether, for there was no Court of Chancery in which he could assert it. Nor do I find any trace of a doctrine that, when a man has purchased a debt, it is in the power of the original creditor to prevent a recovery by the owner of it by prohibiting the use of his own name as a nominal plaintiff in the action brought for the recovery of it. Such a doctrine would, of course, have prevented the assignment of choses altogether, for there being at that time no forum in which the assignee could proceed, the assignment would have been altogether valueless. It is true that generally in such suits no question of this kind has arisen, for ordinarily the legal plaintiff, who is a mere naked trustee for the equitable owner, has interposed no objection to the use of his name, knowing very well that he is not, under such circumstances responsible for costs, and that he incurs no other liability. A case, however, is reported in 1 Dal. 139 (McCullum *v.* Coxe), in which a plaintiff who had assigned the cause of action to another person endeavored to discontinue, but the Court would not permit him. Chief Justice TILGHMAN, in Steele *v.* Phœnix Insurance Co. (3 Bin. 312), cites this case with approbation, and adds, "our courts will take notice of the equitable plaintiff, although the suit is not brought in his name. It is the experience of every day that the assignee brings an action in the name of the assignor without consulting or even letting him know of it, and in such case we consider the assignor as out of the question, and should issue an attachment for costs against the person for whose use the suit is brought, in case of a judgment for the defendant." In Browne, for the use of Phillips, *v.* Weird (5 S. & R. 403), in determining that the nominal plaintiff is a competent witness for the equitable plaintiff in an action so brought, the same eminent Judge said: "We have no Court of Chancery, and therefore are obliged to sustain actions in the name of one person for the use of another. But in such cases the person for whose use the suit is brought is considered as the plaintiff; an attachment for costs may issue against him, *nor is the person whose name is made use of liable for the costs.* This I consider as our practice, long settled and well understood." In Campbell *v.* Galbreath (5 Watts, 426), which was an ejectment, Judge KENNEDY, shall be made to appear. If, however, in the course of the trial, it should turn out from the evidence that he is only a trustee, without the least interest whatever in the action, and that it was commenced without his knowledge or consent for the exclusive benefit of others, they, whoever they are, become thus made known to the defendant, so that, if the cause should be determined in his favor, he can be at no loss to whom he may look for payment of his costs. . . . The person in whose name the action is brought on the record must be presumed to be the real plaintiff, unless a cestui que trust be named therein, until the contrary is shown. But if there be no cestui que trust mentioned, and the defendant knows the fact that the plaintiff is invested with the legal title to the land for which the action is brought merely as trustee, and has reason to believe that it has not been commenced at his instance for the benefit of the cestui que trust, but has been brought by a stranger who has no interest, he may, before he pleads to the action, have a rule on the plaintiff's attorney to file his warrant, in order that he may know and ascertain by whose authority the suit has been instituted." In Canby *v.* Ridgway (1 Bin. 496), where an action was brought in the name of the legal plaintiff, but really for the use of another person, and the defendant was successful in the suit, the Court held that the action should be marked to the use of the equitable plaintiff, for whose use the suit was prosecuted, and that he should pay the costs. "The defendant," say the Court, "might have pleaded that the action was for his use and made a set-off of a debt due from him. Having used the process of the Court for his exclusive benefit, it is reasonable that he should be answerable for costs. In Bury *v.* Hartman (4 S. & R. 184), Judge DUNCAN said: "The substance of the rule that choses in action are not assignable is gone, and the shadow only remains. The assignee is recognized as the real party, except as to bringing the suit in his own name. The rule that choses in action are not assignable is now considered in a court of law as a maxim without use and without convenience." In Fetterman *v.* Plummer's Admin'r (9 S. & R. 20), where the assignor of a chose without interest was held to be a competent witness for the use plaintiff, the same learned Judge said: "In these equitable assignments the name of the assignor must from necessity be used; the form of action requires that it should be used as plaintiff, *nor could he refuse its use.* The nominal plaintiff is not liable for costs where the transfer is *bona fide*, and

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against the equitable plaintiff. "The name of the trustee," said Chief Justice TILGHMAN, "is used by the cestui que trust, who is liable for the costs of suit, and is in fact the only person interested. We have acted uniformly on this principle in our courts of law." In Jones *v.* Martins, the Court said: "For all questions of substance the equitable plaintiff is the real plaintiff; he is responsible for costs, and the Court would interfere at once to prevent the nominal plaintiff from discontinuing the action or releasing it." In Chambersburg Insurance Co. *v.* Smith (1 Jones, 120), it was held not to be necessary, to enable a use plaintiff to carry on a suit in the name of the legal plaintiff, that the legal plaintiff should authorize the suit. "It is contended," said COULTER, J., "that as Smith had not expressly authorized the suit, it cannot be carried on in his name, but that is a mistake; he did not interdict it; he said he presumed that Nichols had a right to his name without asking his consent. The Court would not have permitted the trustee to arrest the suit. The cestui que trust is answerable for costs, and has a right to impetrate the writ and carry on the suit for his own benefit. All this has been ruled in many cases."

The principles deducible from all these cases are that in Pennsylvania the equitable owner of a chose in action is entitled by virtue of his ownership to bring an action in the name of the legal plaintiff for his use in order to recover the chose, that the party whose name is thus necessarily used as a legal plaintiff cannot prevent such use of his name and will not be permitted to arrest or discontinue the action, that when the name of the use plaintiff is not mentioned, he may nevertheless be sought out and made responsible for costs, that the defendant may set up any just defence which he has against the use plaintiff, as, for example, a set-off, that when the action has been commenced in the name of the legal plaintiff, without his knowledge or against his consent, he is not liable for costs, that he is only liable for costs where he has authorized the action, and that the use plaintiff if the action is defeated is always liable for costs where the action has been brought with his privity or consent. Nor are these principles impugned by the authorities cited by the defendant. In Montgomery *v.* Cook (6 W. 238); Armstrong *v.* Lancaster (5 W. 68); Blanchard *v.* Commonwealth (6 W. 309); Commonwealth *v.* Lightner (9 W. & S. 117); Hamilton *v.* Brown (6 H. 87), all that was determined was that where the action is brought by the legal plaintiff, and stands entirely upon the legal title, the defendant has no concern with the title of the use plaintiff and will not be permitted to controvert it, or to make that an issue in the cause, for the reason that the legal title being sufficient for the recovery, and such recovery being a bar to any other action, the defendant cannot defeat the action by showing a defect in the title of the equitable plaintiff. Therefore where a recovery may be had on the naked legal title, that of the use plaintiff need not be traced. Under such circumstances an assignee need show no title in himself. It is enough to show a right in the legal plaintiff. "Equity will not in such cases regard the assignee further than *at his instance* to enforce the remedy and perfect the rights derived:" (BELL, J., Hamilton *v.* Brown, 6 H. 89.) But those decisions do not apply to and do not touch the case in which the legal plaintiff, whose name is used without his authority and against his consent, repudiates the action, and in which it is apparent from the facts that the action could not be maintained at all by the legal plaintiff except for the maintenance of the right set up by the equitable plaintiff and to enforce his rights. The holder of a promissory note who has received it under circumstances which do not allow him to sue upon it in his name brings a suit in the name of the payee to his use. It could not be pretended that, under such circumstances, the legal plaintiff could maintain an action for his own benefit because he had parted with the note, yet it was held that the equitable plaintiff might recover in the name of the legal plaintiff. (Jones, for the use of Parker, *v.* Martins, 1 Har. 614.) A. gives a bond to B. It is taken up and paid by C., under an understanding with A. that he is to become his creditor instead of B. If B. were to bring an action upon the bond for his own use, it is plain that he could not recover, for he has been paid and has parted with the bond; but will any one say that C. cannot maintain an action upon it in the name of B. for his use? If B. had not been paid and the action were brought in his name to the use of C., A. would have no concern with the equitable plaintiff, unless he wished to plead a set-off against him, and he would not be permitted to contest C.'s equitable title. The legal title is in such case sufficient for the recovery, and there is no need to look beyond it. If a controversy arises in regard to the money the Court will see that the party gets it who is entitled to it, but it is no concern of A. who gets it. The recovery by the legal plaintiff is a perfect protection to him. Now the case which I have last put is a perfect illustration of the point decided in the cases cited by the defendant. Yet it is plain upon the cases which I have previously referred to that B. although paid, and although he could not maintain any action upon the bond for his own benefit could not prevent the use of his name as legal plaintiff in an action brought upon the bond by C. in the name of B., to his use. The Pennsylvania authorities upon this subject are not contradictory, but entirely reconcilable with each other. I might further illustrate the point by reference

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to the numerous cases which have arisen upon the doctrine of subrogation, in which it has been held that a person entitled in equity to be subrogated to the rights of an original creditor is entitled to use the name of that creditor to enforce his own rights where it is plain that, except for that purpose, the action could not be maintained in the name of the original creditor. The distinction between the cases cited by the defendant and the present case is, that in those cases the action was maintainable by the legal plaintiff, whether there had been an equitable assignment or not, and so it did not concern the defendant whether there had been an assignment or not; but in the present case the action cannot be maintained unless there has been an assignment in fact or in law of the notes in suit. The decision of Judge SHARSWOOD, in Mississippi R. R. Co. *v.* The Southern R. R. Association (8 Phila. R. 107), which is also relied upon by the defendants, does not touch the present question, and went wholly upon the want of priority of contract. The point decided was simply that where A. makes a contract with B. to pay certain moneys to C. for the benefit of B., and the contract is for the benefit of B. alone, and there is no contract with C., C. cannot sue A. upon that contract. It was a modification of and exception to the doctrine laid down in Blymire *v.* Boistle (6 W. 182), and did not enter into any discussion of the right of an equitable purchaser of a debt to use the name of the former creditor as a legal plaintiff in a case where the former creditor has ceased to have any interest in the question.

In the case now before us it appears from the depositions that Thomas White, the equitable plaintiff, claims that his father, Alexander M. White, took up the notes of Thomas White, deceased, with his own money, and under circumstances which entitled him to be regarded as the purchaser of the debt in fact or in law, and to sue upon the notes in the name of the original payee to his use. If he can establish his right to do so he is, according to our view of the law, plainly entitled to maintain the action in its present form, with or without the consent of Mr. Coffey. If he cannot establish this his action must fail. But it is clear that we ought not to determine this upon a mere rule to strike off the warrant of attorney. To do so would be to decide the whole case and to turn the plaintiff out of Court without an opportunity to make out his case. We are no further concerned with the depositions which have been taken upon the present rule than to determine that the plaintiff's attorney in prosecuting this case represents a party who is entitled to be heard, and to have his case presented and decided by due course of law. The facts are to be decided by a jury, and the questions of law involved in them by the Court. To anticipate the jury in the finding of the facts would be to throttle the plaintiff's case before it has been tried, nor can the law which is to be applied to the case be determined until the facts are laid before the only tribunal which is competent to pass upon them. All that we determine now is, that the plaintiff's claim is a good one if he can establish it; that is, if he can establish the fact that Alexander M. White was a purchaser of these notes, or paid them under circumstances which would in a court of equity entitle him to be subrogated to the former rights of the payee. If he can establish this he has a right to maintain the action in a Pennsylvania court of law, in the form in which it is brought, without the consent of the legal plaintiff, whose name he is obliged to use, and we have no right to turn him out of doors without an opportunity to establish this. I may add that, in view of the refusal of the legal plaintiff to give his consent to the action, and of his positive disclaimer of record of all responsibility for it, it is entirely clear to us that he cannot in any event be made responsible for costs. It is also, in our opinion, indubitable that under the facts upon which the plaintiff's action depends, and the circumstances under which it is brought, it is altogether competent for the defendant to deny the title of Alexander M. White and Thomas White to the choses in action which are the subject of dispute, and to show that neither of them have any title in equity to the sealed notes. Indeed it must be quite apparent that the equitable plaintiff cannot maintain his action without showing that title himself, for inasmuch as the legal plaintiff repudiates the action and denies that he has any title to sue, or that the equitable plaintiff has any right to use his name, the latter cannot possibly succeed without showing an equitable title in himself, and that by reason of that title, he has a right to use the name of the legal plaintiff as that of a naked trustee for himself. If the plaintiff is put to show this, as we think he certainly is under the circumstances of this case, it cannot be doubted that the defendant may controvert it, and prove that the plaintiff has no such title. Plainly no recovery could be had here upon the legal title alone, for the legal plaintiff has received the value of the notes and parted with them, and the plaintiff's whole case is that, notwithstanding that fact, they are not extinguished, but that Alexander M. White paid them under such circumstances as gave him a good equitable title to them which carried with it, to him and his assignee, the right to use the name of the payee for their recovery, and if the equitable plaintiff cannot establish that his action must come to nought.

Rule discharged.

Opinion by THAYER, P. J.

[*Cf.* Kennebec Ice and Coal Co. *v.* Wilmington and N. R. Co., 13 WEEKLY NOTES, 162.] W. M. S. JR.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JAN. 31, 1884.* [No. 8.

Supreme Court.

Oct. and Nov. '83, 104. October 4, 1883.

Pennock, to use of Blair, v. Stewart. In re Petition of Samuel M. Stewart.

Mortgages—Act of April 3, 1851—Right of mortgagor, on petition, to pay into Court amount claimed to be due, and have mortgage satisfied—Interest and costs—Effect of such proceeding on sci. fa. previously issued under Act of 1705.

Where a mortgage is due, and there is a dispute as to the amount due, the mortgagor may, as a matter of right, under the Act of April 3, 1851 (P. L. 871, sect. 14), upon petition to the Court of the county where the mortgaged premises are situate, pay into Court the principal and interest claimed by the mortgagee to be due, together with commissions and costs, etc., and the Court shall thereupon order the mortgage to be satisfied of record.

The pendency of a scire facias, issued on the mortgage by the mortgagee under the Act of 1705, does not deprive the mortgagor of the above stated right, provided the sci. fa. has not been prosecuted to final judgment before presenting the petition, and payment of the money into Court.

The amount to be paid into Court, in such proceeding under the Act of 1851, must include all interest and costs, etc., accrued up to the date of actual payment into Court.

Upon such payment proceedings upon the pending scire facias will be stayed, and the Court will proceed to determine, as provided by the Act of 1851, any dispute between the parties as to the true amount due on the mortgage.

Error to the Court of Common Pleas of Westmoreland County.

This was, in the Court below, a petition by Samuel M. Stewart praying leave to pay into Court the amount "admitted to be due" on a certain mortgage, given by him, with interest, etc., the mortgage to be thereupon marked satisfied by order of Court. The Court subsequently permitted an amendment, whereby the petitioner prayed leave to pay into Court the amount "claimed to be due" on said mortgage, so as to bring the proceeding within the Act of April 3, 1851 (P. L. 871).*

The facts of the case were as follows: On January 4, 1883, a scire facias sur mortgage was issued in the Common Pleas of Westmoreland County, by Isaac M. Pennock, for the use of John Blair, against Samuel M. Stewart, upon a certain mortgage, dated June 6, 1877, delivered June 19, 1877, duly recorded, given by defendant to the legal plaintiff, and by him assigned on June 19, 1877, to the equitable plaintiff, to secure the payment of $5500, within two years from the date thereof with interest payable semi-annually. It appeared that at the time of said assignment of the mortgage Stewart had executed and delivered a certificate of no defence. This sci. fa. was returned served January 12, 1883.

On January 6, 1883, two days after the issuing of said sci. fa., the said Samuel M. Stewart, the mortgagor, presented his petition to the Court of Common Pleas of Westmoreland County (in which county the mortgaged premises were situate), setting forth that the sum of $5500, which the mortgage was given to secure, included a large amount of usury, and also a bonus which had been retained by the mortgagee, and that the true amount due on the date of filing the petition, for principal and interest, etc., was $5703.37; which amount the petitioner had on said date tendered to the assignee of the mortgage, who had refused the tender, and thereby prevented the consummation of a pending agreement for the sale of the mortgaged premises.

The petitioner prayed for a rule on said Blair, the assignee of the mortgage, to show cause why said sum of $5703.37 should not be paid to him or paid into Court, and thereupon the mortgage be marked satisfied of record by order of Court.

The Court granted a rule to show cause as prayed for, and directed proceedings on the sci. fa. to be stayed pending the disposition of said rule.

John Blair, the assignee of the mortgage, filed an answer to the rule, denying knowledge of the alleged usury, etc., averring that he purchased said mortgage from I. M. Pennock, the mortgagee, for the full sum of $5170, in cash, applying enough to satisfy existing liens entered of record against the mortgagor, and paying the balance to Pennock; and that he took the mortgage on the faith of a certificate of no defence executed by the mortgagor.

of money claimed by the said mortgagee or trustee under the mortgage or assignment, stating, if any, the objections to the claim of such mortgagee or assignee; and the Court, upon payment of the said amount claimed into

The respondent also filed the following exceptions to the petition and rule granted thereon: (1) The equity powers of the Court cannot be invoked to prevent the respondent from proceeding in a legal way to collect his debt, when that legal way, to wit, by scire facias sur mortgage, gives the petitioner the opportunity of making any defence he has to the whole or any part of the respondent's claim. (2) The petition in this case is not based on any law now in force in this State.

Thereupon, on motion of petitioner for leave to amend the prayer of his petition, the Court filed the following order, February 15, 1883:—

"It is now asked that the petition and order of Court be so amended that upon the amount *claimed to be due* being paid into Court the mortgage be marked satisfied, under the Act of April 3, 1851. This, perhaps, would have been the proper petition and order at first, clearly so if a sci. fa. had not issued. The petitioner, however, asked leave to pay into Court the amount *admitted to be due*, and have the mortgage satisfied. This could not be done under the Act. It might be proper as a tender in defence on the sci. fa.

"We are inclined, however, to allow the petitioner to pay into Court the amount *claimed to be due*, together with all costs which have accrued on the sci. fa., and then have the mortgage marked satisfied, otherwise the case must proceed on the sci. fa.

"And now, February 15, 1883, the matter is referred to Mr. McConnell to report the amount claimed to be due on the mortgage together with the costs which have accrued on the sci. fa."

Said Blair, thereupon, on March 3, 1883, filed a formal motion to dismiss the proceedings on the petition, and to allow plaintiff to proceed on his sci. fa. sur mortgage. March 5, 1883, ordered on argument list.

On March 4, 1883, the commissioner filed his report, setting forth that the entire amount of debt and interest claimed by the plaintiff to that date, together with attorney's commission, prothonotary's percentage, and costs "accrued at this date," was the sum of $7171.32.

The case was argued on the above motion and on the report of the commissioner, April 10, 1883, and on April 28, 1883, the Court (HUNTER, P. J.) filed the following opinion and decree:—

"This is an application under the Act of April 3, 1851, to pay money into Court and have mortgage decreed satisfied. The application originally was to pay into Court the amount admitted to be due. This was refused and the commissioner directed to report what sum was claimed to be due. This he has done and finds the sum to be $7171.32.

"It is contended that after sci. fa. the application comes too late. The sci. fa. issued January 4, 1883. The application came two days thereafter. The Act is silent as to when application may be made, only that the mortgage be due. I know of no case where the application was made after sci. fa., except the case of Assurance Company *v.* Power, 12 Philad. Rep. 377, where the application was refused on another ground, the Court simply say there, remarking on the point raised here, that they did not think it necessary to decide whether such petition was in time after the proceedings had progressed so far on the sci. fa. in that case.

"The only hesitancy the Court has had here is that there seems to be such questions of fact as may possibly require an issue—questions that could have been well settled on the trial of the sci. fa.—yet I think this application is a matter of right under the Act.

"And now, April 28, 1883, leave given the defendant to pay into Court the amount claimed to be due as found by the commissioner, to wit, the sum of $7171.32, and upon the payment of said sum into Court, it is ordered and decreed that satisfaction be entered upon said mortgage by the recorder of deeds."

The plaintiff, having excepted to said opinion and decree, took this writ of error, and filed the following as his specifications of error:—

"The Court erred in making the final decree as it did, and in the opinion filed therewith, for the following reasons:—

"First, That the application of the mortgagor, the defendant, was not a matter of right, under the Act of April 3, 1851.

"Second, That a writ of scire facias sur mortgage, having been issued and in the hands of the sheriff before the application of defendant was made, he could not avail himself of the provisions of said Act.

"Third, In not fixing any time for the payment of the money into Court, and in not requiring the defendant to pay interest on the principal sum from the 4th of March, 1883, to the date of actual payment into Court."

Latta (with him *Gill*), for the plaintiff in error.

The Act of 1705 affords a plain remedy for the collection of a mortgage, which secures every right of defence to the mortgagor. After the mortgagee has brought suit under that Act he has a legal right to proceed therein to trial by jury, and jurisdiction cannot be taken away against his consent, by a summary proceeding by petition to the Court. The Act of 1851 neither repeals the Act of 1705, nor affects the remedy thereunder. It may have been intended to afford relief to a mortgagor where the mortgagee refused to proceed to collect his money after it became due, or after tender; or merely to reach cases of in-

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solvents who have mortgaged or assigned their real estate for the benefit of creditors. Under the construction of the Court below, the effect would be to change and impair the contract of security evidenced by the mortgage.

Even if the Act of 1851 were applicable to this case, it could not have the effect, as given to it by the Court below, of stopping the running of interest on the debt on March 4, 1883, when the commissioner filed his report, fifty-five days before the final order was made, and allow the defendant an indefinite time for paying the money into Court. In point of fact, the money has not yet been paid into Court. And if paid into Court, the defendant should not be permitted thereby to stop the running of interest and compel the plaintiff to litigate with an insolvent debtor without security for accruing costs. The mortgagor has violated no duty, has committed no laches, and he cannot be thus summarily deprived of a right vested in him by the common law and the Act of 1705. A statute giving a new remedy or creating a new jurisdiction, affecting the rights of others, should be strictly construed.

East Union Twp. *v.* Ryan, 86 Pa. St. 459

Moorhead (*Head* with him), for the defendant in error.

The case comes directly within the words of the Act of 1851. The mortgage being due the mortgagor asked and obtained leave to pay into Court the whole amount claimed to be due, with interest, etc. It is not claimed that the Act is unconstitutional, or that it has been repealed, but it is said that a sci. fa. having issued on the mortgage, the petition was too late. But no such exception can be read into the Act of 1851. There is no reason why, if the mortgagor can invoke the Act of 1851 prior to the issuing of a sci. fa. under the Act of 1705, and thereby deprive the mortgagee of adopting that remedy, he cannot afterwards do the same, any time prior to final judgment on the sci. fa. The Act of 1851 affects the mortgagee's remedy, not his right. But if the two Acts were necessarily repugnant, the earlier Act must give way. The mortgage was dated long after the passage of the Act of 1851, and the mortgagee took with notice of the existing law, and he or his assignee cannot deprive the mortgagor of his rights thereunder. The plaintiff in error, by taking his writ of error is himself responsible for the money not having been actually paid into the Court below.

October 22, 1883. THE COURT. The Act of April 3, 1851 (P. L. 871, § 14), under which the petition in this case was presented, provides that the mortgagors in any mortgage or the assignors in any deed of assignment in trust for the benefit of creditors, shall have the right, upon application to the Court of Common Pleas of the county where the land mortgaged or assigned is situated, by bill or petition setting forth the facts, to pay into Court the amount of money claimed by said mortgagee or trustee, stating the objections, if any, to the claim of such mortgagee or assignee; and the Court, upon the payment of said amount claimed into Court, shall order and decree that satisfaction shall be entered upon such mortgage, or that the assignee or assignees shall reconvey the assigned property, and the Court shall proceed to hear and determine the objections to the payment of any part of the money in Court as to right and justice shall belong and decree accordingly. (Purd. Dig., 481, pl. 118.)

In cases of dispute between mortgagor and mortgagee as to the amount actually due on the mortgage, the purpose of the Act is to enable the former to bring into Court the full amount claimed by the latter, including debt, interest, commissions, costs, etc., to the day of payment, and thus substitute the money in Court for the security which the mortgagor desires to have satisfied.

The application, in cases coming fairly within the terms of the Act, is a matter of right, and upon the payment into Court of the full amount claimed it is the duty of the Court to order satisfaction of the mortgage. The mortgagee may then, by leave of Court, take out so much of the money as is not in dispute, and the residue, if not invested by order of Court or taken out by one of the parties on giving approved security for its payment when required, remains in Court to abide its final order in the premises. Strictly the amount claimed should, on leave granted, be paid into Court before the order of satisfaction is made, but when payment of the money into Court is made a condition precedent to the operation of the order or decree of satisfaction, it practically amounts to the same thing; but, in all such cases, a reasonable time within which the mortgagor may pay the money into Court should be specified in the order, and as a general rule proceedings on the scire facias sur mortgage should not be stayed until the amount claimed is actually paid into Court. Until then the mortgage security, with all its incidents, belongs to the mortgagee, and he has a right, save in exceptional cases, to proceed thereon until the mortgagor has placed himself in a position to demand that satisfaction be entered on the security. This he can do only by paying into Court the full amount claimed and thus substituting the money for the mortgage security.

The allegations of fact, upon which the application in this case is based, are fully set forth in the petition, and they clearly bring the case within the provisions of the Act. As amended by

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leave of Court, the substance of the petition is, *inter alia*, that a dispute exists between petitioner and the assignee of the mortgage as to the amount actually due thereon; that petitioner having contracted to sell and convey the farm incumbered by the mortgage, tendered the assignee and owner thereof the amount legally due thereon, but he refused to accept the same and demanded a much larger sum, and thereby prevented, for the time being at least, the consummation of the sale, etc., to the great injury of petitioner. The prayer, as amended, is that petitioner have leave to pay into Court the amount claimed by the assignee of the mortgage, and that, upon payment into Court of that amount, the Court will order and decree that satisfaction be entered on the mortgage, etc., in accordance with the terms of the Act.

For the purpose of ascertaining the amount of money claimed by the mortgagee a commissioner was appointed, who reported to the Court that the amount, including interest to March 4, 1883, attorney's commissions, prothonotary's percentage, and costs on the sci. fa. sur mortgage to same date was $7171.32. It is not denied that this is the correct amount claimed at that date, but the decree complained of was not made until nearly two months thereafter. In the mean time additional interest had accrued on the mortgagee's claim, together with additional attorney's commissions and prothonotary's percentage, etc. The amount specified in the decree should have included all these up to the day the money is actually paid into Court. As already stated, the Act contemplates the payment into Court of the full amount claimed by the mortgagee, with interest and all costs to the date of payment. Nothing less will satisfy the requirements of the Act. In that respect the decree is erroneous, and must be reversed or modified.

A brief application of these principles to the matters complained of in the several assignments of error will suffice. The first specification, "That the application of the mortgagor was not a matter of right, under the Act of April 3d 1851," is not sustained. It is apparent from what has been said that the Act was intended for just such cases as that presented in the petition, and the application when put in proper form, as it was by the amendment, was clearly a matter of right.

final adjudication of the mortgagee's claim, which could not be questioned in any collateral proceeding.

The last specification of error is sustained. In the order of Court a reasonable time should have been fixed within which the money should be paid into Court; and there was error in not requiring the mortgagor to pay, in addition to the amount specified in the order, interest on the principal sum from March 4, 1883, until the money was actually paid into Court, together with attorney's commissions and prothonotary's percentage thereon. If this had been done the decree would have been substantially correct.

The order staying proceedings on the scire facias has not been assigned for error, and it is therefore unnecessary to add anything to what has already been said on the subject.

The decree is reversed at the costs of the mortgagor, Samuel M. Stewart; and leave is now granted him to pay into the Court below, within twenty days from this date, the amount claimed by the assignee of the mortgage, to wit, seven thousand one hundred and seventy-one dollars and thirty-two cents ($7171.32), together with additional interest on the principal debt from March 4, 1883, until the whole amount is paid into Court, and also attorney's commissions of five per cent. and prothonotary's percentage on said additional interest, and, upon payment into Court, within the time specified, of the whole amount claimed by the assignee of the mortgage, it is ordered and decreed that satisfaction be entered on the mortgage; and it is further ordered that the record, with a certified copy of this opinion, be remitted to the Court below with instructions to carry into effect the foregoing decree and proceed with the case according to law.

Opinion by STERRETT, J.

PAXSON, J., absent.

[*Cf. In re* Bedford Street Mission, 1 WEEKLY NOTES, 100.]

A. A. O.

Oct. & Nov. '83, 30. Oct. 15, 1883.

Weaver et al. v. Craighead et al.

Ejectment—Evidence—Estoppel—Notice—Advertisements and handbills.

At law the testimony of one witness to establish an oral

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An advertisement of the sale of property in a newspaper and by handbills, unknown to the party sought to be affected by it, does not amount to notice; nor is it competent testimony as a make-weight in support of the allegation of fraud.

Error to the Common Pleas of Washington County.

Ejectment, by James Craighead *et al.*, doing business as the Farmers' Deposit Company of Canonsburg, against J. P. Weaver and Alexander Gaston, to recover a tract of land situate in North Strabane Township, Washington County, on which is erected a frame dwelling-house. Plea, not guilty.

On the trial, before HART, P. J., the following facts appeared: On January 27, 1876, Weaver, by articles of agreement, contracted to sell the above tract of land to Samuel Chamberlain, a harnessmaker, etc., of Canonsburg, for the sum of $1500, payable as follows:—

"Eight hundred dollars to be paid in harness, or buggies, or anything in the second party's line, at the lowest cash market price. . . . On the first day of May, 1876, the party of the second part agrees to pay to the party of the first part, five hundred dollars, also to make him a title clear of all incumbrances to forty acres of land situated in Waubamsee County, Kansas, at which time the party of the first part agrees to make to the party of the second part, a title to said house and lot clear of all incumbrances, and also give full possession."

About May 1, 1876, Chamberlain paid Weaver $250, half the cash payment, and transferred to him the Western land. Chamberlain testified that it was then agreed between them that he should retain the balance of the cash payment, paying interest thereon; and that Weaver should retain possession of the land, paying $5 a month rent, until he built a house for himself. There was no time specified for the payment of the $5 a month. This testimony was flatly contradicted by Weaver, and slightly corroborated by another witness.

The article of agreement was never recorded, nor a deed made, nor possession given in pursuance of it. The total amount paid by Chamberlain in harness, cash, and land, was $705, leaving a balance of $795 due thereon.

On July 12, 1876, Chamberlain made a voluntary assignment for the benefit of his creditors, and shortly afterward moved to Pittsburgh. The assignees advertised for sale, in the Canonsburg *Herald* and by handbills, the interest of Chamberlain in this property. They failed to sell at public sale, and afterwards, at private sale, sold it to plaintiffs for the consideration of $50. The deed therefor was delivered January 27, 1877, and recorded April 7, 1877. Plaintiffs made a tender to Weaver, which it is admitted was insufficient, and was refused.

Weaver, having been in continuous possession under his recorded title, conveyed the property to Alexander Gaston, his brother-in-law, by deed dated March 5, and recorded March 6, 1877, for the consideration of $950. After this sale Weaver still retained possession of the property, and plaintiffs brought the ejectment against him alone.

Gaston, on his own petition, was admitted as a defendant, and rested his defence on the grounds that he was a *bona fide* purchaser for value, without notice or knowledge of any outstanding title in Chamberlain or plaintiffs. He testified that Weaver met him in Washington on March 6, and offered to sell him the property; that the deed was already prepared and acknowledged; that they had never before that time had any conversation about him buying the property; that he had the records examined and found nothing against the property; that he left the deed for record the same day; that he did not take the Canonsburg paper, and had not seen the handbills; that he did not know of any outstanding title in Chamberlain or plaintiffs; that he paid $100 of the purchase-money that day by a note of Weaver's, which he held; the balance a day or so afterwards.

Plaintiffs offered to prove by McConnell, one of the assignees, that "Alex. Gaston having sworn that he had no notice of this property having been sold to Chamberlain, the purpose now is to show that the property was advertised, and the handbills scattered all over the county." Objected to by defendants because the offer does not show any direct knowledge brought home to Gaston of these advertisements or handbills. Objection overruled. Exception. (Eighth assignment of error.)

Plaintiffs presented, *inter alia*, the following point:—

(1) The construction of verbal contracts is for the jury, and therefore it is for them to determine upon the evidence whether Weaver became the tenant of Chamberlain in May, 1876. Affirmed. (First assignment of error.)

Defendants presented, *inter alia*, the following point:—

(10) That the plaintiffs, in this case, claiming title under the article of agreement between Chamberlain and Weaver, and seeking to enforce a specific performance of that contract, were bound in equity to pay or tender the full balance upon said contract in cash before bringing suit, and, if the jury find from the evidence that this was not done, their verdict must be for the defendant.

Answer. This is true, and the plaintiff cannot recover in this action, unless, as I have said, there is, in the opinion of the jury, clear and satisfactory proof of the alleged tenancy of Weaver; and also that the evidence clearly establishes, to the satisfaction of the jury, that the pur-

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chase of Gaston from Weaver was fraudulent and collusive. (Third assignment of error.)

(12) Taking all the testimony of Samuel Chamberlain, as to the agreement of Weaver to pay $5 per month rent for the time he remained in possession after May 1, 1876, as true, it does not establish such a tenancy as would enable Chamberlain or his vendees to recover the land in dispute until they have paid the amount which they were required to pay under the articles of agreement of January 27, 1876.

Answer. Refused. The question is one of fact for the jury to determine, under the instructions already given. (Fifth assignment of error.)

(13) Even if the jury believe that Weaver agreed to pay Chamberlain $5 per month as rent for the premises for the time he remained in possession after May 1, 1876, this in itself was no waiver of his and his vendees' right to hold possession of the land after the determination of such lease, until Chamberlain or his vendees should pay the purchase-money which was to be paid, by the terms of the agreement under which they claim title, before such possession was to be delivered.

Answer. This also is a question of fact for the jury under instructions of the general charge. (Sixth assignment of error.)

(5) That the evidence of William McConnell, that Chamberlain's interest in the land in dispute had been advertised in the Canonsburg *Herald*, and by printed handbills, without any proof to show that Gaston, the subsequent purchaser, ever saw or read the paper or handbills, is too general, uncertain, and indefinite to destroy Gaston's title, and the jury are not warranted in inferring notice from such evidence.

Answer. It is proper evidence as explained in the general charge on the question of actual fraud. The weight of the evidence is for the jury. (Ninth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"Now the rule of law where that relation is established is, that the tenant, unless he has been tricked into taking a lease by some fraud, is not allowed to dispute his landlord's title; and hence, if Weaver became the tenant of Chamberlain, he could not set up any title in himself, or any one else, superior to the title of Chamberlain. If he desired to do so, it was his duty to retire from the tenancy, and bring an action of ejectment against Chamberlain. But, gentlemen, the duty verdict for the plaintiff." (Eighth assignment of error.)

"Then as evidence tending to show that Mr. Gaston had notice of Chamberlain's title, the plaintiff was allowed to prove that the assignees, before they made sale of this property, advertised it somewhat extensively by handbills which were sent out to the neighboring stores and post-offices, the nearest one to Mr. Gaston being at McConnell's Mills, about four miles from Gaston's residence. The sale was also advertised in the Canonsburg paper, but not in any Washington paper so far as any one could testify; and Mr. Gaston swears that the only newspaper he was taking at the time was a Washington paper. Now the testimony in regard to the advertisements and handbills giving notice of this assignees' sale was allowed, as being some evidence upon the question of fraud and collusion already developed by the evidence of Mr. Gaston." (Tenth assignment of error.)

Verdict and judgment for plaintiffs.

Defendants thereupon took this writ, assigning for error the answers to the foregoing points, and the portions of the charge above quoted.

J. W. Donnan (*A. Donnan* with him), for plaintiffs in error.

It is conceded that the defendants in error are not entitled to recover the land in dispute by virtue of any title under the agreement of January 27, 1876, because of the failure to pay or tender the balance due upon the contract.

The question of estoppel is based solely upon the testimony of Chamberlain. Assuming it to be true, its sufficiency for that purpose was a question of law for the Court, and not a fact for the jury.

Keating *v.* Orne, 27 Smith, 89.
Lewis *v.* Carstairs, 5 W. & S. 205.

The defendants in error were bound to show every element necessary to constitute the estoppel; and if, upon the facts in proof taken as true, any ingredient is wanting, the Court should so instruct the jury.

DeHaven *v.* Landell, 7 Casey, 120.
Groft *v.* Weakland, 10 Casey, 304.

The estoppel which arises out of the relation of landlord and tenant is not a technical, but an equitable estoppel, and depends for its exercise upon the particular circumstances of each case.

Den *v.* Ashmore, 2 Zab. 264.
2 Smith's L. C. 654–7–8.
Bigelow on Estoppel, 371.

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between Weaver and Chamberlain estops Chamberlain, until he has paid the purchase-money, from disavowing Weaver's title.

Bigelow on Estoppel, 414, 415.
Bush *v.* Marshall, 6 How. 284.
Galloway *v.* Finley, 12 Peters, 264.
Carpenter *v.* Thompson, 3 N. H. 204.
Meyers *v.* Hill, 10 Wright, 9.

McConnell's testimony, that the property in dispute had been advertised for public sale by Chamberlain's assignees, without proof that Gaston, the subsequent purchaser, ever saw or read the advertisements, was inadmissible to prove notice, or as evidence tending to show fraud.

Lincoln *v.* Wright, 11 Harris, 80.
Beltzhoover *v.* Blackstock, 3 Watts, 20.
Union Ref. Co. *v.* Bushnell, 7 Norris, 89.
Kellogg *v.* French, 15 Gray, 354.

M. C. Acheson (*A. W. Acheson*, and *I. Y. Hamilton* with him), for defendants in error.

The evidence of the tenancy, with the instruction that it must be established by clear proof, was rightly submitted to the jury.

McFarland *v.* Newman, 9 Watts, 59.
Boyer *v* Smith, 3 Watts, 449.

The evidence of McConnell was not admitted as proof of notice, but was allowed to go to the jury with the evidence of relationship and other suspicious circumstances, on the question of fraud. On that ground the evidence was admissible, and the instruction to the jury correct.

Trefts *v.* King, 6 Harris, 157.
White & Tudor's L. C. in Equity, 148–9.
Walter *v.* Gernant, 1 Harris, 517.

November 12, 1883. THE COURT. On May 1, 1876, upon the payment of five hundred dollars and the conveyance of forty acres of land situated in Kansas, Weaver was bound by his covenant to convey the lot in controversy to Chamberlain and give full possession. Soon after that date Chamberlain paid two hundred and fifty dollars, and conveyed the forty acres to Weaver. Then, if Chamberlain's testimony is true, by oral contract, he rented the lot to Weaver for five dollars per month, until such time as he should build a house; no specified time; and Weaver extended the time for payment of the remaining two hundred and fifty dollars for an indefinite period. It was competent for the parties to so agree, and the verdict establishes that they did, for the present consideration.

The Court was bound to submit the testimony, no matter how flatly contradicted; whether there was a contract and what its terms, was for the jury to determine. In equity to establish a claim that is denied, two witnesses, or the equivalent of two, are necessary; but this claim under the alleged lease is at law. The first, fifth, and sixth assignments are not sustained.

For many purposes the possession of Weaver, was the possession of Chamberlain. Taking a lease was an acknowledgment of the landlord's right of possession. Chamberlain had the equitable title upon which he could have recovered possession in an ejectment, after tender or payment of all the purchase-money that was due. Had Weaver not become his tenant, Chamberlain would probably have paid the balance and required possession. In violation of his written contract with Chamberlain and of the oral lease, Weaver sold and conveyed the land in fee simple to Gaston. Now he cannot restore possession if he would, for Gaston claims to be an innocent purchaser. There are no peculiar equities to except this case out of the general rule, that a tenant is estopped from denying his landlord's title. Had Weaver been honest and fair, and remained in position to convey and give possession on receipt of the purchase-money, it would be doubtful if his case would then be an exception to that rule; now it is against equity that he should deny the plaintiffs' right to recover possession because they did not tender the purchase-money before bringing suit. He cannot complain of the matters set forth in the third, fourth, and seventh assignments.

But one question remains that need be noticed, namely, the admission of testimony that Chamberlain's interest in the property was advertised for sale in a newspaper and by handbills, without evidence that Gaston had knowledge thereof, and submitting such testimony to the jury as "being some evidence upon the question of fraud and collusion." That, we think, was error. It is well settled that such publication, unknown to the party sought to be affected by it, does not amount to notice. The publication was not made by either Weaver or Gaston, and was not of the res gestæ of their transaction. It was the act of Chamberlain's assignee. If Gaston had knowledge of it, he was not an innocent purchaser; if he had no knowledge of it, how can it be evidence that he perpetrated a fraud? The law does not make a publication in the newspapers and by handbills either constitute notice to a purchaser, or evidence that he colluded with the vendor to defraud another person of his rights. If it did, no purchaser would be safe. The defendant in error cites Walter *v.* Gernant (13 Pa. St. 517), and Trefts *v.* King (18 Id. 157) in support of the position that the testimony was admissible.

Neither of these cases touches the admissibility of newspaper publications, and in each the testimony adduced to affect the purchaser with fraud was of words and acts by himself, in addition to the circumstances of the sale and purchase; in one the near relationship of the parties was also material.

We are not convinced that the act or declaration of a third person, though a claimant of the

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property, unknown to the purchaser and unconnected with his negotiations with the vendor, are competent testimony as a makeweight in support of the allegation of fraud.

The eighth, ninth, and tenth assignments are well taken, and the—

Judgment is reversed and venire facias de novo awarded.

Opinion by TRUNKEY, J. G. P. H.

July, '83, 7. April 18, 1883.

Rigony et al. v. County of Schuylkill.

Negligence — Bridges — Counties — Duty of repairing bridges—Acts of March 6, 1860, and March 21, 1861.

The Act of March 6, 1860, § 2 (P. L. 105), requires the townships and boroughs of Schuylkill County to keep in repair the county bridges within their limits. A supplemental Act was passed March 21. 1861 (P. L. 163), providing that if, in the opinion of the borough auditors the cost of the repairs would exceed $20, and they should notify the County Commissioners of that fact, the commissioners should cause the repairs to be made at the expense of the county:

Held, that both these prerequisites must concur, to render the county liable for an accident occasioned by a failure on the part of the county to make repairs to a bridge.

In the above case the Court charged in substance that if there were gross and obvious defects in the work; *or*, if there was any defect in the original structure; *or*, if the bridge was not built of proper material of sufficient strength, the county would be liable:

Held, that the instructions were proper, and that the language of the Court was not such as to warrant the inference that a combination of all the above elements was necessary to constitute liability on the part of the county.

Error to the Common Pleas of Schuylkill County.

Case, by Catherine Rigony, widow of James Whalen, deceased, and John Rigony, her husband, and John Whalen, Martin Whalen, and Frank Whalen, minor children of said James Whalen, by their next friend, Catherine Rigony, against the county of Schuylkill, to recover damages for the death of said James Whalen, by the falling of a county bridge in the borough of Gilberton, Schuylkill County, through the alleged negligence of the defendant. Plea, not guilty, etc.

On the trial, before BECHTEL, P. J., the following facts appeared: On May 19, 1877, the deceased, James Whalen, was crossing the said bridge, when it fell and crushed him to death. The bridge was constructed in 1868, by the County Commissioners, and, as appeared from the testimony, had been in an unsafe condition for several months prior to the accident. The Act of March 6, 1860, § 2 (P. L. 105), provides:—

"That it shall be the duty of the several townships and boroughs in Schuylkill County, in which any county bridge is now or may hereafter be erected, to keep the same in repair at the expense of the township, townships, or boroughs." . . .

And the supplemental Act of March 21, 1861 (P. L. 163), provides as follows:—

"That the provision of the second section of the Act to which this is a supplement, shall not be construed so as to require the several townships and boroughs in Schuylkill County, in which any county bridge or bridges are now, or may hereafter be erected, to put and keep the same in repair, when, in the opinion of the auditors of the township or borough in which such bridge is erected, the expense of repairing shall at any one time exceed the sum of twenty dollars; and if, in the opinion of said auditors, the repairing of such bridge shall exceed the said sum of twenty dollars, they shall cause the same to be made known to the County Commissioners, who shall forthwith cause the same to be done at the expense of the county."

There was no evidence showing that the County Commissioners had been notified by the borough auditors, as provided by the above Act, that the bridge needed repairs exceeding $20.

The plaintiff requested the Court to charge, *inter alia*: "That if the jury believe the bridge across the Mahanoy Creek, in said county, erected by the county of Schuylkill, broke down by reason of the bad or deficient construction of the same, either from insufficiency of the materials used in the same, or from insufficient staying of the arches, or by reason of the weight or length of the span being too great for the arches to bear, or from any cause growing out of insufficient or negligent construction, and the deceased, James Whalen, was killed while passing over the same, then the county is liable to the plaintiff, and the verdict should be in favor of the plaintiff."

Answer. "We will answer this by repeating a part of what we said in our general charge, which is as follows: 'It is the duty of the commissioners to see that the contract is of such a character and for such a bridge as to be adequate to the purposes for which it is erected, and to furnish and afford to the public who are required to use it, and have a right to use it, a reasonably safe means of travelling along the public highway.' If there was any defect in the original structure, if the bridge in question was not properly built, of proper material and of sufficient strength; if the original structure was grossly and obviously defective in the work, and if such defects could be ascertained by the exercise of proper care and caution on the part of the county officials, and they failed to exercise such care, and thus neglected to properly protect the travelling public, we think their failure to use reasonable care, and caution in the discharge of this duty would amount to negligence.

"And, if you further find that this negligence produced or occasioned the accident which resulted in the death of the deceased, then we

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think the county would be liable in damages to the plaintiff, and in such case you should find for the plaintiff."

The Court further charged, *inter alia*, as follows:—

"For, if the bridge in question was originally properly constructed of good material and sufficient strength, but by the wear to which it was subjected or from other cause it needed repairs, and the death of Whalen was caused by the failure to repair it, then we think the liability therefor would be different.

"By the second section of the Act of Assembly of 1860, . . it is made the duty of the townships and boroughs of this county, in which any county bridge is now, or shall hereafter be erected, to keep the same in repair at the expense of the townships or boroughs in the same manner as is now prescribed by law in relation to public roads. This Act contains a repealing clause, and after the passage of the Act we think the county of Schuylkill was relieved from all liability for the repairs of the county bridges, and the duty of such repairing was cast upon the townships and boroughs. In 1861, however, another Act of Assembly was passed relating to the repairs of county bridges in this county.

"You will notice that by this Act it is made the duty of the county to repair 'when in the opinion of the auditors of the township or borough in which said bridge is erected the expense of repairing shall at any one time exceed the sum of $20.' But when the auditors of said township or borough shall be of such opinion, 'they shall cause the same to be made known to the commissioners,' 'who shall forthwith cause the same to be done at the expense of the county.' It is after the commissioners have received such information from such auditors that they 'shall forthwith cause the same to be done at the expense of the county.'

"We think the primary liability to repair would still remain with the townships and boroughs until they shift it by the notice of the auditors to the commissioners."

Verdict for defendant and judgment thereon. The plaintiffs thereupon took this writ, assigning for error the answer to their point, and the portions of the charge above set out.

James Ryon, for plaintiff in error.

A. W. Schalck, County Solicitor, and *J. F. Minogue*, for defendant in error.

October 1, 1883. THE COURT. Under the Act of March 6, 1860 § 2 (P. L. 105), we think it clear that the borough of Gilberton and not the county of Schuylkill was subject to the duty of keeping in repair the bridge in question in this case. The Act of March 21st, 1861 (P. L. 163), restricted the generality of this duty, but in a very peculiar manner. The Act provides that the Act of 1860, § 2, shall not be construed so as to require the townships and boroughs of the county to keep in repair county bridges erected therein "when in the opinion of the auditors of the township or borough in which such bridge is erected, the expense of repairing shall at any one time exceed the sum of twenty dollars; and, if in the opinion of said auditors the repairing of such bridge shall exceed the said sum of twenty dollars, they shall cause the same to be made known to the county commissioners, who shall forthwith cause the same to be done at the expense of the county."

It will be perceived that the duty of the county commissioners to make repairs to the bridges in question arises under this Act, only when the township or borough auditors are of opinion that the expense of repairing will at any one time exceed the sum of twenty dollars, and, when in addition to this, the auditors shall have made that opinion known to the commissioners. Both these prerequisites must concur before the duty of repair comes into existence. Whether this legislation is reasonable or unreasonable may perhaps be questionable, but is not material, since its validity and obligatory force do not depend upon that consideration. It is the written law and the courts as well as the people are bound by it. The commissioners are only required to act after they have been informed of the opinion of the auditors. It is not alleged in the present case that any such information was ever communicated to the County Commissioners, but the contrary is directly proved and not disputed. Now, liability for non-repair is legally consequent only upon a neglected duty to repair. We said in Rapho *v.* Moore (18 P. F. S. on p. 406), "without a duty of repair no liability rests upon the municipality. As a general proposition, but by no means universal, bridges are treated as a portion of the highways which cross them, and are to be maintained by the same persons to whom the duty of repairing the highways is committed. (Shear. & Red. on Negligence, § 248.) In this state, the duty is statutory and therefore we must look to the statute for its nature and extent."

The learned Court below left to the jury the question whether the injury of the plaintiffs was caused by defects in the original structure of the bridge, or from the failure to keep it in repair, directing that in the former event the county would be liable, in the latter, not. It seems to us that this was as much as the plaintiff could ask, under the law, and as the jury has found for the defendant, we are bound to infer that the evidence satisfied them that the accident, which resulted in Whalen's death, resulted from deficient repairs and not from defects in the original

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structure. There was abundant testimony in the case to justify such a verdict. Complaint is made of the language used by the Court in stating the terms of the liability of the county for defects in the original structure. We do not think the charge is amenable to an allegation of error in the instructions on this subject. The Judge said: "If there was any defect in the original structure, if the bridge in question was not properly built of proper material and of sufficient strength, if the original structure was grossly and obviously defective in the work, and such defects could be ascertained by the exercise of proper care and caution on the part of the county officials and they failed to exercise such care and thus neglected to properly protect the travelling public, we think their failure to use reasonable care and caution in the discharge of this duty would amount to negligence." Of course, it is not claimed that there was error in saying that the accumulated force of all the enumerated derelictions would constitute negligence. Hence in literal strictness and in an affirmative sense this part of the charge was correct in the conclusion drawn from the premises stated. But the complaint is that the Court overstated the conditions upon which liability would arise. In other words, that the learned Judge held that all the defects stated must concur in order to make out liability. This is not correct in fact. The one clause especially objected to is the following, "if the original structure was grossly and obviously defective *in the work*." It was not said that this and the other defects mentioned must be combined to impose liability. The other defects related to the manner or character of the structure itself, to the kind of material used, and to its strength or weakness, while this was defect *in the work*. In the latter case, if the defect was *gross and obvious* there would be neglect in not discovering it. It is true the several kinds of defects enumerated are not connected by the disjunctive conjunction, but it is also true they are not joined by the copulative. They are rather expressed independently of each other, as we read the charge, that if there were gross and obvious defects *in the work* there would be liability, and there would also be liability if there was any defect in the original structure, or if the bridge was not built of proper material having sufficient strengh. The expression the decay of the material used, after long use, come within a different category, and the omission to search for and discover them is evidence of negligence, properly chargeable however to those whose duty it is to repair. We are of opinion that the learned Judge carefully pointed out to the jury the proper distinctions affecting the liability of the county and the borough respectively, and that there was no error in his charge in the matters complained of.

Judgment affirmed.

Opinion by GREEN, J. T. R.

Common Pleas—Law.

C. P. No. 1. Dec. 8, 1883.

Zieger v. Zieger.

Divorce—Practice—Both husband and wife may institute proceedings for divorce at the same time.

Rule to quash libel and set aside proceedings in divorce.

In this case the wife of the respondent had instituted proceedings for divorce on the ground of desertion, when the husband obtained the present rule. It appeared by the affidavit of the respondent that his wife left him some months before beginning the suit, and has since lived with her parents in Trenton.

W. F. Johnson, for the rule.

The libellant is not entitled to bring this action, not having resided in this Commonwealth upwards of a year prior to its commencement. The respondent has a suit for divorce now pending in this Court.

Eldridge, contra.

The present suit is for desertion, that of the husband for adultery.

THE COURT. There is no reason why each party should not bring a separate suit in divorce against the other for different causes of action.

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C. P. No. 1. December 15, 1883.

Philadelphia Trust Co., Adm'r v. Mary Roberts.

Principal and agent—Implied agency—Powers of a conveyancer obtaining money for his principal—Negligence—When a party loaning money neglects to inquire as to the power of the agent of the borrower to receive it, he will be held guilty of negligence.

Rule to open a judgment obtained on a sci. fa. sur mortgage.

The following facts appeared from the depositions under the above rule by the mortgagee:—

The plaintiff paid the sum of $5000 on the receipt of the bond and mortgage signed by the defendant to one George R. Magee, who represented himself as the agent of the borrower.

The defendant never received any part of the said consideration for the bond and mortgage, the same being embezzled by Magee. The bond and mortgage was never read by, or to the defendant, and were executed by her under the impression falsely conveyed to her by Magee that the papers were the deeds for a certain lot sold by him on her account.

Magee was not a conveyancer, had no office, and no sign, but occupied a desk in his father's office, who was simply an engrosser. Magee's business was placing bonds and mortgages, and dealing in real estate, in which capacity he stood between buyers and sellers. Defendant had employed Magee on one occasion as agent to settle the case of a disputed boundary, but he had no authority to receive any money on her account.

The plaintiff paid the money by a check to the order of George R. Magee, and subsequently on defendant refusing to pay the interest on the mortgage when the first instalment fell due, issued a sci. fa., and obtained judgment, when the present rule was taken.

F. E. Brewster, for the rule.

The real question is one of agency. The only proof of agency is the declaration of Magee, and his possession of the bond and mortgage, and this is not evidence to bind defendant.

Clark *v.* Baker 2 Wharton, 340.
Chambers *v.* Davis, 3 Id. 40.

Declarations by an agent without proof of antecedent authority or subsequent ratification are not evidence.

Plumsted *v.* Rudebagh, 1 Yeates, 502.
Rutzen *v.* Farr, 4 Ad. & El. 53.
Jordan *v.* Stewart, 11 H. 244.
Grim *v.* Bonnell, 1 WEEKLY NOTES, 596.

An agent employed to sell an estate has no implied authority to receive the purchase-money.

2 Parsons on Contracts, § 615.
2 Addison on Contracts, § 342.
Mynn *v.* Joliffe, 1 Mood. & Rob. 327.

Authority to receive interest on a mortgage is no authority to receive principal.

Addison on Contracts, § 342.

A scrivener who lends another's money on mortgage, and who holds the mortgage deeds, has no implied authority to receive the principal.

Addison on Contracts, § 342.
Wilkinson *v.* Candlish, 5 Ex. 91.
Same *v.* Same, 19 L. J. Ex. 166.
Kent *v.* Thomas, 1 H. & N. 473.

Authority to loan money implies no authority to collect.

Cooley *v.* Willard, 34 Ill. 69.
Ames *v.* Drew, 31 N. H. 475.
Hays *v.* Lynn, 7 W. 524.
Painter *v.* Abil, 33 L. J. Rep., N. S. Ex. 60.
Sykes *v.* Giles, 5 M. & W. 645.

Ashhurst, contra.

It was defendant's duty to read the instrument before signing, and her failure so to do makes the loss hers.

Thoroughgood's Case, 2 Coke, 9.
Kennedy *v.* Green, 3 M. & K. 699.
Marjoribanks *v.* Hovenden, Drury, 11.
Hunter *v.* Walters, L. R. 11 Eq. 312; affirmed in L. R. 7 Ch. Ap. 75.
Hallenbeck *v.* Dewitt, 2 John. 404.
Bank of Kentucky *v.* Schuylkill Bank, 1 Par. Eq. 248.
Penn. R. R. Co.'s Appeal, 5 Nor. 80.
Wright's Appeal, 12 WEEKLY NOTES, 225.
Penna. R. Co. *v.* Shay, 1 Norris, 198.
Green *v.* North Buffalo Township, 6 Smith, 110.
Rapp *v.* Hains, 5 WEEKLY NOTES, 489.
Greenfield's Est., 2 H. 489.
Drechman *v.* Lauer, 10 WEEKLY NOTES, 536.

December 22, 1883. THE COURT. The circumstances under which the defendant executed this bond and mortgage would not, we think, constitute a defence to its payment in the hands of a *bona fide* holder for value.

The defendant, however, contends that no matter how negligent she may have been in executing them, she has never received any consideration for them. This raises the question whether the payment of the purchase-money to a certain George R. Magee constituted a valid payment to her. There is no evidence that he was her agent, either general or special; on the contrary, it is positively denied by the defendant. The claim on the part of the plaintiff is that Magee was her agent by implication. This claim seems to be founded mainly on his own pretension, with the additional fact that he once had possession of a plan of a certain piece of real estate belonging to her, and the bond and mortgage in question.

According to his father's account of George R. Magee, he was not a conveyancer, had no office of his own, and no sign indicating any business; that he "occupied a small desk" in his father's office, for which privilege he paid four dollars a month; that his business was

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placing bonds and mortgages, and general dealing in real estate and existing properties; that he made exchanges and stood between parties in buying and selling; that he had never served any time or apprenticeship in a conveyancer's office, but only in that of his father, who says that he himself was not a conveyancer, but did considerable engrossing work for other parties.

The inference that a person of this sort was entitled to have paid to him so large a sum of money as $5000, without the slightest inquiry as to his authority, merely because he happened to have got a bond and mortgage in his possession, would appear to be drawn from inadequate premises. In Jones *v.* Chaplin, Lord Chancellor CHELMSFORD says: "It is quite clear that, if the purchaser pay his purchase-money to a person not authorized to receive it, he is liable to pay it over again. It may, I think, be considered as established, that the possession of the essential conveyance, with the signed receipts for the consideration money indorsed, is not, in itself, an authority to the solicitor of the vendor to receive the purchase-money."

And in our own courts it has been held, following the English decisions, that an agent authorized to receive the interest on a mortgage has no right to give a discharge for the principal. (Taylor *v.* Vingert, 33 Leg. Int. 238.)

Every one who transacts business with an agent is bound to inquire and inform himself as to the nature and extent of his authority. He cannot plead ignorance or even misinformation by the agent himself.

In this case the whole difficulty could have been avoided by simply drawing or indorsing the check to the order of the mortgagor instead of to this itinerant real estate dealer. There is no reflection upon the entire good faith with which this was done, but a simple question of the efficacy of such a payment.

It is doubtless true that people every day collect money on the simple statement of their own authority to do so, but when such payments are made they are made at the risk of the party who makes them, and if a loss occurs they must bear it. The judgment is opened and the defendant let into a defence.

Oral opinion by BIDDLE, J. D. H.

C. P. No. 1. Oct. 27, 1883.

plaintiff having obtained a judgment levied on personal property which was claimed by the wife of the defendant, under the supposition that it belonged to her. Before any further steps were taken she filed a disclaimer, and her husband then claimed the $300 exemption, which the sheriff refused to allow.

Todd, for the rule, cited Cornman's Appeal (9 Nor. 254, 257), and argued that the authorities relied on by the plaintiff are all cases of either a denial of property by the defendant *himself* or cases of actual fraud.

Scollay, contra.

The Court will not interfere when the sheriff refuses to allow exemption.

Thornton *v.* Hotel Co., 5 WEEKLY NOTES, 428.
Kiker *v.* Walker, 7 Id. 521.

The right to exemption has been forfeited by allowing another party to claim the property.

Gilliland *v.* Rhoads, 10 Cas. 187.
Strouse *v.* Becker, 2 Wr. 190.

THE COURT. If a perfect stranger sets up a claim of property which defendant does not at the time object to, the defendant cannot afterward claim his exemption out of that property. But where the wife is the one claiming property in things of which there has been an undivided ownership and a use in common so that it is hard to tell whose the property is, the case is different. Here the husband, finding the wife was mistaken, induced her to withdraw her claim and let him make his; and this would seem to show the very opposite of acquiescence.

Rule absolute.

Oral opinion by BIDDLE, J. E. A. B.

C. P. No. 2. Dec 10, 1883.

Taylor, to use of Cobb v. Kennelly.

Landlord and tenant—Contract of suretyship for rent—When it runs with the land and may be sued on by assignee of reversion.

Sur demurrer to special plea.

Appeal from magistrate's judgment by defendant in an action of assumpsit on a contract of suretyship. The use plaintiff had bought certain premises during the existence of a lease, and the defendant was the tenant's surety. The contract was attached to the bill of particulars, and was to continue "as long as the said premises shall be held or occupied by the said lessee." The de-

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Taylor [the landlord] or to any grantee of said premises, or to any person except the said Alfred Taylor. . . . . This defendant became responsible [by the contract of suretyship] for the payment of said rent by the said Thomas to the said Taylor, but not to any assignee of the said Taylor or grantee of the said premises. That afterwards, to wit, on December 27, 1873, said Taylor conveyed said premises in fee and assigned said contract or indenture of lease and said contract of suretyship to one Caroline Cobb, the use plaintiff, without notice to or consent of this defendant, and defendant further says that during all the time that said Thomas occupied said premises as the tenant of said Taylor under said lease and up to the time said Taylor conveyed said premises, ... she, the said Thomas, faithfully paid all the rents to the said Taylor as the same became due."

E. B. Watson, for demurrer.

This covenant runs with the land, and may be sued upon by the assignee of the reversion.

Spencer's Case, 1 Sm. L. C. *115.

Bedell, for the defendant.

There was no contract of liability to any one but the original landlord.

[MITCHELL, J. You covenanted to pay the rent and to be liable for all damage, etc., "as long as the said premises shall be held or occupied by the said lessee."]

That part of the covenant is only shown in the bill of particulars, which cannot be considered in a hearing on a demurrer.

THE COURT. Demurrer sustained.

C. C. B.

C. P. No. 2. Dec. 3, 1883.

Caldwell v. Prendergest.

Affidavit of defence—Sufficiency of—Denial of purchase of goods.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on book-entries charging the defendant with 440½ pounds of leather, costing $354.81, furnished June 13, 1883.

The affidavit averred as follows: "Defendant never bought anything of any kind from plaintiff, and plaintiff never sold directly or indirectly to defendant the goods charged in the book entries. On or about the middle of June, 1883, the defendant received from the Pittsburgh tannery, at Watsontown, an invoice of leather similar in character in certain respects to that stated to have been furnished by the plaintiff, except that the leather received was of a different quality and name, and only weighed 431 pounds in all. The defendant had not ordered this leather and at once wrote to the Pittsburgh tannery, saying that he did not want it. To this the tannery replied, admitting that the leather was not ordered, and requesting him to sell it for them, and to make an advance thereon. He did sell the leather, and the balance of the proceeds remaining in his hands, after deducting advances, expenses, and commissions . . . . is $95.86, which is the only sum to which the plaintiff can have any claim, all of which he expects to prove," etc.

William Drayton, for the rule.

The affidavit alleged nothing inconsistent with the plaintiff's claim. It does not deny the receipt of the goods. It is, therefore, insufficient.

Hunsicker *v.* Arnold, 1 WEEKLY NOTES, 589.

THE COURT. Rule discharged. C. C. B.

C. P. No. 2. December, 1883.

Lippincott v. The Philadelphia Trust Co.

Act of February 24, 1834—Surviving executor—Power of sale continues to survivor of three—Will construed not to be a direction otherwise.

Case stated, setting forth the following facts:—

James Dundas died July 4, 1865, and by his will appointed as his executors Joshua Lippincott, Richard Smethurst, and James Dundas Lippincott. Smethurst died in April, 1867, Joshua Lippincott died in October, 1880, and James Dundas Lippincott was left the sole surviving executor and trustee. On March 17, 1883, James Dundas Lippincott, the surviving executor, obtained permission from the Orphans' Court to sell certain land belonging to the estate. The sale was made at public auction, June 6, 1883, and the Philadelphia Trust, Safe Deposit, and Insurance Company, the defendants in this case, were one of the purchasers. The Orphans' Court confirmed the sale, and authorized the said surviving executor to make the necessary conveyances to the trust company. But when the executor offered the company a fee simple deed they refused it, averring that he, as surviving executor, had no power under the will to make title to the premises in question. The executor brought this suit against the trust company, and the case was stated, which provided that if the Court shall be of opinion that under the will of James Dundas, deceased, the said J. Dundas Lippincott, sole surviving executor as aforesaid, has the power to convey the title to the said premises to the defendant, then judgment is to be entered for the plaintiff in the sum of $12,187.50; but if the Court shall be of a contrary opinion, then judgment is to be entered for the defendant; either party to be at liberty to sue out a writ of error.

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The clauses of the will of James Dundas bearing on the point are the following:—

"*Item Fourteenth.*—I give to my executors, hereinafter named, full power and authority to sell and dispose of, either at public or private sale, the whole or any part of my estate, real or personal, without application to the Orphans' Court, or any other court, either for the purpose of affecting a partition among the said devisees, or for the purpose of making a partition or division of any lands that I may own in Schuylkill County in common with others, or in carrying out the general purposes of this, my will; and to sign, seal, execute, acknowledge, and deliver all necessary deeds and conveyances for the purposes aforesaid, and without any liability on the part of the purchaser as to the application of the purchase-moneys. . . .

"*Item Fifteenth.*—All sales and conveyances to be made by my executors are to be clear of any charge or lien on account of any legacies, annuities, or bequests herein contained, and of any trusts herein or hereby created or declared.

"*Item Sixteenth.*—I hereby order and direct that all the powers of sale or investments created by or arising out of this my will, shall be executed without any application to any Court of any county or jurisdiction in which my estate may lie; and it is my will that my said executors shall not be personally liable for the exercise of the said powers. Provided it be done with good faith and intention, each of my said executors shall be liable for his own acts only, and not for the acts of his co executors, to which he has not consented. A majority of my said executors shall be competent to exercise all the powers given by this my will.

"*Item Seventeenth.*—If any of my executors shall die, or decline the executorship, it shall be the duty of the acting executors to appoint another in the place of the executor so dying or declining, and to make such conveyances, and do such acts as may invest the said substituted executor, from time to time, as occasion may arise, with the same rights and powers which are given to the executors named in this my will."

John G. Johnson and *George W. Biddle*, for the plaintiff.

The power to fill vacancies could only be exercised by two. There being but one left, it is now impossible to exercise it. The powers of sale being conferred, not for the benefit of the estate, but of the cestui que trust, it will be punishing the parties in interest for the default of the executors in not appointing, to hold that the powers cannot be exercised. The Act makes the powers survive, unless the testator directs otherwise. The testator does not so direct, but, on the contrary, insists that all powers shall be exercised without reference to the Courts.

Samuel Dickson and *R. L. Ashhurst*, for the defendant.

At common law, it is clear that this power could not have been exercised. The Act of 1834 (Purd. Dig. 418) provides that the power shall survive, except when the testator directs otherwise. In this case he did direct otherwise, by item 17, which shows that he intended always to have three executors, and not confide this power to one. The Act of 1800 (Purd. Dig. 417) does not apply. The argument *ab inconvenienti* is of no force, because under the Act of 1849 (Purd. Dig. 1423) the Orphans' Court can appoint trustees to fill the vacancies.

From the whole tenor of the testator's will it is evident he intended the power to be exercised by three and not by one.

Rex *v.* Loxdale, 1 Burrows, 445.
Ex parte Davis, 2 Y. & C. 468.
Perry, Trusts, 286.
Hulme *v.* Hulme, 2 M. & K. 682.
Mass G. H. *v.* Amory, 12 Pick. 445.
Reading R. R. *v.* L. N. Co., 12 Casey, 212.
City *v.* Donath, 9 WEEKLY NOTES, 415.

Johnson, in reply.

Item 17 of the will refers to the time of testator's death only. After grant of letters testamentary, if one executor died, how could the others appoint a new *executor?* The testator was a lawyer, and could not have intended such an absurdity.

C. A. V.

THE COURT. Under the Act of 1834 the power of sale survived to the plaintiff, unless the testator has directed otherwise. We do not regard item 17 of the will as such a direction.

Judgment for plaintiff. S. G. F.

C. P. No. 2. December 3, 1883.

Ireland v. Stockham.

Attachment of debt—Does not prevent judgment—Defendant may pay money into Court.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note.

The affidavit of defence averred that defendant had been served as garnishee in two attachment-executions against plaintiff, of which attachments plaintiff was duly notified before the bringing of this suit; that these attachments aggregated a sum equal to the whole amount of the note; that defendant was willing to pay the amount of the note to whichever party was entitled to receive it, but that he could not pay it to the plaintiff without being liable to the attaching creditor.

D. C. Robinson showed cause.

The pendency of the attachment is a good defence.

Savings Inst. *v.* Smethurst, 2 Miles, 439.

We do not want to be subjected to an execution when we are willing to pay if we can safely do so.

Hicks *v.* Brinkworth, 1 WEEKLY NOTES, 90.

[MITCHELL, J. It is the settled practice now to give judgment in such cases, and protect the defendant from execution. You can pay the money into Court and let the parties interplead.]

We are ready to do that.

THE COURT. Rule absolute, and rule granted to defendant on plaintiff to show cause why the money should not be paid into Court; execution to stay meanwhile. C. C. B.

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C. P. No. 2. December 6, 1883.

Mullen v. Mageoch.

Judgment entered on warrant of attorney—Rule as to opening—Whenever there appears to be facts in dispute upon which a jury ought to pass the judgment will be opened.

Sur rule to open judgment and let the defendant into a defence.

Judgment had been entered upon a bond and warrant of attorney to confess judgment which had been given by defendants, Mageoch & Ennis, to W. W. Mullen.

W. W. Mullen having died, his administrators had assigned the bond to W. J. Mullen, whose executors had upon his death assigned it to E. J. Mullen, the plaintiff.

W. J. Mullen in his lifetime and while he was owner of the bond had by writing indorsed thereon agreed with the defendants "in consideration of one dollar, etc., to allow a credit for merchandise for which he was indebted to said obligors and to accept similar merchandise in payment and discharge of the balance remaining."

Credit was allowed on the bond for all merchandise purchased by W. J. Mullen from defendant up to the time of his death. A further credit, however, was claimed by defendants for merchandise furnished to one Jacob Cummings.

The depositions taken by defendants under the rule to open judgment showed that they had furnished to Cummings merchandise at the request of W. J. Mullen, and had by his direction charged the same to him. The only witnesses, however, who testified to these facts were the defendants themselves. No depositions were taken on behalf of plaintiffs.

Marshall, for the rule.

J. Henry Williams (*R. J. Williams* with him) showed cause.

The agreement to accept merchandise in payment was *nudum pactum*.

Addison on Contracts, sec. 12, etc.
Wharton on Contracts, sec. 494.

Even supposing the contract to be binding upon W. J. Mullen, it was a mere personal promise, and ceased to be of effect after his death. The witnesses called to prove W. J. Mullen's liability for merchandise furnished to Cummings are all interested parties, and therefore incompetent to testify after his death.

[MITCHELL J. The agreement to accept payment in clothing recites a consideration of one dollar, and cannot be presumed to be *nudum pactum*. As to the question of evidence, we cannot go into that now; it may be the defendant cannot prove his case when it comes to trial. All we have to do now is to ascertain if there is a question of fact on which a jury ought to pass.]

THE COURT. Rule absolute. T. B. S.

C. P. No. 3. Nov. 10, 1883.

Wood & Tracy v. The Commonwealth Guarantee Trust, etc. Co.

Service of summons—When it will be set aside—Decoying defendant within the jurisdiction of the Court.

Sur rule to set aside service of summons.

Service was made on W. W. Jennings, President of the Commonwealth Guarantee Trust and Safe Deposit Company of Harrisburg, at the office of L. W. Barringer, on September 20, 1883. The following correspondence in reference to settling the matters in controversy had previously passed between Jennings and Wood & Tracy.

PHILA., Aug. 21, 1883.

W. W. Jennings, Harrisburg.—Is there no possibility of reaching a settlement of our account soon? Will you please answer us? WOOD & TRACY.

HARRISBURG, Aug. 22, 1883.

Wood & Tracy.—Received yours of 21st. I met Mr. Hall, who says you should ascertain who has power to act for the Collins Granite Co., and also what compromise they would agree to. I will try to meet you as soon after you get the information as possible.

Yours, W. W. JENNINGS.

WEST PHILA., Sep. 4, 1883.

W. W. Jennings.—We have heard from Builder, who has the authority from Collins Granite Co. to settle. He is in New York, and we could get him over, if you would give us, say forty-eight hours' notice when you could be down. Please advise us. Yours truly,

WOOD & TRACY.

HARRISBURG, Sep. 13, 1883.

Wood & Tracy.—I have not been able as yet to fix a day to meet you, but think I will be able some time next week. Inform me what days would suit you next week.

Yours, W. W. JENNINGS.

Sep. 17.

I will be in your city Thursday next, fix time and place on that day. W. W. JENNINGS.

PHILA., Sep. 18, 1883.

Dear Sir.—We will meet you at Mr. Barringer's office, 407 Walnut Street, say 12 o'clock, Thursday.

Yours truly, WOOD & TRACY.

HARRISBURG.

I will be at 407 Walnut Street to-morrow, Thursday, at 12 M. Please be on time, as I have other things to attend to. W. W. JENNINGS.

In the depositions taken under the rule Jennings testified, *inter alia*, that he came to Philadelphia in accordance with the appointment, and went to Mr. Barringer's office. There was no result in the conversation as to the settlement; that on leaving the office at the outer door he was served with a writ of summons, and that he had no other business in the town that day.

L. W. Barringer showed cause. If a defendant is decoyed into the jurisdiction of the Court

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the service of summons can undoubtedly be set aside. But in this case he was not decoyed. The correspondence shows that he came of his own accord. His last letter distinctly admitted that he had other things to attend to.

E. C. Mitchell, for the rule.

Eo die. THE COURT. Rule absolute.

A. B. W.

C. P. No. 4. December 23, 1883.

Helmbold v. D. H. and W. Railroad Co.

Coupons—Actions upon—A coupon is incidental to and forms part of a bond, and therefore suit upon it is not barred until twenty years after maturity—In a suit on coupons payable at a particular time and place, it is no defence to allege want of demand, without showing that a fund was provided to meet them—The special remedy given in a mortgage created as security for a bonded indebtedness is not exclusive, but an action of debt on the bond coexists with it.

Rule for judgment for want of sufficient affidavit of defence.

Assumpsit upon a number of coupons detached from bonds issued by the defendant company in 1874.

The affidavit of defence stated in substance that the greater part of the plaintiff's claim upon the coupons had accrued more than six years before the bringing of this suit; that the coupons were payable at the Mechanics' National Bank of New York, and payment had not been demanded there, and that the bonds from which said coupons were detached were secured by a mortgage of the corporation wherein a special remedy was provided in case of default, and that said remedy was exclusive.

John Douglass Brown, Jr., for the rule.

The period of limitation upon a coupon is the same as that upon the bond to which it was attached.

City of Kenosha *v.* Lamson, 9 Wall. 483.
Clark *v.* Iowa City, 20 Wall. 589.
Koshkonong *v.* Burton, 104 U. S. 668.
Williamsport Gas Co. *v.* Pinkerton, 14 Norris, 62.
Daniel on Negotiable Instr., § 1516.

Coupons payable at a particular place import that the debtor will have a deposit, at the time and place specified, to answer; without showing that such a fund was provided, it is no defence to allege a want of demand.

In the absence of such fund, interest is payable on the coupons after maturity without presentation.

Phila. & B. R. Co. *v.* Johnson, 4 Smith, 127.
Williamsport Gas Co. *v.* Pinkerton, *supra.*
County of Beaver *v.* Armstrong, 8 Wright, 63.
North Penn. R. Co. *v.* Adams, 4 Smith, 94.
Moody *v.* Phila. & R. R. Co., 13 WEEKLY NOTES, 48.
Sherman *v.* Phila. & R. R. Co., Id. 238.

The fact that a remedy was given in the mortgage, which was created as security for the debt, is no defence to an action of debt on the bonds.

Phila. & B. R. Co. *v.* Johnson, 4 Smith, 127.

Geo. L. Crawford (*Samuel G. Thompson*, with him), contra.

Coupons, when detached, and in the hands of third parties, stand upon their own footing, and will be barred by the Statute of Limitations if more than six years due.

THE COURT. Rule absolute.

W. M. S., JR.

C. P. No. 4. January 5, 1884.

Kasper v. Newhouser.

Slander—An affidavit required to support a capias for slander must allege expressly what words were spoken.

Rule to show cause why defendant should not be discharged on common bail.

The defendant was sent to the county prison in default of $500 bail required by a capias for slander which issued on an affidavit that the defendant, Newhouser, "did unlawfully, maliciously, and without probable cause, report to the revenue officers of the United States Government, located in this county, that the deponent did remove old or cancelled beer stamps from barrels or packages of beer that had already been used or cancelled and place them upon new barrels or packages of beer, with a view of defrauding the government of the United States out of its lawful revenue. That the said charge is maliciously false, and was so known to be by the aforesaid Newhouser; that the said charge, if true, would subject this deponent to both fine and imprisonment under section 3343 of the Revised Statutes of the United States."

Thos. A. Fahy, showed cause.

This defendant maliciously charged the plaintiff, a law-abiding citizen, with using cancelled stamps, which charge was proven before the revenue officers to be utterly false.

[THAYER, P. J. Do you charge the defendant with slander, libel, or false arrest?]

With slander.

[THAYER, P. J. Your affidavit does not set out any slanderous words, but simply states that he reported something to the revenue officers.]

The affidavit states that he made a false report, which, if true, would have subjected plaintiff to fine and imprisonment. The substance of the report is given in the affidavit.

A. T. Goldbeck, contra.

THE COURT. The affidavit is insufficient. Rule absolute.

W. M. S., JR.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, FEB. 7, 1884.* [No. 9.

Supreme Court.

Jan. '83, 294. March 30, 1883.

Smith v. Insurance Co.

Insurance companies—Paid up policies—Stipulation for issue of—A policy holder whose policy is forfeited for non-payment is not entitled to a paid-up policy—Parol evidence to contradict the terms of the policy, when inadmissible——Prospectus ineffectual to contradict the policy.

Where a policy of life insurance provided that the company would, if requested, "after the payment of premium for two full years issue a paid-up policy" for a specified amount, but was subject to the usual covenant by the assured to pay the premiums on the day they fell due, and to the stipulation that in case of the violation of any of the conditions the policy would be void:

Held, that a request for the issue of a "paid-up" policy must be made while the original policy is in full life, and cannot be made after the latter has become forfeited for non-payment of premiums.

Bussing *v.* Ins. Co., 34 Ohio, 226; People *v.* Ins. Co., 15 Hun, 8, followed. Winchell *v.* Insurance Co., 8 Ins. L. J. 651, distinguished.

In such a case testimony as to the statements made by the company's agents on other occasions as to the meaning of such policies is inadmissible.

A clause in the prospectus of an insurance company offering thirty days' grace in the payment of premiums is ineffectual to contradict the terms of the policy.

An insurance company which is in the habit of sending notices to its assured of the time when the premiums are due is not obliged to continue to do so, and the neglect of the assured to pay at the proper time is at his own peril.

Even if the insured was misled by the company's failure to send the customary notices, such failure will not serve to excuse two years' neglect on his part to pay the premiums falling due. Such a continued default cannot be traced to the misleading effect of the company's uniform practice to send notices.

Error to the Common Pleas No. 2, of Philadelphia County.

Debt, by Wm. Hastie Smith and wife, in right of the wife, against the National Life Insurance Company, to recover damages for a refusal of the company to issue a "paid-up" policy to the plaintiff.

The defendant pleaded the general issue, and specially that their refusal was upon the ground that the policy had lapsed by reason of non-payment of premiums. The plaintiff demurred to the special plea, and the Court gave judgment for the defendant on the demurrer. (Reported 11 WEEKLY NOTES, 156; *q. v.*) (First assignment of error.)

On the trial, before FELL, J., the plaintiff offered to show "that the company defendant were declaring to other parties, whom they were soliciting to take policies, and to other policy-holders in the said company, that their policies were non-forfeitable." Objected to. Objection sustained. (Second assignment of error.)

The plaintiff also offered to ask F. W. Smith, an actuary of an insurance company, a witness, the following question: "Look at the clause of the policy which has respect to the non-forfeiting of the policy after the payment of two years' premiums (the policy in question shown the witness), and, looking at it, state if you have knowledge of what construction insurance companies, at the time that policy was issued, placed upon that clause, and what that construction was. Objected to. Objection sustained. (Third assignment of error.)

It further appeared that although it was the custom of the company to send notices of the time when the premiums were due, yet that they had not done so before the one upon which the insured had first made default; it was also shown that in the prospectus of the company the policies were called non-forfeitable.

All the remaining facts are sufficiently set forth in the previous report of this case (11 WEEKLY NOTES, 156), and in the opinion of the Supreme Court (*infra*).

Upon the close of the plaintiff's testimony, the Court entered a compulsory nonsuit which the Court in banc subsequently refused to take off, whereupon the plaintiffs took this writ, assigning for error the entry of judgment upon the demurrer, the exclusion of the testimony above cited, and the refusal of the Court to take off the nonsuit.

Arthur M. Burton, for plaintiffs in error.

In view of the express agreement to give a paid-up policy, after two years, the non-payment of premiums after two full years was immaterial, else the conditions would have been repugnant.

Bradley *v.* Peixoto, 3 Ves. 324.
Mills *v.* Wright, 1 Freeman, 247.
Furnivall *v.* Combs, 6 Scott N. R. 522.

One part of a contract may not be so construed as to abrogate another part when there is a reasonable construction by which both parts may be sustained.

Hazleton Coal Co. *v.* Buck Mt. Coal Co., 7 Sm. 313.

An exception in a policy must be construed in favor of the insured.

Ins. Co. *v.* Updegraff, 7 Wright, 350.
Ins. Co. *v.* Brock, 7 Sm. 74.
Buckley *v.* Garrett, 11 Wright, 204.
Com. *v.* Berger, 6 Id. 283.

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Knecht *v.* Ins. Co., 9 Norris, 118.
Kronk *v.* Ins. Co., 10 Norris, 300.
Mears *v.* Id., 11 Id. 15.

A forfeiture will not be declared when there is a construction which will save it.

Girard Co. *v.* N. Y. Mut. Ins. Co., 9 WEEKLY NOTES, 425; s. c. 1 Out. 26.
Winchell *v.* Ins. Co., 8 Ins. L. J. 651.
Chase *v.* Id., 7 Id. 93.
Dorr *v.* Id., 7 Id. 368.
Montgomery *v.* Id., 8 Id. 300.
Ins. Co. *v.* Drach, 12 WEEKLY NOTES, 378.

If a policy of insurance differ from the terms of the agreement to insure the Court will deal with the rights of the assured upon the footing of the agreement not of the policy.

Collett *v.* Morrison, 9 Hare, 162.

And evidence of parol variations of a writing is always admissible.

Lippincott *v*, Whitman, 2 Norris, 244.
Barclay *v.* Wainwright, 5 Norris, 191.
Weaver *v.* Wood, 9 Barr, 220.

The question whether the demand for the "paid-up" policy was not made within a reasonable time should have been submitted to the jury.

College *v.* Kerr, 3 Brewst. 196.

The failure of the company to send notices excused the assured's default.

Helme *v.* Ins., 11 Smith, 107.

In any case the plaintiffs were entitled to recover the premiums already paid, because of the failure of the company to issue a policy consonant with their agreement.

Helme *v.* Ins. Co., 11 Smith, 107.
Coal Co. *v.* McShain, 25 Smith, 238.
Shughart *v.* Moore, 28 Smith, 469.

The evidence in explanation of the subject matter should have been received.

Barnhart *v.* Riddle, 5 Casey, 92.
Clarke *v.* Adams, 2 Norris, 309.

R. C. Dale (with him *S. Dickson* and *Wm. McGeorge*), for defendants in error. The construction which the Court below placed upon the policy is not only founded upon reason, but is supported by the weight of authority.

Bussing *v.* Ins. Co., 34 Ohio, 222.
People *v.* Ins. Co., 15 Hun, 8.

The policy in suit must be regarded as the contract which defines the rights of the parties, and its terms cannot be varied by proof that the plaintiffs read a prospectus before applying for the policy. The negotiations, both written and verbal, which precede the consummation of a written contract must be regarded as merged in the writing.

Ruse *v.* Ins. Co., 23 N. Y. 516.
Allegaert *v.* Smart, 8 WEEKLY NOTES, 217; affirmed 10 WEEKLY NOTES, 29.
Thorne *v.* Warflein, 12 Id. 425.
Martin *v.* Berens, 17 Smith, 457.

The fact that the company did not send a notice of the time of payment of a premium did not excuse the assured's default.

Thompson *v.* Ins. Co., 14 Otto, 252.

October 1, 1883. THE COURT. The policy in suit was issued by the National Life Insurance Company, of the U. S. of America, on the 20th of October, 1868. It was upon the life of William Hastie Smith, to his wife Isabella, in the sum of three thousand dollars.

The consideration of the contract, apart from the representations made in the application, was the sum of $46.59 in hand paid, and the semi-annual payment of a like sum, on or before the 20th of October and April in every year, during the continuance of the policy, until fifteen full payments were made, the last to be made on the 20th of April, 1883.

The policy contained the following provision: "And the said company further agree, that after due payment of premiums for two full years, they will, if requested, on the surrender of this policy, duly receipted, issue another policy, payable as herein provided, on which no further premium shall be required on the life of the person whose life is hereby insured, for as many fifteenth parts of the original amount, hereby assured, as there shall have been complete annual premiums paid."

The plaintiff paid the premiums regularly for ten years, the semi-annual premium for October, 1878, and those subsequently accruing were not paid. On the 2d of October, 1880, application was made for a paid-up policy for $2000, being ten-fifteenths of the amount of the original, according to the provision of the clause above quoted. This application was refused by the company, upon the ground, that under the express terms of the policy, the plaintiffs had forfeited their rights under it, by non-payment of premiums. This action was, therefore, brought to recover damages for such refusal.

In the clause quoted, there is no limitation as to the time when a policy must be surrendered, in order that the holder may receive a paid-up policy, for a fractional part of the original sum, excepting that the surrender must be "after due payment of premiums for two full years."

The policy further provides, however: "This policy is issued and accepted by the insured, and the holder thereof, on the following express conditions and agreements: Second, that the premiums shall be paid in cash on or before the days upon which they become due at the branch office of said company, in the city of Philadelphia, or to their duly authorized agents, when they produce receipts signed by the president or secretary. Fifth, that in case of the violation of the foregoing conditions, or any of them, or of the insured dying by his own hand, or in consequence of a duel or in consequence of violating the laws of the United States or of any nation, State or province, this policy shall become null and void, and all payments thereon shall be forfeited to said company."

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Under the rule of construction, which requires that full effect must be given to every stipulation in a contract, the provision, first quoted, must be read in connection with the second and fifth conditions. The obvious and natural meaning of these conditions, taken together is, that unless the premiums are paid on or before the day upon which they become due, respectively, the entire policy shall become void, and all payments made shall be forfeited to the company. The payment of the premiums constitutes not only the consideration, but the condition of the contract.

The provision for forfeiture is not limited to the first two annual premiums; it is general, and applies to all. In the previous clauses of the policy, the number and amount of these premiums are particularly specified, and the time is fixed for the payment of each, the last being payable on the 20th day of April, 1883.

The second condition requires that the *premiums* shall be paid in cash on or before the days upon which they become due. There is no discrimination or distinction; the condition is applicable to all. The effect of the second and fifth conditions, therefore, when read in connection with the previous clause, providing for a surrender of the original and the issue of a paid-up policy, is to abridge its operation, and only to give it effect where that surrender is made in the lifetime of the policy. That is to say, during some current year for which payment has been made, and before or on the day the annual premium is payable. If any condition of the policy is violated, the whole instrument, by its own terms, is rendered null and void, and when the policy became void, none of its provisions remained, neither party had any further rights under it.

The policy was, however, by its terms, non-forfeitable, if the assured chose, at the proper time, to avail himself of the right it secured. He had a special right, peculiar to the holder of this class of policies, upon discovering his inability to pay at the time fixed by the condition of his contract, to surrender and avoid a forfeiture. That right existed until forfeiture occurred; then all rights ceased.

This construction results from the obvious force of the language employed; indeed the words of the policy admit of no other. A condition in a policy of insurance being the language of the company, must, if there be any ambiguity in it, be construed against the company, and in favor of the assured, if reasonable. Any other construction would be plainly contrary to the express condition that if the policy became null and void, all payments made thereon shall be forfeited to the said company.

The several contracts upon the construction of which were ruled the cases of Dorr *v.* Ins. Co. (67 Me. 438), Johnson *v.* Ins. Co. (9 Ins. L. J. 189), and Montgomery *v.* Ins. Co. (8 Ins. L. J. 300), were not similar in their provision to that in suit. In each of these cases, it was plainly stipulated, that if after payment of a certain number of the premiums, those subsequently accruing were not paid, when due, and forfeiture ensued, the company would still be liable, for such part thereof as is proportionate to the annual payments made. These cases are, therefore, not in point; they are distinguished in this, that they were on policies which were non-forfeitable, and which had an acknowledged value after a failure to pay a premium.

The case of Bussing *v.* Ins. Co. (34 Ohio 226) is, however, in all respects similar to this. The policy in that case contained substantially the same provisions, for a paid-up policy, followed by a condition, "that if the amount of any annual premium, herein provided for, is not fully paid, with interest due thereon, on the day and in the manner so provided for, then this policy shall be null and void, and wholly forfeited, and in case the policy becomes null and void, all payments made thereon, and all dividends and credits accruing therefrom, and remaining unpaid shall be forfeited to the company." It was held that the right of the policy holder, to make the exchange, was required to be exercised during the life of the policy. It was not the intention of the parties, in the event of the policy becoming void, on default in the payment of premiums, that it should still remain good as a policy *pro tanto* for the premiums which had been paid. To the same effect in the case of People *v.* Widows' Ins. Co. (15 Hun, 8).

In the case of Winchell *v.* Ins. Co. (U. S. C. C., Mass., 8 Ins. L. J., 651), relied upon by plaintiff in error, the provision for a paid-up policy, and the conditions upon which the original was issued and accepted, are in most respects similar to the provision and conditions of the policy in suit, but that case is distinguishable from this in the fact that the condition was expressly "subject to the provisions of 186 ch. of the Acts of the Legislature of Massachuetts, in the year of 186[illegible], entitled An Act to regulate

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decease of the assured. The assured had paid eight annual premiums, including that due June 1, 1873. He died December 17, 1877. The bill alleged that the payments upon the policy were sufficient, under the statute of Massachusetts, referred to in the policy, to continue it in force until after the death of the assured. The defendants maintained that the two clauses taken together meant that the option must be exercised before there was a forfeiture. The learned Court, LOWELL, J., although admitting the case of Bussing's Ex's *v.* Union Mutual Life Insurance Co. (*supra*) was an authority for this construction, and that it seemed to reconcile the apparent discrepancies in the two clauses, and to be consistent with all the words used, "after much doubt," adopts the plaintiff's construction, assigning as a reason for so doing, that "the assured in reading his policy would suppose that he need give himself no uneasiness about the premiums, for that he could always be sure of a policy as large as those he had paid would warrant." We are inclined to adopt the construction, which is consistent with all the words used, "and reconciled all apparent discrepancies," rather than one which results from the belief of what the defendant might suppose "on the reading of the paper." But the Court adds: Even if we supplied the words, "while the policy is in force," the policy *was* in full force, for the whole amount when the assured died. It was in force in all respects, and to all intents and purposes, and subject to be forfeited if the assured did any act prohibited by the conditions, such as travelling in certain countries, and engaging in certain occupations. In other words, up to this time, it was not forfeited at all, except as to the right of extending it beyond the time to which the statute extended it.

We are of opinion, therefore, that the Court below was right in entering judgment for the defendant, on the demurrer to the defendant's special plea.

The testimony offered, the exclusion of which is complained of in the 2d and 3d assignments, was clearly inadmissible; it was a matter of no moment what statements the defendant's agents may have made on other occasions to other people as to the effect of this form of policy, nor was it material how others in the same line of business may have construed it.

We are of opinion, also, that the Court was right in refusing to take off the nonsuit entered at the trial; the policy defines the rights of the parties. Its terms cannot, in the absence of fraud or mistake, be varied by parol proof of fraud or [illegible] 459), where parties without any fraud or mistake have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement, and we are not disposed to relax the rule, nor as stated by Mr. Justice GREEN, in Thorne *v.* Warflein (12 WEEKLY NOTES, 429), "can we throw the whole case into the jury box, on the ground of fraud, simply because one of two parties to a written contract testifies that there were parol stipulations contradictory of the terms of the writing, agreed to at the same time. There must be evidence of fraud, other than that which may be derived from the mere difference in the parol and written terms."

The principles which govern the admission of parol evidence, affecting written instruments, are well established. For some purposes, which are well defined, it is admissible (Martin *v.* Berens, *supra*); but as a general rule it is not received to contradict or vary the terms of a written agreement. The pamphlet is not referred to in the policy; it is not annexed to it. It contains statements of the company as to the special features of the several forms of the contract, which they are authorized to make, but in the absence of proof of fraud or mistake, all previous regulations and propositions, in relation to the contract, are merged in the final agreement.

In the case of Ruse *v.* Ins. Co. (23 N. Y. 516); a "prospectus" was offered in evidence for the same purpose, for which the pamphlet was offered here, and in a cause somewhat similar in its facts. The prospectus offered thirty days' grace in payment of premiums, and contained a clause, "every precaution is taken to prevent a forfeiture of the policy," but the prospectus in the Court of Appeals was held to be inadmissible to affect the company under their contract, as a proof of waiver by way of estoppel.

It is contended that the failure of the defendant company to send the customary notice, excused the plaintiff's default. By the terms of the contract, it was certainly the duty of the assured to pay on the day stipulated, whether he received notice or not. He knew, or was bound to know, the several dates at which the premiums were due, and his neglect to pay was at his own peril; the company was under no obligation to give the notice. (Thompson *v.* Ins. Co., 104 U. S. 253.)

Assuming, however, that the assured may have been misled by the company's course of business, there can be no apology or excuse for two whole years' neglect, upon that ground. Such [illegible]

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Jan. '83, 111. March 5, 1883.

Merchants' Bank of Easton v. Shouse.

Corporations—Lien of—Bank of issue—Savings Funds—Stock—Lien on for debt of shareholder—Set-off—Act of April 16, 1850—Act of November 6, 1856—Act of March 14, 1871.

Corporations are not creatures of the common law as opposed to the statute law. There is no such thing as a common law corporation in this Commonwealth.

At common law corporations have no lien upon stock for the amount of debts due to them by their various stockholders.

The Act of March 14, 1871 (P. L. 350), incorporating the Merchants' Bank of Easton, confers upon said corporation no right of lien upon its stock for the amount of debts due to it by its stockholders.

The provisions of the Act of April 16, 1850 (P. L. 478), conferring such rights upon banks of issue do not extend to mere savings banks.

A. died, holding stock in the Merchants' Bank of Easton, and heavily indebted to said corporation. After his death the corporation began to wind up its affairs, and declared a dividend of its assets to its stockholders:

Held, That A.'s administratrix was entitled to the amount of the dividend falling to A.'s estate, and that the bank could not retain this sum and apply it on account of A.'s indebtedness.

Error to the Common Pleas of Northampton County.

Case stated, wherein Catharine H. Shouse, administratrix of the estate of John Shouse, deceased, was plaintiff, and the Merchants' Bank of Easton defendant.

The following facts appeared from the case stated: John Shouse was a stockholder in the Merchants' Bank of Easton, a corporation created by Act of March 14, 1871 (P. L. 350), and while a stockholder died; he was at the time of his death indebted to the bank upon promissory notes discounted by it which were past due at the time of his death, in the sum of ten thousand dollars. He owned at the time of his death stock of the said bank standing in his name on the books of the company to the number of five hundred and sixty shares. The bank had paid all its outstanding liabilities, had ceased doing any new business, and was converting its assets into money for distribution among the stockholders, part of its assets was so converted and part was unconverted at the time of his death. Some time after John Shouse's death the bank made a partial distribution of the money on hand to the amount of two dollars per share. The money claimed upon John Shouse's stock to the amount of eleven hundred and twenty dollars was not paid to his administratrix, but was retained by the bank, the bank claiming that they had a right to retain and appropriate the said eleven hundred and twenty dollars towards the extinguishment of the said indebtedness of John Shouse. To determine whether or not the bank had such right, this action was brought.

If the Court be of the opinion that the said "The Merchants' Bank of Easton" has no right to retain the said dividend of two dollars per share, amounting to eleven hundred and twelve dollars, upon the five hundred and fifty-six shares of capital stock standing on the books of the company in the name of John Shouse, as payment on account of the indebtedness to it of the said John Shouse, then judgment to be entered for the plaintiff; but if the Court be of the opinion that the bank has a right to retain such dividend on account of such indebtedness, then judgment to be entered for defendant."

The Court entered judgment for the plaintiff, on the case stated, whereupon the defendant took this writ, assigning for error the entering of judgment for the plaintiff.

Reeder & Reeder, for plaintiff in error.

The Merchants' Bank of Easton is a bank of issue under the Act of April 16, 1850, and therefore has the right to retain the stock and all proceeds of the stock of any debtor stockholder until his indebtedness to it be paid. All banks chartered after the adoption of said Act are banks of issue, unless specially prohibited from acting as such. The Merchants' Bank was not specially prohibited. Even if the Merchants' Bank was not a bank of issue, it had the right to apply the money due John Shouse towards extinguishing his indebtedness. For bank stock is a mere chose in action, and being such, John Shouse's stock at the time of his death was a mere right on his part to receive on demand the proportion belonging to him; but he being also a debtor to the bank at that time, the right of set-off existed before his death, the assets being in the possession of the bank and never in his.

Lambarde *v.* Older, 23 Eng L. & Eq. 45.
Bosler *v.* Exchange Bank, 4 Barr, 32.
Light *v.* Leininger, 8 Barr, 403.
Appeal of Farmers', etc., Bank, 12 Wright, 57.
Jordan *v.* Sharlock, 3 Norris, 366.
Dorsheimer *v.* Bucher, 7 S. & R. 9.
Mercein *v.* Smith, 2 Hill, 210.

As both the set-off and the original claim existed before his death, the set-off can, according to the authorities, be applied to the claim after his decease.

Henry W. Scott and *James W. Wilson*, for defendant in error.

The Merchants' Bank is not a bank of issue, because not expressly made so. Its privileges as defined by sec. 2 of its charter are "*to receive on deposit* such sums," etc. etc. It is a settled rule that a corporation possesses those powers which are given to it by its charter and no others.

Comm. *v.* Erie, etc, R. R. 3 Casey, 351.
Diligent Fire Co. *v.* Comm., 25 Smith, 295.
Nat. Bank of Clarion *v.* Gruber, 10 Norris, 377.

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The bank is not entitled to set-off. It does not appear that the assets from dividends were declared, or were under the control of the bank at decedent's death. At the time of decedent's death the assets were unascertained, and there was no mutuality of action existing between the parties.

Patterson's Appeal, 15 Norris, 95.
Leiper *v.* Levis, 15 S. & R. 108.
McClintock's Appeal, 5 Casey, 360.
Roumfort *v.* McAlarney, 1 Norris, 193.
Steamship Dock Co. *v.* Herron, 2 Smith, 280.

April 16, 1883. THE COURT. According to the case stated which we have before us, John Shouse, at the time of his decease, was the owner of some five hundred and fifty-six shares of the capital stock of the Merchants' Bank of Easton, the defendant below, and it also thereby appears that to this institution he died largely indebted. These shares represented his interest in the bank and its assets, and were, to all intents and purposes, personal property which, after his death, passed to the plaintiff as part of his estate. It does not appear that, prior to the time of his decease, the bank, which was, as is alleged, in process of liquidation, had converted any part of its corporate assets, represented by the said stock, into money and applied it on Shouse's indebtedness, at all events, the dividends, which form the subject of the present contention, were declared after his death. Such being the case, unless before that time the bank had a lien upon that stock it could have none afterwards which would be superior to that of the other creditors of this insolvent estate. In other words, if this stock passed to the administratrix unincumbered by any lien of the bank, it must necessarily follow that she, as trustee of the general creditors, must be regarded as the owner of the money realized by its conversion, and, as such, be entitled to its custody. This view of the case would negative the bank's alleged right of set-off, since its claim on the fund could rise no higher than that of any other creditor. In fact, this position does not seem to be disputed, for the argument for the plaintiff is based wholly on the ground of a supposed lien upon the stock, and it is said that this lien was given by the 10th section of the banking Act of April 16, 1850. But as that Act applies only to banks of issue, as it does not embrace mere savings institutions, such as the defendant, the argu-

It would thus seem that the General Assembly of 1856 was not only under the impression that institutions of this kind did not come within the Act of 1850, but was also careful that they should not, by any implication, be brought within it, except so far only as that part of the section mentioned was concerned.

But upon this part of our subject we need not dwell, for an examination of the defendant's charter will at once show that by it the legislature conferred no such right as that contended for. This charter is, in itself, full and complete, it refers to no other Act, and it is therefore idle to rummage other statutes for powers that the Legislature never intended should belong to this institution.

Neither can we entertain the idea that the defendant had a common law lien upon Shouse's stock. Corporations are not the creatures of common law. Such a thing as a common law corporation is wholly unknown to the laws of Pennsylvania; hence, these artificial bodies can have no common law rights, except as such rights may be incidental to the proper execution of the legislative grants, by which such bodies are created.

But when for a corporation a distinct power, or right, is claimed, as in the present case, such claim must have for its foundation some statutory grant or it has no validity. Moreover, the case of the Steamship Dock Co. *v.* Herron (2 P. F. S. 280), cited in the learned and able opinion of the Court below, in terms rules that there is no such thing as a common law lien on stock, in favor of a corporation, for a debt due it by a shareholder.

The judgment is affirmed.

Opinion by GORDON, J.

GREEN, J. absent.

S. G. F.

July, '82, 138. March 5, 1883.

Lochman v. Brobst.

Married woman—Separate estate—Contract—Evidence—Execution—Fraud.

Where a married woman, having a separate estate, pur-

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judgment, and the mortgaged premises were sold under a levari facias to A.'s wife, who already owned in her own right another house and lot. The purchase-money was not actually paid to the sheriff, but the building association accepted in lieu thereof a mortgage on the property. Subsequently judgment creditors of A. issued execution against the premises as the property of A., and having purchased the same at sheriff's sale, brought ejectment against A.'s wife:

Held, that A.'s wife, in order to sustain her title, was bound to show satisfactorily that she had purchased the property upon the credit of her separate estate, and that the mere fact of her having a separate estate was not conclusive of that fact.

Error to the Common Pleas of Lehigh County.

Ejectment, by George Brobst against Benjamin Lochman and Catharine Lochman, his wife, for a house and lot on Seventh Street, in the borough of Allentown.

On the trial, before ALBRIGHT, P. J., the following facts appeared: Benjamin Lochman, the defendant, was seised of a certain house and lot on Seventh Street, in the borough of Allentown, the property in question, upon which the Equitable Building Association had a mortgage for $326. In 1879 the building association issued a sci. fa. on its mortgage, obtained judgment, and sold the property under a levari facias. Lochman, before the sale, went to George Brobst, who had a second mortgage on the property, and asked him to buy the property, but he declined. At the sheriff's sale it was struck down to Catharine Lochman, wife of the defendant. Her daughter-in-law gave her the money to pay the costs, and the building association accepted a mortgage on the house and lot for the amount realized, to obtain which Lochman transferred two shares of the building association stock to Mrs. Lochman, in consideration of moneys borrowed from her. It appeared that at the time of this transaction Catharine Lochman was seized in her own right of, in, and to a certain other house and lot in the said borough.

Shortly afterwards George Brobst, having obtained judgment on the bond accompanying his second mortgage, levied upon and sold the premises in question as the property of Benjamin Lochman. The deed having been acknowledged to him, he brought this action of ejectment.

Plaintiff requested the Court to charge, *inter alia*, as follows:—

(1) The purchase of real estate by a married woman amounts to nothing, unless it be accom- [illegible] whole purchase-money, this is a purchase upon credit, and the fact that she was the owner of another property is of no consequence, and will not give her title to the property purchased upon credit as against her husband's creditors. *Affirmed.*

The defendant presented, *inter alia*, the following points: (4) If the jury believe that Mrs. Lochman had a separate estate, she had a right to purchase the property on credit. *Answer.* Refused. The purchase must have been upon the credit of her separate estate.

The Court charged the jury, *inter alia*, as follows: "If the building association gave Mrs. Lochman credit for the amount of money which they would have had to draw from the sheriff, and which it is admitted on the part of the president they did not draw, but agreed with Mrs. Lochman that they would give her credit on her own separate estate, they were at liberty to do so, and if she thus consummated the sale, it would make a good title in her. . . . I therefore say to you that she (Mrs. Lochman) has to-day, and had in 1879, when these questions arose, a separate estate. But even if she had a separate estate, and if the building association, when they gave this credit which enabled her to obtain this title from the sheriff in her own name, did not give that credit on the strength of her separate estate, then it would avail her nothing. . . . You will, in the next place, inquire whether the building association, when they made the arrangement alleged to have been made by the defendants, did give Mrs. Lochman the credit (I refer now to the arrangement by which they agreed not to demand the money they had to receive from the sheriff from him, but entered into this contract with Mrs. Lochman), and whether they gave her that credit upon the strength of her separate estate. If you find it proved clearly, fully, and satisfactorily that they did, then that branch of the case will be decided in favor of Mrs. Lochman, the defendant. If you find that it is not so proven, and that that branch of the case is decided against her, then she cannot recover, and your verdict will be in favor of the plaintiff. . . . Inasmuch as Catharine Lochman, who claims the property by prior sheriff's deed, is the wife of Benjamin Lochman, as whose property this lot was sold, it is incumbent upon her to show that she was the *bona fide* purchaser of this property, and that she paid for it with her [illegible]

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John Rupp and *C. J. Eardmann*, for plaintiff in error.

It is settled that a married woman with a separate estate can purchase on credit. But the Court misled the jury on this point by charging that it must be a purchase with her own funds, which she had obtained by will, descent, or conveyance. She purchased at sheriff's sale, so that it was a sale for cash, and not a purchase on credit. The fact that the building association made the loan and accepted the mortgage, shows that they relied on her separate estate.

Edward Harvey and *John D. Stiles & Son*, for defendant in error.

The purchaser must have purchased and loaned the money, relying on the separate estate. The plaintiff in error has nothing to complain of in the charge of the Court.

April 2, 1883. THE COURT. The learned Judge of the Court below said to the jury in his charge: "If the building association gave Mrs. Lochman credit for the amount of money, which they would have had to draw from the sheriff, and which it is admitted on the part of the president they did not draw, but agreed with Mrs. Lochman that they would give her credit upon her own separate estate, they were at liberty to do so, and if she thus consummated the sale it would make a good title in her." After referring to the testimony on the question whether Mrs. Lochman had a separate estate at the time of the purchase of the property in question, the Judge instructed the jury positively that she had a separate estate, and then in the latter part of the charge, recurring to the subject, he said: "You will in the next place inquire whether the building association, when they made the arrangement alleged to have been made by the defendant, did give Mrs. Lochman the credit (I refer now to the arrangement by which they agreed not to demand the money they had to receive from the sheriff from him, but entered into this contract with Mrs. Lochman), and whether they gave her that credit on the strength of her separate estate. If you find it proved clearly, fully, and satisfactorily that they did, then that branch of the case will be decided in favor of Mrs. Lochman, the defendant."

The learned counsel for the plaintiffs in error complain that the Court charged the jury, "that a married woman under no circumstances can purchase upon credit," and then to convict the Court of error they cite the decisions of this given upon Mrs. Lochman's separate estate was fairly left to the jury and in precise accord with the decisions referred to. Nor did the Court charge that it was necessary for a married woman to pledge her own separate estate by mortgage or otherwise, if in point of fact the credit was given upon the faith of the separate estate, and this also is in conformity to the authorities. It seems very clear to us that the Court went quite as far in stating the law upon this subject, as is permitted by the cases, and Mrs. Lochman was afforded the full benefit of the most advanced doctrine which has been thus far announced. In the statement of the general rule in regard to the acquisition of property by a woman after marriage, as expressed in the plaintiffs' third point, and in the portions of the charge covered by the ninth and tenth assignments, the Court was entirely correct. This doctrine has been held in many cases, and we certainly do not mean to abandon it yet. In Baringer *v.* Stiver (13 Wr. 129) it was well expressed by Mr. Justice AGNEW: "We adhere to the settled doctrine, that it is only where the property acquired after marriage has been paid for with her own separate estate, clearly and satisfactorily established, it is hers, and is protected from her husband's creditors. To suffer a wife to purchase upon credit is to open a wide door for fraud. Its effect is to throw upon the creditors the burden of proving whose funds afterwards entered into the payment. For starting with title founded on her credit she can stand upon it, until the husband's means can be shown to enter into the purchase." We do not understand the answers to the plaintiffs' fourth point and the defendant's second point, to be obnoxious to the criticism made upon them by the learned counsel for plaintiffs in error. Evidently what the court meant to say, and in reality did say, was that a purchase by a a married woman upon her bare credit, unsupported by a separate estate, would give her no title. This is manifest by the concluding clause of the answer to defendant's second point. "The purchase must have been upon the credit of her separate estate." This is exactly what we said in Sixbee *v.* Bowen (10 Norr. 149): "She is not precluded from buying on credit, but it is incumbent on her to show that her separate estate was the foundation of her credit." And in Seeds *v.* Kahler (26 P. F. S. 262) it is said: "It is well settled that when the wife has a separate estate, and she buys property on the credit of that separate estate, she may hold it against the credi-

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time some separate estate of her own. In other words, mere proof that she did own separate estate without showing that credit was given upon it in any way, is sufficient to convert what would otherwise be a void sale into a valid one, as against the husband's creditors. We do not so understand the decisions. In all of them it is expressly held that if the property was purchased by the wife on credit, it must have been upon the credit of a separate estate owned by the wife in order to protect it against the husband's creditors. Thus in Bucher *v.* Ream (18 P. F. S. 421) we said on p. 426: "And property purchased by the wife on the credit of her separate estate or by her earnings derived from the management of it, is protected from her husband's creditors. (Brown *v.* Pendleton, 10 P. F. S. 419.) But where the wife has no separate estate she can acquire no separate property with her earnings during coverture. Her earnings belong to her husband, and if she purchases property with borrowed money or on credit, it belongs to her husband as it respects his creditors, and is liable for his debts." In Brown *v.* Pendleton, the goods levied on as the husband's were purchased by the wife with money borrowed by her on a mortgage of her separate real estate. She opened a store with such goods and kept a separate bank account upon which she drew to pay for goods purchased, and she purchased other goods on a short credit with which mingled with the others she carried on business; it was held the case should have gone to the jury on the question whether the goods purchased on credit were acquired on the credit of her separate estate and its earnings. AGNEW J. said: "But where she has known property of her own, the credit founded upon it, or the products arising from it, are protected from her husband's creditors." That is, there must not be only a separate estate, but there must be a credit founded upon that estate, where the purchase has been upon credit in order to protect it. The same was held in Silveus's Ex'ors *v.* Porter (24 P. F. S. 448), and in Seeds *v.* Kahler (26 P. F. S. 262). In the latter case we said: "She is not precluded from buying upon credit, provided it be upon the credit of her separate estate. It is incumbent upon her to establish the fact that the purchase was so made, to protect her title against the creditors of her husband." . . . "As already shown she had a separate estate—her husband had none. The question then is, was there sufficient evidence to leave to the jury to find whether the mare was purchased for the plaintiff and on the credit of her separate estate?" From this it will be seen that it is not enough to show merely that the wife has a separate estate, but she must go further and show that the purchase was made upon the credit of that estate. This was precisely the rule which the learned Judge of the Court below followed in the present case. He told the jury that if the building association gave credit to Mrs. Lochman upon her separate estate in the arrangement they made with her, she would acquire a good title. The jury found against her, and we think the evidence was such as to justify such a finding.

As to the shares of stock in the building association, the Court left fairly to the jury the question whether the transfer of them by her husband to her, was in fraud of creditors or in payment of a debt due to her, and the jury found against her. Certainly this was a question of fact to be determined by the jury.

We think the claim of the wife was treated with great fairness by the Court; she was allowed full opportunity to bring her case within the most recent rulings in relation to purchases on credit by married women, and she failed because she could not satisfy the jury of the necessary facts to make out her case.

Judgment affirmed.

Opinion by GREEN, J. S. G. F.

July ,82, 155. March 5, 1883.

Steckel, Adm'r, etc., v. Koons.

Dower—Act of March 29, 1832—Merger—Sheriff's sale.

If, under the Act of March 29, 1832 (P. L. 202), a charge in lieu of dower is made on land, and a son who, on the death of the widow, would be entitled, under the Act, to a share in the principal so charged, accepts, in the partition proceedings, the same land as part of his share of his father's estate, such acceptance will merge his right, on the death of the widow, to a share of the principal charged on said land in lieu of dower; and on judgment being obtained against him, and the land sold, the purchaser at the sheriff's sale is not liable for the principal charged on the land, in an action brought against him by the administrator of said son.

If there are two children, both of whom, on the death of the widow, would be entitled, under the Act, to a share in the principal charged as a dower interest on the land, and both of whom in the partition proceedings have accepted land on which said principal is charged, and one of them conveys his land so accepted to the other, without reservation, the share of both parties in the principal charged on said land is paid by operation of law, and cannot be recovered from one who has purchased at sheriff's sale the land so conveyed.

Error to the Common Pleas of Lehigh County. Debt by Thomas Steckel, administrator of John H. Romig, deceased, against David Koons.

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On the trial before ALBRIGHT, P. J., the following facts appeared:—

John H. Romig, Sr., died in 1838, intestate, and leaving, *inter alia*, two tracts of land whereof he died seised. By the partition proceedings in 1845 his estate was distributed among the widow and three children, Lydia, Mary, and John H. Romig, Jr. The son, John H. Romig, Jr., received tract of land No. 1, at its valuation, and the daughter Mary, by David Gackenbach, her husband, accepted tract No. 2. The widow's dower was charged on these two tracts, $3758.25 on No. 1, and $659.61 on No. 2, the interest to be paid to the widow annually during her life, and after her death the principal to be divided equally among the three children. On October 14, 1848, Mary and her husband David Gackenbach, conveyed their tract No. 2 to John H. Romig, Jr., who already had No. 1; so that both tracts became vested in John H. Romig, Jr. On Feb. 11, 1847, a judgment was entered against him, and subsequently execution being issued thereon, the two tracts of land in question were sold on October 18, 1851, by the sheriff, and David Koons, the defendant in this case, became the purchaser. The sheriff gave Koons a deed of the land Dec. 5, 1851. The widow died in July, 1880, and the son, John H. Romig, Jr., had died some time before that. His administrator then brought this suit against Koons, the purchaser at the sheriff's sale, to recover from him Romig's share of the dower which had been charged on the land Koons had bought.

At the trial the plaintiff was nonsuited. A motion to take off the nonsuit was refused by the Court; and in their opinion they said:—

"It is contended that because the 41st section of the Act of 29th March, 1832, provides that *on the death of the widow*, the principal sum which remains charged during her lifetime to secure her annual interest, shall be paid to the persons legally entitled thereto, and because the widow of John Romig, Sr., died after the land had been sold by the sheriff, as the property of John H. Romig, that therefore the interest of John H. Romig in said thirds remained charged on the land, and the defendant, who is the sheriff's vendee, is liable in this action. The interest of John H. Romig in the tract accepted by him became an estate in the land; he was not a debtor to himself for a debt due at the decease of the widow. (Erb *v.* Huston, 6 H. John Romig, Sr. In the thirds charged on that tract, John H. Romig had an interest. By virtue of the acceptance he became entitled to receive his share of the thirds at the widow's death. It was a chose in action, a debt payable *in futuro*. When Mrs. Gackenbach and her husband transferred the title to that tract to John Romig, the interest of the latter was paid by operation of law."

The plaintiff thereupon took this writ, and assigned for error the refusal to take off the nonsuit.

John Rupp and *J. B. Deshler*, for the plaintiff in error.

Under the Act of 1832 the widow's interest is realty, but the interest of the heirs in the principal charged is merely a lien on the land.

Dickinson *v.* Beyer, 6 Norris, 274.
Kurtz's Appeal, 2 Casey, 465.
Ebbs *v.* Commonwealth, 1 Jones, 374.

The interest of the heir being a lien and not an estate, the doctrine of merger does not apply.

4 Kent, Com., 99.

The cases which hold that the interest of plaintiff's intestate was paid by operation of law when he acquired the land, were not decided under the Act of 1832, but under the Acts of 1799 and 1807.

The question is one of intention; and an intention to prevent the extinguishment of the incumbrance will be presumed wherever it is the interest of the party that the incumbrances shall not be sunk in the inheritance.

Richards *v.* Ayres, 1 W. & S. 485.
Kline *v.* Bowman, 7 Harris, 24.
Shertzer's Execr. *v.* Heir, 7 Harris, 34.

It is the intent of the Act that the whole sum shall "remain charged" on the land during the widow's lifetime and not be merged.

Harry G. Stiles and *John D. Stiles*, for defendant in error.

The Act of 1832 is not different from the Acts of 1799 and 1807.

The interest of plaintiff's intestate was paid by operation of law.

Stecker *v.* Shimer, 5 Wharton, 459.
Duey *v.* Clemens, 1 Barr, 118.
Updegrove *v.* Updegrove, 1 Barr, 136.
Dech *v.* Gluck, 11 Wright, 403.
Shelly *v.* Shelly, 8 W. & S. 153.

A widow's statutory dower is not a lien on land but an interest in it.

Helfrich *v.* Weaver, 11 Smith, 390.
Schall's Appeal, 4 Wright. 170.

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bach and wife conveyed the other purpart to the testator, they made no reservation whatever. Their share of the widow's thirds was thereby paid by operation of law. The learned Judge therefore committed no error in refusing to take off the compulsory nonsuit.

Judgment affirmed.

PER CURIAM. S. G. F.

Common Pleas—Equity.

C. P. No. 2. December 10, 1883.

Thistle v. Lippincott.

Equity—Discovery in aid of an action at law—When granted—What must appear in bill—Principal and agent—Equitable jurisdiction in matters of account.

Sur demurrer to bill of discovery.

Action on the case (in aid of which this bill was filed) by Thistle against Lippincott, Son & Co.

The bill set forth, *inter alia*, the following facts:—

The complainant was a manufacturer of shoes for five years previous to March, 1883. At various times during that period he consigned to the defendants, who are auctioneers, large numbers of shoes for sale on commission, each dozen pairs being inclosed in a separate box. These boxes were the complainant's property, either furnished by him, or by the defendants and paid for by him. The defendants sold the shoes and boxes for the complainant's account, the purchasers being charged and paying for the boxes as well as the shoes. The complainant had paid all the defendants' charges for commissions and expenses and they had accounted to him for all sales of shoes, but not for the sales of the boxes. In March, 1883, the complainant ceased his dealings with the defendants. Being at that time indebted to them in a small balance for advances, he asked them to deduct this sum from the amount due him for sales of boxes and return the rest, about $275, to him. On their refusal to do this, he brought suit. After his narr. had been filed, the defendants asked for a bill of particulars, which he would be unable to furnish except by means of this bill, "inasmuch as he neither had nor has the requisite information, the said defendants, who alone possess the same, not having exhibited or furnished to him any accounts, statements, or other information" in regard to the sales of the boxes. Besides this, the complainant would be unable safely to go to trial and prosecute his case without a full discovery in regard to these sales.

To this bill the defendants demurred for the following reasons:—

(1) The bill did not show that the information sought was solely within the knowledge of the defendants, or that there were no other witnesses from whom it might be procured.

(2) It merely asked for information which the court at law had full power to compel defendants to disclose.

(3) It was filed only to find out whether the complainant had any cause of action, not simply to compel the production of evidence in support of a known cause of action.

(4) It was not the proper means of procuring the information necessary for preparing a bill of particulars.

(5) It did not show that the court of equity had jurisdiction, owing to the inability of the court at law to obtain the information sought.

(6) It did not show a good case at law.

George H. Earle, Jr., for the demurrer.

Bills of discovery in aid of actions at law are not favored by our Courts, as they delay the suit and put the defendant at a disadvantage. They are therefore sustained only when the information sought is solely within the knowledge and control of the defendant and cannot be obtained at the trial of the suit at law. The bill does not show that this is the case.

Leggett *v.* Postley, 2 Paige Ch. 579.
Gelston *v.* Hoyt, 1 John. Ch. 546.
Phillips *v.* Kern, 6 Phila. 9.

This is a mere "fishing bill." It does not show a good cause of action at law, but is an attempt to find out whether there is any cause of action at all.

Lubé's Equity Pleading, 329, note.
Newkerk *v.* Willett, 2 Caine's Cas 296.

The complainant having begun his action at law, this bill cannot be treated as a bill for an account to the inconvenience of the defendants in the action at law.

Story's Equity, § 442.

Ernest H. Davis, contra.

The complainant shows a good cause of action at law. The goods being consigned to the defendants as factors, the law presumes that they contracted to account for the sales, and pay over the proceeds and return all unsold goods on demand. They are, therefore, liable both for not accounting and for money had and received.

2 Chitty's Pleading, *343, note g.
Russell on Factors and Brokers, *40, *264–5.
Story on Agency, § 33.
Pulling on Mercantile Accounts, *134–5.

By the Acts of 16 June, 1836, and 10 April, 1848 (Purdon, 590–2), the equity jurisdiction of

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our courts in matters of discovery is complete, and this mode of procuring evidence is particularly applicable to suits between principal and factor.

Story's Equity, §§ 67, 458, note 4, 459.
Russell on Factors, *267.
Bank of Ky. *v.* Schuyl. Bk., 1 Pars. 180, 221.
Bank of U. S. *v.* Biddle, 2 Id. 31, 55.
Oil Co. *v.* Adams, 6 Phila. 182.

The resort to equity is necessary. The Act of 27 February, 1798 (Purdon, 621), providing for the compulsory production of books and papers, but at the trial only, does not meet this case.

Prestien *v.* Sarmiento, 4 WEEKLY NOTES, 89.

It is also allowable. Neither the Act of 1798 nor the later Acts in regard to evidence curtail the power of a court of equity to grant a discovery.

Story's Equity, §§ 33, note 3, 64 i. note 1.
Bispham's Equity, § 558, and cases cited in note 1, p. 592.
U S. Bank *v.* Biddle, 1 Pars. 31, 53-4.
Reed *v.* Stevenson, 6 WEEKLY NOTES, 173.
Kirkpatrick *v.* McDonald, 1 Jones, 387, 393.
Wesley Church *v.* Moore, 10 Barr, 273, 279.
Painter *v.* Harding, 3 Phila. 59.

Under the evidence Acts of 1865 and 1869 and their supplements, it is optional whether the adverse party be called as a witness, either before or at the trial, or be made to answer a bill of discovery.

Campbell *v.* Knowles, 13 Phila. 163.

As the complainant is obliged to rely, in his action at law, upon books and papers of which he at present knows nothing, and as the account is made up of a number of small items, running through a period of five years, this is the only adequate mode of obtaining the information sought.

Story's Equity, §§ 67, 1483 *et seq.*
Peebles *v.* Boggs, 1 Phila. 151, 155.
Gillingham *v.* Baker, 22 Leg. Int. 117.

As factors the defendants are bound to keep full and accurate accounts. As owner of the fund to which the accounts relate, the complainant is entitled to the production and inspection of them.

Story's Equity, §§ 74 d. note 5, 462.
Story on Agency, § 203.
Pulling on Acounts, *110.
Wigram on Discovery, *199, etc.

The bill expressly states that the defendants alone possess the information sought, but even this is not essential. It is unnecessary to state that they have kept full and accurate accounts, for the law presumes that they have done so. It is also unnecessary, in a case like this, where discovery alone is sought, to allege that the complainant has no other means of obtaining evidence in support of his claim.

Story's Equity, Pleading, §§ 319 (note 1, p. 288), 324.
Story's Equity, §§ 74 c. note 3, 1483 note 3.

Where the bill, as in this case, clearly shows that the complainant has an interest, capable and proper to be vindicated in some judicial proceeding, in the subject matter to which the discovery relates, it cannot be called a "fishing bill."

Brightly's Equity, § 483.
Peebles *v.* Boggs, 1 Phila. 151, 155.

Independently of the necessity for a discovery, equitable relief may be granted in this case, because it is an action for an account and because the defendants are trustees.

Story's Equity, §§ 67, 73, 458 *et seq.*
Baker *v.* Biddle, 1 Bald. 394, 408.
Act of 13 Oct. 1840, Purdon, 591, § 4.
P. & C. R. R.'s App., 3 Out. 177.

A full and exact bill of particulars would be in effect a statement of the business transacted by the defendants as the plaintiff's factors. He is entitled to such a statement, and can obtain it by a bill of discovery. His right to such information cannot be affected by his use of it in furnishing a bill of particulars.

C. A. V.

THE COURT. Demurrer overruled, on the ground that the defendants are sued as factors or agents, and are bound absolutely to account.

C. C. B.

C. P. No. 3. Oct. 12, 1883.

Coffin v. Gruber et al.

Equity—Receiver — Injunction —Limited partnership—Notes given by the general partners as individuals for moneys loaned to the special partner, which moneys went into the firm as capital—Liability of the partnership—Confession of judgment in contemplation of insolvency —Capital of a limited partnership and its character—Act of March 21, 1836.

Sur motion to continue injunction.

The bill and the evidence showed the following state of facts: The defendants, Henry Gruber, William P. Hoopes, and Albert H. Mershon, on July 1, 1881, formed a limited partnership under the Act of March 21, 1836. The general partners were Henry Gruber and William P. Hoopes, the special partner being Albert H. Mershon. The amount of the capital contributed by the special partner was stated to be $12,000 in cash. No capital was contributed by the general partners. Of this amount, $4500 were loaned to Mershon by Anna E. Cadwallader, and $7500 by Kate M. Lacey, who is now his wife. On January 2, 1882, judgment notes signed by the defendants, Henry Gruber and William P. Hoopes, in their individual names, were given to Anna E. Cadwallader and Kate M. Lacey for $4500 and $7500 respectively. The firm was then solvent. On March 1, 1883, a judgment note for $1100, similar to the others, was given to George Gruber, a brother of Henry Gruber.

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On September 7, 1883, the firm of Gruber, Hoopes & Co. suspended payment of their debts, and presented a statement to their creditors, and endeavored to effect a settlement of their debts at the rate of forty cents on the dollar. On September 14, 1883, judgments were entered by confession upon the three judgment notes above mentioned.

The bill prayed for an injunction to restrain execution on these judgments, and for a receiver.

Richard C. Dale and *John C. Bullitt*, for the motion.

The general partners of a limited partnership, organized under the Act of March 21, 1836, cannot confess a judgment which will be a lien upon the partnership assets, in favor of a creditor of a special partner who has loaned the money to the special partner to be contributed as special capital.

Granting the power of a limited partnership to assume the debt of a special partner, and confess judgment in favor of his creditor, the judgment notes signed by Henry Gruber and William P. Hoopes were not effective as instruments imposing a liability upon the partnership, but are the individual obligations of Henry Gruber and William P. Hoopes.

The firm of Gruber, Hoopes & Co. was then insolvent, and the act of confessing judgment by a limited partnership when insolvent or in contemplation of insolvency, even in favor of a *bona fide* partnership creditor, is in direct violation of the Act of March 21, 1836, § 20.

Thomas J. Diehl, contra, cited—

Walker *v.* Marine Bank, 2 Out. 574.

October 27, 1883. THE COURT. The bill filed in this cause fails to charge, and the evidence does not establish the fact that Mrs Cadwallader or Mrs. Mershon, the real owners of two of the alleged void judgments, either directly or indirectly combined and confederated for the purpose of defrauding the creditors of the firm of Gruber, Hoopes & Co.; if, therefore, in so far as these judgments are concerned, we are to grant the prayers of the bill, we must do so either (1st) because the judgment notes do not bind the partnership, not being signed with the firm name, but only by the individual partners, or (2d) because the notes, if otherwise valid, are void, having been executed when "the firm

The solution of each of these questions will determine this case.

1. The evidence clearly established these facts, viz: That Henry Gruber and William P. Hoopes were the only general partners of this concern, and that, intending to bind the partnership, they, in ignorance of the law, signed the notes individually; that the money intended to be secured was then in the firm, and was used by the partnership. It is admitted by the plaintiff's counsel that where all the partners of a firm sign a judgment note in their individual names for an indebtedness due by the firm, upon proof that a creditor is a partnership creditor, he may enforce his claim by an execution against partnership assets. The force of this principle of law is sought to be avoided, by the argument, that two at least of these execution plaintiffs were not partnership creditors, but only persons who had *advanced money* to the special partner, and therefore they must look alone to him for payment, for, as between the general creditors and these execution plaintiffs, no consideration existed or could exist.

It has been decided that the use of the money is a sufficient consideration for the assumption of the debt. (Walker *v.* Marine Bank, 98 P. S. R. 574; Lint *v.* Shultz, 37 Leg. Intell. 426.) And the principle has been extended to a case where money had been loaned upon the personal credit of a member of the firm, but the money went into the firm, and that fact alone created a consideration to support the firm's subsequent promise to pay. (Siegel *v.* Chidsey, 28 P. S. R. 279.)

We see no reason to doubt the fact that the debt was treated as a liability of the firm, although it does not appear distinctly as a firm liability; the fact that it does not so appear was explained by the oaths of both partners, and that the money went into the firm, and was used by it in its legitimate business is beyond a doubt.

2. Were two of these judgments confessed when the firm was "insolvent" or "in contemplation of insolvency?" If so, they are, by the very terms of the Act of Assembly, null and void, as to partnership creditors.

The notes held by Mrs. Lacey, now Mrs. Mershon, and Mrs. Cadwallader, were executed on the second of January, 1882. On that day no debts, strictly so called, existed against this firm, and from that date to a very recent period of time the firm continued solvent. But it is

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notes that condition of things did not exist, and the best proof of the fact is, that for a period of about eighteen months the firm proceeded to do business in their usual manner, and were solvent. The law evidently intends to prevent a preference, where that preference would produce a fraudulent result. Can it be truly said that a firm able to pay its debts, and which continues to do so for more than a year, is either insolvent or contemplating insolvency because at the end of that time it fails in business? We think not, and upon this point we come to a conclusion adverse to the plaintiffs in this bill.

3. The last question presented involves the vital point in this cause.

Does the Act of Assembly of March 21, 1836, whereby limited partnerships may be created, and the general policy of the law, which ought to govern in the construction of that statute, prohibit one who loans money to a special partner, from taking such a security from the general partners of the firm; and is the sum paid in by a special partner in substance a trust fund, and as such to be held only for the benefit of the general creditors of the concern? The question is, we believe, new, and difficult of solution.

As a principle of universal application, the true intent and meaning of a statute must be ascertained by regarding the object intended to be accomplished by its enactment.

To enable one to embark in business, and yet protect him as a partner from general liability, was the real object of this law, hence the Act, in detail, declares how this may be safely done. The amount of money actually paid in was the limit fixed by law to the liability of a special partner. The fund thus contributed gave credit to the concern, and was immediately placed at hazard in the business. In the absence of fraud, or even pretended fraud, every creditor of the firm knew, or was supposed to know, that a certain amount had been contributed and might be lost. The special partner was also in any event always liable for the general debts of a firm to the amount paid in, and his credit, to that extent at least, was involved in the general credit of the parnership.

How can it be held that a special fund could in any event be held in special trust? The very fact that all the capital of a firm is at all times at a risk, forbids the idea that any specific fund can be held in trust. The very idea of a trust fund, involves the thought, that that fund must at all times be securely invested, and held to meet the demands of a beneficiary of the trust. No one contends that this special partner is not liable for the debts of the concern, at least in the extent of $12,000. If, in the course of events, the creditors of a special partner desire additional security for the fund paid in by that partner, and by them loaned to him, who is injured by the transaction? The general partners are benefited, because the capital advanced remains intact, and is only secured. Surely the creditors cannot complain, because the money advanced is in the concern, and is daily used in its business. It gives so much additional credit to the firm. Doubtless one intending to become a special partner, might borrow the money which he intended subsequently to contribute to a partnership, and give any individual security desired therefor.

If, in the course of business, a firm becomes embarrassed, what is to prevent the creditor of a special partner from suing out his individual security, and, as against that partner, obtain a judgment and issue execution thereon? The very fact that the general partners of a concern might be willing to assume the debt, might prevent insolvency, and thus protect the general creditors.

Whichever way we look at the question we cannot avoid the conclusion that the law intended, and all that it intended, in the absence of fraud, was to provide a method by which, when certain specified sums of money were paid into a firm by a person called a special partner, the amount paid and the name of the person contributing should be known; and that thereafter this sum should of course be liable to the risks of the business, and the liability of the special partner be limited.

One of the judgment notes specified in the bill was executed March 1, 1883, and as at that time the firm was insolvent, the judgment confessed to George Gruber is null and void.

As to each of the other defendants named in the bill, the injunction heretofore granted is dissolved; as to George Gruber the injunction is continued until further order of the Court. The prayer for the appointment of a receiver is refused.

Opinion by LUDLOW, P. J.

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Common Pleas—Law.

C. P. No. 1. November 24, 1883.

Baltz Co. v. Livingston, Defendant; and The Fidelity Insurance, Trust, and Safe Deposit Company, Garnishee.

Practice—Attachment execution—Executors and administrators—An attachment against a party in his own name will bind funds held by him as administrator of an estate in which the defendant has an interest.

Sur rule for judgment upon garnishees' answers to interrogatories.

This was an attachment execution against the Fidelity Insurance, Trust, and Safe Deposit Company. The answers of the garnishees set forth, that in their own right they had no business transactions with the defendant, but were administrators of Matilda Livingston, deceased, to whose entire estate the defendant was entitled, after payment of debts, costs, etc., of administration. That the balance for distribution of the estate, as shown by their account, had been awarded to them, the accountants, to await the issue of this and other attachments, in some of which they were correctly described as "administrators of Matilda Livingston, deceased." The answers further admitted an amount in the hands of the garnishees, as such administrators, greater than the amount of the judgments.

George W. Arundel, for the rule.

In a precisely similar attachment, in C. P. No. 3, judgment was given for the plaintiff against the garnishees accountants, administrators of Matilda Livingston, deceased.

McColgan *v.* Livingston, C. P. No. 3, Dec. T. '82, No. 686.

John M. Gest, for the garnishees.

The Trust Company, in their individual or corporate capacity, are legally distinct from the Trust Company, administrators of Matilda Livingston, deceased. To bind the interest of the defendant, the attachment should be laid against the garnishees as administrators.

THE COURT. The answers disclose that the garnishees have assets of defendant in their hands as administrators of an estate, to which the defendant is entitled as distributee. The attachment, though not laid against them as administrators, will bind the interest of the defendant.

The Court entered judgment against the garnishees, as administrators, of Matilda Livingston, deceased. C. H. B.

[In Trego *et al.* *v.* Jones, C. P. No. 3, June, 1875, No. 956, an attachment sur judgment was laid in the hands of B. S. Hunt and Geo. N. Watson, *executors* of the last will of John H. Jones, deceased, on September 7, 1876; another att. ex. was on September 11, 1876, laid in the hands of B. S. Hunt and Geo. N. Watson, *executors and trustees* under the will of John H. Jones, deceased, by other parties, whereupon, on October 11, 1876, Trego took a rule to amend the record by inserting in his att. ex. after the names of the garnishees the words "Executors and Trustees under the will of John H. Jones, deceased;" and it was argued to the Court that the writ having been served upon the same persons, the title was mere matter of description not essential, but the Court denied the validity of the argument and made the following entry: "Rule absolute without prejudice to rights of other creditors." The same course was followed in C. P. No. 3, June, 1876, Nos. 1457 and 1458.

Cf. Bentley *v.* Kaufman, 3 WEEKLY NOTES, 352.]

C. P. No. 1. November 24, 1883.

Ross v. Railroad Co.

Railroads—Report of viewers—Award of damages—Time of filing—Interest on award—Appeal—When there is an appeal from the award of a jury, interest will only be allowed from the time of the determination or withdrawal of the appeal.

Rule to confirm an award of viewers, and enter judgment *nunc pro tunc*.

In this case certain property of the plaintiff had been taken by the Pennsylvania R. R. Co. for the use of the road, and the report of the jury of view, awarding damages for $64,000, had been filed July 6, 1883. From this award plaintiff appealed, but subsequently withdrew the appeal on November 21, 1883, and now asked to have the judgment on the award entered as of July 6, 1883, with interest from that date. To this defendant objected, claiming that interest was only due from the date of withdrawal of the appeal.

Freedley and *Rawle*, for the rule.

A vendee in possession must pay interest until payment of the purchase-money. The defendant not only deprived the plaintiff of her interest in the land, but has been receiving rent therefor from the lessees of the premises, and should therefore pay interest from the date of the award, having neither paid the amount of the award into Court, nor tendered it to the plaintiff. The Act of 1848, supplementary to the charter of the Penna. R. R. Co., and not the general railroad law, applies to this case.

Penna. R. R. Co. *v.* Cooper, 8 P. F. Smith, 408.

It makes no difference that the appeal was taken by the plaintiff, inasmuch as the defendant has been in possession of the property all the time, without payment or tender of payment.

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H. K. Fox, contra.

No action can be taken on an award till judgment, and the payment of interest cannot be imposed on the defendant for the delay caused by the plaintiff; that would be interest for a period during which defendant was awaiting the plaintiff's pleasure in making an election of her remedy. The defendant has no title till final judgment is entered upon the award; the defendant is not a vendee of the land, but holds only an easement—a right of way over it.

Kelsey *v.* Murphy, 6 Casey, 340.
Hoopes *v.* Brinton, 8 Watts, 73.
Norris *v.* The City, 20 P. F. Smith, 332.

Rawle, in reply.

It is the universal practice to allow interest on an award from the time of filing. Interest on a verdict runs from the time judgment is entered, though a writ of error be taken.

[BIDDLE, J. That is the case of a final judgment? In this case you have not yet obtained a final judgment.]

We are seeking a judgment *nunc pro tunc*. Upon principle, it would be great injustice if interest should stop during the pendency of an appeal. This would give railroads even greater advantages than they now possess.

December 1, 1883. THE COURT. The exceptant having taken an appeal put it out of the power of the railroad company to settle before November 21, when the appeal was withdrawn. This fact is conclusive, in our opinion, and we cannot enter judgment as of July 6.

Rule discharged, and judgment entered as of November 21, 1883.

Oral opinion by ALLISON, P. J. J. H. W.

Orphans' Court.

November 18, 1883.

Mullen's Estate.

Decedent's estate—Annuity—Direction by testator to set aside a sum sufficient to produce—The Court will award to trustee an amount adequate to meet all contingencies arising from falling of prices and possible losses attendant upon changes of investments.

Sur petition and answer.

The petition of Edward J. Mullen and others residuary legatees under the will of William J. Mullen, the decedent, set forth the death of the testator in 1882, the appointment of the Guarantee Trust and Safe Deposit Company as executors and trustees, and recited the following clause of the will: "I direct my executors and trustees to pay weekly the sum of two dollars for and during the term of his (John Costello a grandson's) natural life, and to invest a sufficient amount to produce an income for that purpose."

The petition also alleged that at the audit of the trustee's account the Auditing Judge directed four thousand dollars to be set apart to produce that sum, and that since the filing of the said adjudication, the said trustees have invested four thousand dollars at nearly five per cent., yielding an income of one hundred and ninety-nine dollars per annum, and as the annuity to be paid is only one hundred and four, prayed that the adjudication be modified, and the sum of three thousand dollars be awarded to produce the above annuity.

An answer was filed in behalf of the trustees of annuitant the substance of which is set out in the opinion of the Court, *infra*.

Robert J. Williams, for the petitioners.
Charles S. Pancoast, for the trustees.

December 1, 1883. THE COURT. While we do not doubt the distribution of the sum asked for by petitioners would be very desirable, yet, in view of all the circumstances, the objections of the trustee, and the interests of the annuitant, which are of primary importance, we are not prepared to take the responsibility of assuming that the sum of $3000 will, during the lifetime of the annuitant, certainly pay to him the clear amount of $2 per week, or $104 per annum. While it would be sufficient at present, yet it does not follow it will be ten or twenty years hence. While the rate of interest changes, so the character of investments varies from time to time, particularly those known as legal investments. These are at a high premium and low rate of interest now, and this may continue for years to come. A loss may, and frequently does, happen from change of investments, and this must be taken into consideration.

The annuitant should, as far as possible, be protected against the fluctuations which may affect his income; and this can only be done by allowing an ample margin. As testator evidently intended to secure the weekly payment against all peradventure, nothing should be done to endanger it. It may be the petitioners will be postponed the enjoyment of the entire fund but a few months or years; but, in the mean time, the grandson of the testator, who, we are informed, is feeble minded, is reasonably secured in the enjoyment of the pittance bequeathed for his support.

Petition dismissed.

Opinion by HANNA, P. J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, FEB. 14, 1884.* [NO. 10.

Supreme Court.

Jan. '83, 266–269. April 2 to 6, 1883.

Appeals of Seth Caldwell, Jr., et al. Packer v. Noble et al.

Partnership—Evidence—Witnesses, competency of—Acts of March 27, 1865, and April 15, 1869.

A party defendant in a bill praying for a partnership account may be called as a witness for complainant, although one of his co-defendants is dead, and his executors substituted of record at the time the witness is called.

Such witness is within the letter of the Act of 1865; and the fact that he was presumably a friendly witness for complainant goes to his credit, and not to his competency.

The Act of April 15, 1869, which abolished all objection to the competency of witnesses on the ground of "policy of the law," except in cases of actions by or against executors and administrators, etc., was an enabling statute, and rendered no witness incompetent who was competent at the time of its passage.

Appeal of Seth Caldwell, Jr., and others from a decree of the Common Pleas of Carbon County, dismissing exceptions to a Master's report.

This was a partnership bill for an account filed by Asa Packer against his co-partners.

A full report of the case is not given, as the only questions of law involved relate to the admission of testimony. They are as follows: Joseph Noble, one of the defendants, having died, and his executors having been substituted on the record, plaintiff was offered as a witness in his own behalf, and was admitted to testify as to matters which had occurred between himself and his surviving co-partners, but not as to what had taken place between himself and his deceased co-partner.

Exception was taken on the ground that the case fell within the proviso of the Act of 1869, viz., that the Act "shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead."

On this point the Master reported that at the time of this ruling this proviso had not been construed in any similar case, but had been considered in Karns *v.* Tanner (16 Smith, 297), Allum's Exrs. *v.* Carroll's Admr. (17 Smith, 68), Eibert *v.* Finkbeiner (18 Smith, 245), and McBride's Appeal, (22 Smith, 480), and continued: "but under the reasoning of the cases cited it was considered that it would apply only so far as to exclude all testimony as to matters between the surviving party and the deceased party exclusively, as to which executors might be presumed to know nothing, excepting possibly from hearsay, and not as to matters between the surviving parties, who could speak and testify for themselves. In such partnership suits the partners are really, and not merely nominally, plaintiffs and defendants, as they stand upon the record, only up to the decree for an account; after that they are all actors, and may, and often do, change sides as many times as there are disputed items of account. If, in the contested item as to which the plaintiff offered himself as a witness, the executors of Mr. Noble had stood as his only adversaries, the Master would have felt bound to reject him. But they did not so stand; they were the legal representatives of only one of the five original co-parties defendant, who were all to succeed or fail together in this issue; and the Master did not so construe the proviso, or understand that the Court had so construed it, as to render the plaintiff incompetent to testify within the limits to which he was restricted."

Subsequent to the admission of this testimony, however, the cases of Hanna *v.* Wray (27 Smith, 27), Stanbridge *v.* Catanach (2 Norris, 368), Gavit *v.* Supplee (2 WEEKLY NOTES, 561), Crouse *v.* Staley (3 WEEKLY NOTES, 83), Brady *v.* Reed (35 Leg. Int. 346), and Menges *v.* Eyster (Id. 421), were decided; and the Master says: "Under these decisions it would seem to be clear that no party to civil proceedings is competent, by the Act of 1869, to testify in his own behalf where one of the opposite or adverse parties to the original transaction is dead, whether his executor or administrator has been substituted or not. And as, in the case on hand, the executors of Mr. Noble had been substituted as defendants, when the plaintiff was admitted to testify it would seem that an error was committed in admitting him, and his testimony must be disregarded in the consideration of the case."

Elisha A. Packer, a cousin of the plaintiff, and one of the defendants, was also called, and was one of the principal witnesses for the plaintiff. In order to contradict him, and also to testify as to other points in the case, the defendants called two others of their number, Messrs. Hall and Caldwell. On this point the Master says: "When the competency of a witness depends upon his being an adversary of the party calling him, his position as an adversary is determined, not by the character of the testimony he is expected or intended to deliver, or does deliver, or by his personal and private relations to the other parties in the cause, but by his position on the

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record, or by his interest in the result of the controversy. In this railroad issue the interests of this witness coincided with his position on the record, and he stood just as adversarily to the plaintiff as did any of the other defendants; if they succeeded he would succeed, and if they failed he would fail. Now, prior to the Act of 1869, this witness was not only competent, but could be compelled to testify under the Act of 1865 at the call of his adversary, and even prior to the passage of that Act he was competent to testify when so called, if willing to be sworn. (Floyd *v.* Bovard, 6 W. & S. 75.) It has been held that the Act of 1869 was a remedial statute, and was not intended to disable any one who was competent before its passage. (McFerren *v.* Montalto Iron Co., 26 P. F. S. 180; Pratt *v.* Patterson, 31 P. F. S. 114.) In Sheetz *v.* Hanbest (31 P. F. S. 100) it was said by SHARSWOOD, J., delivering the opinion, that 'that Act was intended as an enabling statute. No person competent before the passage of the Act was rendered thereafter incompetent, either by the words or the spirit of the law. Regarding the issue below as an action by executors, the statute declares that it shall not apply in such actions; in other words, that the competency or incompetency of witnesses shall remain as if the statute had not been enacted.' As, then, he was competent before the passage of the Act of 1869, he was competent after its passage, unless the decisions in these cases have been qualified by the reasoning of the Court in Menges, Admr., *v.* Eyster, *ut supra*, and it must now be held that when death has destroyed the equality between the parties none of the survivors are competent for themselves or their adversaries. But if E. A. Packer was not competent to testify for the plaintiff, upon what grounds and for what reason were Mr. Hall and Mr. Caldwell competent to testify against him? The record does not show the grounds upon which the Master's predecessor admitted these two witnesses. If they were admitted under the Act of 1869, it was error, as the later readings of that Act would seem to show, as the executors of Mr. Noble had then been substituted, and they were both parties to the record and interested in the issue. Mr. Caldwell was doubly a party, and doubly interested, in his own right and as one of these very executors. It is true that he had sold out his interest in the partnership assets before he was called to testify, but the sale was not made until after suit was brought, and did not relieve or release him from costs, and while the Act of March 27, 1865, directs that the right to claim commissions or compensation shall not be taken as such an interest as shall disqualify an executor as a witness, the proviso directs that the Act shall not apply, *inter alia*, 'to any case now pending in any court in this Commonwealth,' and this case was then pending, and had been pending since 1857. If he did not admit them under the Act of 1869, he may have admitted Mr. Caldwell under the Act of 1865 to testify generally, because the plaintiff had first called him to testify specially (Bennett *v.* Williams, 7 P. F. S. 404), or he may have admitted both of these witnesses because E. A. Packer had been admitted as a witness, and they were thus made competent under the Act of April 10, 1867, which declares that where one of co-plaintiffs and co-defendants has been compelled by his adversary to testify, the other co-plaintiffs or co-defendants of the party so compelled to testify 'shall also be allowed to give evidence,' that is, they were held to be competent as witnesses because they were the adversaries of the plaintiff—co-adversaries with E. A. Packer.

"As the present Master understands the law they were properly admitted if E. A. Packer was properly admitted, and not otherwise; and if his testimony must be excluded, their testimony cannot be considered. Whether or not, under the reasoning of Menges, Admr., *v.* Eyster, an error was committed in admitting all of these co-defendants to testify must be determined by the Court. The Master is of opinion that they were properly admitted, and that, therefore, their testimony is properly before him."

Exceptions to the ruling on the first point on the part of the plaintiff, and on the second point on the part of the defendants, were overruled by the Court (DREHER, P. J.), and the latter ruling was, *inter alia*, assigned for error by defendants on the present appeal.

James H. Campbell, *William A. Porter*, *Henry W. Muzzey*, *Benjamin H. Brewster* (with whom was *George Bull*), for appellants.

Furman Sheppard, *George W. Biddle* (with whom was *George Biddle*), for appellees.

October 18, 1883. THE COURT.* . . . Asa Packer, the plaintiff, was examined on his own behalf against the objection and protest of the appellants. No question arises now as to the admissibility of his testimony, as the learned Master at a subsequent stage of the proceedings excluded it from his consideration, and says in his report, that he was not consciously influenced by it. . . . .

Before I proceed to discuss the facts, I will dispose of the little law there is in the case. This can be done in a few words. The sixth assignment alleges that "the learned Court erred in refusing to reject the testimony of Elisha A. Packer, he being an incompetent witness."

* The opinion of PAXSON, J., in this case covers sixty-five printed pages, the bulk of which consists of an elaborate review of the facts of the case. The portion of the opinion here printed is all that relates to the question of law herein reported.

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This was a partnership bill praying for an account, and Elisha A. Packer the witness was one of the defendants. He was called by the plaintiff. The ground of the objection was, that Joseph Noble, one of the defendants, was deceased, and his executors substituted upon the record at the time the witness was offered.

If there were any force in this objection to Elisha A. Packer's competency, it is very much weakened by the fact that the appellants afterwards called Mr. Hall and Mr. Caldwell, two of the defendants, to testify against him. These two witnesses were evidently called under the Act of 10th April, 1867, P. L. 60, which enacts that "in all civil actions now pending, or hereafter to be brought, where there are more than one plaintiff or defendant, and either party shall compel one of the adverse parties to testify under the Act to which this is a supplement (Act of March 27, 1865, P. L. 38), the co-plaintiff or plaintiffs, or co-defendant or co-defendants, of the parties so compelled to testify, shall also be allowed to give evidence." The appellants were allowed to call their co-defendants, Seth Caldwell, Jr., and Franklin A. Hall, because the plaintiff had called Elisha A. Packer, a defendant, to the stand. The Act of 1865 having permitted "any party in any civil action or proceeding, whether at law or in equity, to compel an adverse party to testify," the Legislature quickly saw that injustice might be done by allowing one co-plaintiff or co-defendant to be placed upon the stand without allowing his co-parties also to testify to contradict him, and passed the Act of 1867 to remedy this evil. The appellants having availed themselves of their right, under the Act of 1867, to call their co-defendants, Hall and Caldwell, to the stand to testify generally, as well as to contradict Elisha A. Packer, are not in a position now to object to the competency of the latter. They impliedly recognized his competency when they placed their co-defendants upon the stand. If we reject the testimony of Elisha A. Packer, that of Messrs. Hall and Caldwell stands upon no better footing.

We are of opinion, however, that Elisha A. Packer was a competent witness. He comes within the letter of the Act of 1865; and the fact that he was for some purposes the plaintiff's agent, and presumably a friendly witness, has no bearing upon the case. Such an objection goes to his credit, not to his competency.

It was urged, however, that he was an incompetent witness under the Act of 1869, which swept away all objections to witnesses based upon "policy of law," but which contained a proviso that the Act should not apply to suits brought by or against executors and administrators. The answer to this is, that the witness would have been competent prior to the passage of that Act. It has been repeatedly held that the Act of 1869 was an enabling statute, and that it rendered no witness incompetent who was competent at the time of its passage. (Shultz *v.* Hanbest's Executors, 31 P. F. S. 102; Vidal's Appeal, 7 WEEKLY NOTES, 159; Insurance Co. *v.* Shultz, 1 Norris, 51; Pratt *v.* Patterson, 31 P. F. S. 117.) It has always been the law of Pennsylvania, that a party to the record is a competent witness for the adverse party if he is willing to testify. Even his mere declarations can be given in evidence against himself. Surely, then, his sworn testimony is equally competent if he is willing to give it. It was said by Justice ROGERS, in Solms *v.* McCulloch (5 Barr, 473): "The Court rejected the witness on the well-settled principle, that a party to a suit, on principles of policy, cannot be examined as a witness; but this is confined to cases where he is called to testify in favor of his own side, as if in this case General McCulloch (the witness) had been offered for his co-defendants; but it has never been supposed that the rule has been so unbending as to extend to a case like the present, where one of several co-defendants is offered as a witness by the plaintiff and is willing to testify. No question of policy interferes; there is no temptation to perjury where he is willing to give testimony in favor of his adversary and against himself. His declaration in and out of court would undoubtedly be evidence; and why should not his testimony on oath be received? There is no reason for the distinction; indeed, it is better for the co-defendants themselves that he should be examined in court, where, in case of misapprehension or conversation with the adverse party, he, or they, are likely to be affected. They would be more apt to succeed if a concert or combination existed by declarations out of than in Court." (See, also, Canon & Rooney *v.* Campbell, 6 Harris, 169.

It was urged, however, that the Act of 1865 was never intended to apply to the case of a bill in equity, filed by one partner against his co-partners for an account; that after a decree for an account, each of the partners becomes a plaintiff as against each of his co-partners, for the reason that the settlement of the account involves three things, viz.: 1. To ascertain how the firm stands in relation to creditors and other persons who have had dealings with it; 2. To ascertain what each partner is entitled to charge against his co-partner, and what credit he shall be allowed as against his co-partners; and, 3. To apportion between the partners the profits and losses of the business. Hence it was argued, that while the nominal position of the parties to a partnership bill remains the same upon the record, yet in point of fact their real position is constantly changing, and the plaintiff of to-day may be the defendant of to-morrow. Conceding all this to be so, I am unable see that it affects the case.

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It did not require the aid of the Act of 1865 to render Elisha A. Packer a competent witness for the plaintiff. He might have been called if the Act of 1865 had never been passed, provided he were willing to testify. Under the Act of 1865 he could have been called *nolens volens*.

The construction claimed for the Act of 1865 is extremely refined, and we are asked to write an exception into the Act that is not to be found in the pamphlet laws. Aside from this we are unable to see any actual change in the position of Elisha A. Packer. At the time he was offered as a witness he occupied a position legally adverse to the plaintiff. The bill was filed by Asa Packer against six co-partners, including the witness. The latter permitted the bill to be taken *pro confesso* against him; the remaining co-partners resisted the bill. After the decree for an account, his interest in the account to be stated remained precisely as it was at the inception of the suit. If the amount claimed by the firm had been awarded to them, Elisha A. Packer would have been entitled to his share of it. Legally his pecuniary interest was as much against the plaintiff after the decree for an account as before. We need not pursue this branch of the case further. We are of opinion that Elisha A. Packer was a competent witness. . . .

Opinion by PAXSON, J.

STERRETT, J., absent. GREEN, J., having been of counsel, took no part.

W. M. S., Jr.
J. D. B., Jr.

[NOTE.—This decision recognizes as settled law in Pennsylvania that no party can testify in his own behalf when one of the opposite party is deceased. The Master so finds, as the result of the latest decisions, reversing his prior ruling on the point, and this is acquiesced in by the parties and the Supreme Court. It is worth noting, however, that his earlier ruling, admitting the plaintiff to testify to matters which had occurred between the surviving defendants and himself, is supported by the Supreme Court of Massachusetts, under a statute almost identical with the Pennsylvania Act, in two cases which were not brought to the attention of the Master at the time of the admission of this testimony: Hayward *v.* French (12 Gray, 453); Goss *v.* Austin (11 Allen, 525); and that this is the established statutory rule in several of the other States. (New York Annotated Code of Civil Procedure, 1883, §§ 828–9; Revised Statutes of Ohio 1880, § 5242; Revised Statutes of Illinois, 1883, chap. li., § 4).

On the other question above decided this case does not seem to be in accord with the case of McCauley, Executor, *v.* Cook (13 WEEKLY NOTES, 453), in which the opinion was delivered by Mr. Justice GORDON about one year earlier than that of Mr. Justice PAXSON in the present case. A synopsis of each is given in order that the points of agreement and disagreement may be readily seen: (1) In McCauley *v.* Cook suit was brought against McCauley, executor of Alcorn, and Branthoover, upon a due bill alleged to have been made by Alcorn and Branthoover jointly. McCauley alone pleaded *non est factum testatoris*, and the case went to trial as to him alone. Plaintiff (Cook) called Branthoover to prove the execution of the due bill. The Supreme Court held him incompetent, because (*a*) if he were jointly liable with the estate, his testimony would have the effect of relieving him of half his liability; and (*b*) if, as was contended, he was principal, and the estate but surety, yet as he was personally a party to the record, he could not be made a witness against the estate without the consent of its representatives. (2) In Packer *v.* Noble, E. A. Packer, one of the defendants (a certain other defendant being at the time dead, and his executors substituted on the record), was called as a witness for the plaintiff. The Supreme Court held him competent, because (*a*) the appellants had estopped themselves from denying his competency by subsequent acts on their part, and (*b*) apart from this he was a competent witness because he came within the letter of the Act of 1865, and because (*c*) he was called by the party opposed to him on the record, and was willing to testify.

Examining these positions in the most natural order:—

I. It is not stated that the witness in McCauley *v.* Cook was a willing witness for the plaintiff, though it seems probable that he was, and Mr. Justice GORDON evidently meant his words to extend to such a case when he held that he could not be allowed to testify against the protest of his co-defendants, for he fortifies his position by Swanzey *v.* Parker (14 Wright, 441), which entirely supports it. In that case the testimony of one of several co-defendants, a willing witness for the plaintiff, was excluded, and the Court said if the fact of being a party to the suit "alone is a sufficient reason for holding the witness incompetent at all, it can make no difference by which party he is called." The case of Solms *v.* McCulloch (5 Barr, 473), on which Mr. Justice PAXSON relies for his directly contrary opinion, was not mentioned. It is very curious that this case of Swanzey *v.* Parker was not referred to in the case of Packer *v.* Noble at any stage of its warmly contested progress.

II. As to the effect of the Act of 1865 upon the competency of the witness, GORDON, J., holds that the Act must be taken in connection with its supplement of 1867 (which provides that where a party has been called as a witness by his opponent under the Act of 1865, his associates may all be called in their own behalf), and where the latter cannot operate by reason of the death of all but one of the co-parties, advantage cannot be taken of the former. This is in the same spirit as the decisions under which the testimony of the plaintiff, Asa Packer, was excluded, one of his opponents being dead. PAXSON, J., does not take this view of these Acts, simply saying, "He might have been called if the Act of 1865 had never been passed, provided he were willing to testify. Under the Act of 1865 he could have been called *nolens volens*."

III. In both cases the Act of 1869 was held to have no application, GORDON, J., saying that the case falls within the proviso of the Act, and PAXSON, J., that that Act was an enabling Act, and as it would in no case be applied to make any one incompetent who was competent before its passage, it could have no application in the present case.

It is submitted, however, that while the reasoning of the Court in these two cases is inconsistent, the decisions are not necessarily so, so far, at least as the effect of the Acts of 1865 and 1867 is concerned. For it is said in McCauley *v.* Cook that the witness was incompetent under the Act of 1865, because the defendants could not take advantage of the supplement to that Act by calling all the other defendants in their own behalf. In Packer *v.* Noble, however, the defendants in point of fact did take advantage of this supplement by calling two of their number, and were thus estopped from taking exception to the testimony of the plaintiff's witness. And this is pointed out by Mr. Justice PAXSON, though he rests his decision on other grounds.—REP.]

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July, '82, 66. November 27, 1882.

Gibson v. Lenhart.

Replevin—Bailment—Contract—Collateral security—Negotiable coupon bonds.

Railroad coupon bonds being such negotiable securities as pass by delivery, every transfer thereof to a new holder, for value and without notice, gives him a good title as against the former holder. A *bona fide* purchaser of such bonds is unaffected by want of title in his vendor. The last taker is presumed to be a *bona fide* holder for value, and may maintain his possession against everybody until the presumption is successfully rebutted by those who assail his possession.

A. borrowed money from B., agreeing at the time to deposit certain negotiable railroad bonds as collateral security with a bank, within ten days from the date of loan. Subsequently they were deposited, and the bank's certificate therefor issued to B. Afterwards A. failed, and B. left the collaterals in the custody of the bank in an envelope, indorsed as his property. Later on the bank failed, and its receiver set up title to the bonds in one C. to whom the said bonds, with others, had likewise been pledged as collateral by A., about seven months prior to the hypothecation to B., and also left by C. with the same bank on deposit, but not ear-marked:

Held, that although the bonds were not deposited as collateral at the time the loan was made, yet the subsequent ratification of the contemporaneous promise formed one and the same transaction.

Held further, that as between the bank and the pledgee B., to whom its certificate of deposit was issued, B. was entitled to the bonds in dispute.

As between two pledgees of the same negotiable securities, the possession of the holder, if without notice of the prior bailment, is paramount.

Error to the Common Pleas of Crawford County.

Replevin, by William Gibson, against Joseph H. Lenhart, Receiver of the First National Bank of Meadville, Pennsylvania, for certain coupon bonds of the Shenango and Allegheny Railroad, amounting in the aggregate to $9000.

Upon the trial before CHURCH, P. J., the following facts appeared:—

On April 20, 1878, plaintiff loaned to one William Thorp $6674.40 secured by a promissory note, taking Thorp's written agreement to deposit in The First National Bank of Meadville $9000 Shenango and Allegheny Railroad bonds as collateral security for payment of said note, and to send a certificate of deposit therefor within ten days thereafter. On May 3, 1878, plaintiff received from the cashier of said bank, said certificate of deposit, but did not see the bonds. Thorp failed November 12, 1879. The next day plaintiff visited the bank, and was shown an envelope, indorsed with his name, containing $9000 in Shenango and Allegheny Railroad bonds. He was told by the bank officers—of whom Thorp was one—that the bonds were his. They were left in possession of the bank. On June 3, 1880, the bank failed, and Joseph H. Lenhart was subsequently appointed receiver thereof.

On September 21, 1877, George Berringer loaned $15,000 to William Reynolds and the said William Thorp, on a promissory note, secured by $12,000 of said railroad company's bonds belonging to Reynolds, and by $8000 of the same bonds belonging to said Thorp, deposited with the said bank as collateral. $6500 of the $8000 were the identical bonds subsequently hypothecated to plaintiff. The plaintiff had no knowledge of this prior bailment.

The bonds were all in the same form, and of the character known as railroad coupon bonds; one bond was put in evidence as a sample of the rest, but it was not printed with the record.

Defendant offered to prove the following conversation between Reynolds and the president of the bank, then deceased, to wit: "President Derrickson said he discovered where the bonds were—a part of them. He also stated he was not aware of this matter of hypothecation to Berringer until I had called for my coupons on the bonds. The first time he said to me that after the failure of Mr. Thorp that he was informed that certain trust bonds were deposited in a bank at Franklin, or hypothecated, and it was necessary that those bonds should be redeemed; that he went to the Franklin Bank himself for the purpose of ascertaining the facts of the case, and found, if I remember right, there $9000 or $10,000 of bonds hypothecated at one of the National banks for a debt of Mr. Thorp's. He stated that for the sake of protecting the credit of the bank in the case, that he had money of his own, and he determined that he would redeem; and that he afterwards had his father go down, and there was some difficulty about getting the note, and he and his father went to the National Bank and paid the money on the note and redeemed the bonds, and brought the bonds back to The First National Bank. He stated after they had been brought to The First National Bank, only a short time after—a few days—there was an inquiry from Dr. Gibson inquiring about bonds of his that were deposited, and that he placed those bonds, believing they belonged to Dr. Gibson, in the envelope. . . . . He was talking about Shenango bonds, I should say; I understood the doctor referred to the bonds identically. I believe this was before the failure of the bank."

Objected to by plaintiff as hearsay evidence. Objection overruled. Evidence admitted. Exception. (First assignment of error.)

The plaintiff submitted the following points: (1) The bonds involved in this controversy are

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railroad bonds, payable to bearer; and if they were negotiated to plaintiff as collateral security for a loan of money made by him to Thorp at the time, and that he had no knowledge that another than Thorp claimed property in them, then he is a *bona fide* holder for value in the usual course of business, and the verdict should be in his favor.

Answer. Refused under the circumstances of the case. (Second assignment of error.)

(2) If the jury find that Mr. Thorp, at the time he contracted for the loan with Dr. Gibson, agreed to deposit in The First National Bank of Meadville $9000 of the Shenango and Allegheny Railroad bonds, as collateral security for the payment of said loan, and that within a reasonable time thereafter Gibson received from the cashier of said bank a certificate that Mr. Thorp had deposited the bonds in the bank, as per agreement, and that the bonds in controversy, $9000 in amount, were subsequently found in the bank, inclosed in an envelope, with the name of Dr. Gibson indorsed thereon, and there being no evidence of anything wrong or *mala fides* on his part, the verdict should be for plaintiff."

Answer. Refused under the circumstances and evidence in the case, and in the view the Court takes of the same. (Third assignment of error.)

The Court charged the jury, *inter alia*, as follows: "4. Until the replevin was issued in this case, there is no evidence that Dr. Gibson ever had those identical bonds, of which we have the numbers given as hypothecated to George Berringer, in his possession. 5. We say to you that The First National Bank of Meadville was the custodian of the pledgee and pledgor of the original package of bonds in 1877, and they had no right (and the presumption, so far as the evidence in this case is concerned, they did not exercise the right) to take those bonds pledged to George Berringer and pledge them to Dr. Gibson; and so far as the latter sets up the title as being a *bona fide* purchaser for value, we say to you he is not such a *bona fide* purchaser for value as to entitle him to recover these bonds. He never had actual possession of them. The First National Bank was a mere bailee for him as a pledgee, and the bailee for Berringer, the former pledgee. Hence . . . . his pledge being prior in point of time, he is entitled to hold $6500 of those bonds, that amount being identified by their witnesses, as against the subsequent bailment, or rather as against the bailment or pledge such as this plaintiff claims in this case, hence there is nothing to leave to you as a fact to be found. 6. Taking the uncontradicted evidence of the plaintiff in this case, he has not shown such a title as against Berringer, the original pledgee in 1877, as to entitle him to hold $6500 of those bonds, as identified by their witnesses. 7. Plaintiff's points are answered in the affirmative, as abstract propositions, but there is nothing to leave to you, and under the plaintiff's own testimony your verdict will be for the defendant." (Fourth assignment of error.)

Verdict for plaintiff for $2500 of the bonds, and for defendant for $6500 of the said bonds, and judgment thereon. Whereupon the plaintiff took this writ, assigning for error, *inter alia*, the admission of defendant's offer of evidence, the answer to plaintiff's points, and the portions of the charge above set forth.

H. L. Richmond & Sons, and *John G. Johnson*, for plaintiff in error.

The statements of Derrickson were inadmissible as evidence. His declarations, as proven, formed no part of the *res gestæ*, but mere statements of previously occurring facts. The bank was estopped from denying the title of the plaintiff. As against a wrong doer, prior rightful possession is sufficient to enable the plaintiff to maintain replevin. If the right of the plaintiff is better than that of the defendant, whatever it might be with regard to the rest of the world, he is entitled to recover.

Wells on Replevin, §§ 693, 694, 695, and 696.
King *v.* Richards, 6 Wharton, 427.
Miles *v.* Cattle, 6 Bing. 743; s. c., 19 E. C. L. R. 219.

The bonds in question were negotiable securities. Every transfer of them to a new holder for value, divested the rights of former owners. The law presumes the payment of such value in favor of subsequent holders.

Carpenter *v.* Rommell, 5 Phila. 34.
Carr *v.* Le Fevre, 3 Casey, 413.
Beaver County *v.* Armstrong, 8 Wright, 71.
Murray *v.* Lardner, 2 Wallace, 110.
Com'th *v.* Bolles, 4 Otto, 109.
Commissioners *v.* The Railroad, 4 Id. 278.

By the pledge of Berringer's bonds to the plaintiff, who gave a valuable consideration therefor, the former's title was lost, and could not be set up against that vested in the latter.

Houseman *v.* Association, 31 Smith, 256.
Smith's Ap., 11 Wright, 128.

The Franklin Bank, being the holder for value of the bonds formerly hypothecated with Berringer, was entitled to hold them against all prior owners and pledgees. By Derrickson's payment to it, of the Thorp note by it held, out of his individual funds, he acquired its rights, and was entitled to transfer, by subrogation, the same to plaintiff, and to vest in him a right paramount to that of Berringer.

John J. Henderson, for defendant in error.

By the deposit of the bonds to secure Berringer the bank became liable to account to him or the pledgors for the bonds so deposited.

Seibert *v.* McHenry, 6 Watts, 303.
Quincy *v.* Hall, 1 Pick. 360.

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The facts proved show that plaintiff was not a *bona fide* holder for value.

Depeau *v.* Waddington, 6 Wharton, 232.
Kirkpatrick *v.* Muirhead, 4 Harris, 123.

The bonds were never delivered to plaintiff.

Musser *v.* Hyde, 2 W. & S. 318.

December 30, 1882. THE COURT. It may be conceded that in 1877 the bonds in controversy were deposited in The First National Bank of Meadville, to secure the note of Thorp and Reynolds in favor of Berringer, and that the note was not fully paid nor the collaterals voluntarily surrendered to the pledgor; but it by no means follows that the same bonds may not have been subsequently pledged to the plaintiff as collateral security for the money loaned by him to Thorp in April, 1878. Being negotiable securities, every transfer of the bonds to a new holder, for value and without notice, would give the latter a good title to them as against the former holder. That such is the status of coupon bonds, similar to those in question, is too well settled by recent decisions to admit of any doubt. (County of Beaver *v.* Armstrong, 8 Wright 63, 69; Murray *v.* Lardner, 2 Wal. 110, and Commonwealth *v.* Bolles, 4 Otto 109.) Like a bank note, or a promissory note indorsed in blank, they pass by delivery, and a good faith purchaser is unaffected by want of title in his vendor. The last taker is presumed to be a *bona fide* holder for value, and may maintain his possession against every body until the contrary is successfully established by those who undertake to assail his possession.

It is claimed by plaintiff that in making the loan to Thorp in April, 1878, an essential provision of their agreement was that the latter should deposit in The First National Bank of Meadville $9000, Shenango and Allegheny Railroad bonds, as collateral security for the loan, and furnish him with the bank's certificate of such deposit; that, a few days thereafter, he received from the cashier a certificate setting forth, in substance, that Thorp had deposited in the bank bonds corresponding in kind and amount with their agreement, "to be held as security for the payment of his note for $6674.40, dated April 25, 1878, due in one year from that date;" that, resting in the belief that Thorp had fully complied with the condition on which he obtained the loan, he awaited the maturity of the note; and, immediately after the failure of Thorp, he called at the bank and was informed by its president that his bonds were there and his claim was secure; that afterwards, upon inquiring for the bonds, an envelope, indorsed "Dr. Gibson $9000, bonds Shenango and Allegheny Railroad Co.," was handed him by an officer of the bank, who informed him that on surrendering the certificate of deposit he could lift the bonds; but, having mislaid the certificate, the bonds were not taken out of bank. By an arrangement with its president, however, the past due coupons were collected by the bank and the proceeds, $315, marked "The property of Dr. William Gibson," placed in the envelope with the bonds. After the failure of the bank, the money, thus identified as his, was handed to plaintiff by the temporary receiver; but, in the absence of the still missing certificate, he declined to surrender the bonds, and they remained in the vaults of the bank until taken by the sheriff on the writ of replevin and delivered to plaintiff.

If the case had been submitted to the jury on the testimony before them, they would have been warranted in finding the facts substantially as claimed by plaintiff; and that the bonds in controversy are those referred to in the certificate of the cashier and afterwards exhibited to the plaintiff in the bank, where they had been deposited by Thorp in compliance with the condition on which he obtained the loan.

In view of the testimony, and the conclusions which might have been fairly and legitimately drawn therefrom, the learned Judge erred in refusing the plaintiff's points and in withdrawing from the consideration of the jury the several questions of fact therein presented; and, also, in charging as complained of in the fourth to seventh specifications inclusive. As already suggested, the questions of fact referred to were fairly raised by the evidence, and if they had been found, as they might and probably would have been, in favor of the plaintiff, he would have been entitled to a general verdict establishing his right to all the bonds.

It cannot be pretended that the bonds were pledged to the plaintiff as security for an independent and antecedently contracted debt. The contemporaneous agreement to deposit them as collateral security entered into and formed an essential feature or condition of the contract of lending. It was doubtless the leading consideration, so far at least as the plaintiff was concerned, without which the loan would not have been made. The contract was carried out in apparent good faith, and was so recognized by the bank, which now claims, in direct contradiction of its own certificate, to have been the custodian of the same bonds for a prior pledgee. If there was any bad faith in the transaction, it was not on the part of the plaintiff, nor is there a particle of testimony to show that he was aware of any on the part of any one else. From the time the bank issued and delivered the certificate of deposit it became his agent for the custody and safe keeping of the bonds. Its possession was thenceforth his possession, as fully to all intents and purposes as if they had been actually delivered to him. While the pledge was not fully

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completed by actual delivery or deposit of the bonds, on the day Thorp borrowed the money, the continuance of the loan depended on the full execution of the pledge; and the subsequent forbearance, which doubtless resulted from receiving the certificate of deposit, placed the plaintiff in no worse position than he would have occupied if the pledge and receipt of the money had been simultaneous. Upon the facts claimed by the plaintiff and suggested in the points submitted by him, all of which might have been found in his favor, he is entitled to the bonds, as against the bank, if not against Berringer, the former pledgee also. But, as to the latter, we express no opinion, for the reason that he is not a party to this suit.

The testimony complained of in the first assignment should have been excluded on the ground of incompetency.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by STERRETT, J. H. J. S.

Jan. '82, 46. April 25, 1883.

Salter v. Bird.

Statute of Frauds—Parol trusts—Trusts and trustees—Act of April 22, 1856—Ejectment—Practice.

A., and B., his wife, executed a conveyance of certain lands to C. upon a parol trust to hold for the children of the grantors. A. having died C. conveyed the lands to B. upon a similar parol trust. B. afterwards intermarried with D. who coerced her to execute a deed for the lands to E. who immediately reconveyed to D. No consideration passed between the parties to the two last-mentioned conveyances, the intent being to vest the property in D. In ejectment by the children of A. and B. against D. the above facts appeared, and in addition it was in evidence that B. was willing and anxious that plaintiffs should have the property:

Held, that the trust impressed upon the property was an express trust and not a trust *ex maleficio*, and that therefore being in parol it came within the express provisions of the Act of April 22, 1856 (P. L. 533).

Held, therefore, that conceding that the title to the property remained vested in B. the plaintiffs were debarred by said Act from proving the express trust for their benefit and that they were not entitled to maintain ejectment without first procuring a conveyance to themselves from B.

On the trial, before ROCKEFELLER, P. J., the plaintiffs offered Henry Shipp, Mary A. Owen, and William Heaton to prove the following state of facts: William Salter, the owner of the property in dispute, which consisted of three lots in the town of Shamokin, being in ill health, executed a deed to Henry Shipp for the said real estate on August 14, 1863, coupling with it a parol trust that the said Shipp should hold the property until the children of the said Salter had paid a balance of purchase-money and another small debt, and should then convey to them in fee. Shipp accepted the trust. On August 24, 1863, William Salter died, leaving to survive him a widow, Mary A. Salter, and ten children. On April 28, 1864, Henry Shipp conveyed these lots to Mary A. Salter, the widow of William Salter, deceased, subject to a parol trust similar to that under which he held. Subsequently the children of William Salter paid the balance of purchase-money on the property, and also the small debt above referred to. In 1868 Mary A. Salter married William Owen. She told him that she held the property in trust for the children of her former husband. On March 2, 1869, Owen had two deeds prepared, one from Mary A. Owen, formerly Mary A. Salter, and William Owen, her husband, to William Morris, and the other from William Morris and wife back to William Owen. The former recited a consideration of $400, and the latter $600, but in fact nothing was paid by the grantee in either deed. Mrs. Owen protested against signing the deeds, and stated that the property was not her own, but that she held it in trust for the children of her former husband, William Salter. She was, however, coerced into signing the deeds. Owen, when charged with having coerced his wife, admitted having done so, said that he had done wrong, that he was sorry for it, and hoped the plaintiffs would forgive him; that he would see the children made all right, and would convey the lots back to them.

Objected to by the defendants. Objection sustained and offer rejected. Exception.

The Court charged the jury that inasmuch as there was no evidence to show title to the property in question in the plaintiffs, they should find a verdict in favor of the defendants. Verdict accordingly, and judgment thereon. There-

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been living at the date of trial, would proof of his coercion of his wife have been rejected? Could, then, his children stand in any better position? Certainly not. Mrs. Owen, Owen, and his children were trustees *ex maleficio*, and unprotected by the Statute of Frauds.

In Church *v.* Ruland (14 Smith, 432), SHARSWOOD, J., says, "That a trust *ex maleficio* is not within the prohibition contained in the 7th section of the Statute of Fraud and Perjuries, 29 Car. II. c. 3, which was adopted and enacted in this State by the 4th section of the Act of April 22, 1856, P. L. 533, has been the uniform doctrine of the English courts. Hill on Trustees, 59, and cases there cited, to which may be added Plumer *v.* Reed (2 Wright, 46), Beegle *v.* Wentz (5 Smith, 369), decided by this Court since the passage of the Act." The facts of this case bring it clearly within Church *v.* Ruland, although that was the case of a trust arising *ex maleficio*, where the devisee had procured a conveyance to be made to her on the faith of a promise that she would carry out the parol trust which accompanied the devise. The trust in such a case owes its validity, not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee to get at him.

Hoge *v.* Hoge, 1 Watts, 163.
Jones *v.* McKee, 3 Barr, 496; s. c., 6 Barr, 425.

Ejectment is the proper remedy to enforce such a trust.

Jones *v.* McKee 3 Barr, 496.
Aycinena *v.* Peries, 6 W. & S. 257.
Biddle *v.* Moore, 3 Barr, 161.
Corson *v.* Mulvany, 13 Wright, 88.

In Seichrist's App. (16 Smith, 237), it was held that "where one procures a title which he could not have obtained except by confidence reposed in him, and abuses the confidence, he becomes a trustee *ex maleficio*."

Morey *v.* Herrick, 6 Harris, 128.
Sheriff *v.* Neal, 6 Watts, 540.
Miller *v.* Pearce, 6 W. & S. 97.
Beegle *v.* Wentz, 5 Smith, 374.
Lingenfelter *v.* Ritchey, 8 Smith, 488.
Perry on Trusts, p. 151, sec. 181; p. 199, sec. 226; p. 189, sec. 217.
Christy *v.* Sill *et al.*, 14 Norris, 386.
Clark *v.* Trindle *et al.*, 2 Smith, 492.
Smith *v.* Touse, 18 Smith, 158.
Webster *v.* Webster, 3 Smith, 161.
Williard *v.* Williard *et al.*, 6 Smith, 119.

The witnesses offered were competent.

Thomas *v.* Maddan, 14 Wright, 261.

Henry C. Parsons (with him *W. H. Armstrong* and *W. H. M. Oram*), for the defendants in error.

Since the passage of the Act of April 22, 1856, a trust in lands cannot be established by parol evidence without writing. The plain meaning of this enactment is that a trust in land can now be proven in no other way than by writing. The proviso, indeed, excepts from its operation resulting trusts, such as the law implies. A resulting trust, however, is raised only from fraud in obtaining the title, or from payment of the purchase-money when the title is acquired. Payment of the purchase-money subsequently is not sufficient to raise a legal implication of a trust, as all the authorities show.

Barnet *v.* Dougherty, 8 Cas. 371.

There is no allegation of fraud, etc., in the conveyance from Salter to Shipp. If indeed any such trust were intended, and the conveyance was executed by Salter in reliance upon any confidence, it is but the ordinary case of an absolute conveyance to a person who violated an alleged promise, either implied or expressed, and this would not constitute a fraud from which the law would imply a trust.

Barnet *v.* Dougherty, *supra.*
Jackman *v.* Ringland, 4 Watts & Ser. 149.
Kellum *v.* Smith, 9 Casey, 165.
Nixon's App., 13 Smith, 279.
Lynch *v.* Cox, 11 Harris, 268.
Kistler's App., 23 Smith, 393.

Church *v.* Ruland (14 Smith, 432), so much relied upon, is a case in which the will in controversy was made, as it was, in reliance upon promises, without which it would not have been made; and it was expressly in evidence, and is cited in the opinion of the Court, that the testator "was going to make another will, but that Letta, by her promise made at that time, prevented him from doing so," which brought the case within the ordinary rule, which distinguished trusts *ex maleficio* from ordinary trusts, and such distinction runs through all the cases upon which the plaintiffs rely.

2 Wharton's Ev., sec. 1033.
Goucher *v.* Martin, 9 Watts, 106.
Meason *v.* Kane, 13 Smith, 339.
Seichrist's App., 16 Id. 237.
O'Hara *v.* Dilworth, 22 Id. 403.

In any event the trust would have been barred by the limitation of five years established by the statute of 1856.

Brightly's Purd., 930, sec. 14.
Lauer *v.* Lee, 6 Wright, 171.

The witnesses offered were incompetent.

Goodman *v.* Losey, 3 W. & S. 526.
Arthurs *v.* King, 3 Norris, 531.
Karns *v.* Tanner, 16 Smith, 297.
1 Greenlf. Ev., pp. 334, 337.
Crouse *v.* Staley, 3 WEEKLY NOTES, 83.

October 1, 1883. THE COURT. When an action of ejectment is brought, two things are necessarily presupposed. One is, that the plaintiff is not in the possession of the land described in the writ; and the other is, that the defendant is in the possession of the land so described. The action is in its character possessory; it cannot be

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maintained by one having the possession of the property, neither can it be maintained against one who has not possession. Moreover, the cardinal principle governing actions of this kind is, that the plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness of that of his adversary. The defendant has, in the first instance, nothing whatever to do; upon his possession he may securely rest until the plaintiff shows a better right; and until such right has been shown he cannot be disturbed. From this it follows that as to the status of the parties to this suit, at the time of the issuing of the writ, there can be no debate; the defendants were in the possession of the property, and the plaintiffs were not; and to have successfully proposed anything else would simply have been to put the plaintiffs out of court. Such being the case, the rule applies that until the plaintiffs show a better right to that possession than that of the defendants, the latter cannot be disturbed in the occupancy of the controverted premises. It would, however, not be a fair presentation of this case to say that the defendants rest solely on their possession, for they have shown a regular *prima facie* title from William and Mary Ann Salter, the common grantors, through William Owen to themselves. The question then remains, have the plaintiffs shown title in themselves? And for the purposes of this case it must be conceded that they could have proved what they offered to prove. Now, the material part of the plaintiff's offers amounts to this: That William Salter, on the 14th of August, 1863, voluntarily executed a deed for the premises in controversy to Henry Shipp, who agreed orally to hold the same in trust for Salter's ten children, until they paid a certain balance of purchase-money and another small debt; that he did so hold it until said indebtedness was paid by Salter's sons, and then, upon the 28th of April, 1864, deeded it to Mary A., then widow of William Salter, under a verbal agreement or understanding that she would hold it in trust for the aforesaid children. We may here stop, for by passing over the proof proposed for the purpose of impeaching her deed to her second husband, William Owen, we not only avoid a question involving the admissibility of her testimony, but by an admission of title in their alleged trustee put the case on the best possible else be void." This language is all-embracing, and so clear and positive that the legislative intent cannot be mistaken. Unless, therefore, this case can be brought within that provision of the statute which excepts trusts resulting from legal implication or construction, commonly called resulting trusts, the plaintiffs have no title. But in order to accomplish this result it must be shown that Mrs. Salter obtained the deed to the property in dispute by some kind of fraud or artifice which induced its execution. But nothing of the kind has been proposed. All that is alleged is that she agreed to hold it in trust for her children. But we cannot see how it would be possible to create a parole trust under any other conditions. If such a trust is not within the statute, then there can be none that comes within it. For if a deed, like the one before us, absolute on its face, be made to one who receives it, and does not agree to hold it in trust, there is, and can be, no trust for the statute to operate upon; the transaction begins and ends in an unqualified conveyance. Bound, therefore, as we must be, by the spirit and letter of the statute, we can but repeat what was held as law in the case of Barnet *v.* Dougherty (8 Ca. 372), that a resulting trust can only arise from some fraudulent act by or through which the title has been obtained, or by the payment of the money of the alleged use party for the purchase of the property at the time when the conveyance is made, and that neither subsequent fraud nor subsequent payment will avail to raise such a trust. Nor is this case at all like that of Church *v.* Ruland (14 P. F. S. 432), where the devise was made through the active solicitation and persuasion of the devisee, and under the solemn promise that at her death one-half of it should go to her sister's children. Mrs. Salter took no active part in the creation of this trust. It is not pretended that she, by either solicitations or promises, induced the execution of the deed from her husband to Shipp, or from Shipp to herself. Therefore, though the above case goes far towards the destruction of a most valuable statute, especially designed for the quieting of titles to real estate, yet it does not go far enough to cover this case.

But it is urged that she is willing to execute this trust; if so, it follows that neither in act nor

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their own showing, they might have had her title for the asking—a title which, if the proposed proof be taken as true, never passed out of her. If the deed of March 2, 1869, executed by herself and husband to William Morris, was without consideration, and designed, as it appears to have been, simply as a means employed to pass her title to her husband; and if, in addition, it can be made to appear that she did not voluntarily execute and deliver that instrument, then as between herself and the heirs of her late husband, the transaction was a fraud on her rights, and was wholly inoperative and nugatory. Clothed with her title, the plaintiffs would have had a good standing to maintain their action; and if they could have established the above-stated proposition by the necessary facts they would, no doubt, have gotten a verdict for the premises in dispute. Standing, however, as they now do, without title, they cannot of right complain of the rulings of the Court below.

The judgment is affirmed.

Opinion by GORDON, J. J. H. M.

Jan. '83, 370, 371. April 17, 1883.

Delano Land Company et al. v. Conners et al.

Conners's Appeal.

School tax—Excessive building tax—Equity—Injunction when grantable.

Where there is an attempt on the part of school directors to levy and collect a building tax in one year for the purpose of using a portion so collected to pay a deficit in the general fund for the preceding year, a court of equity will enjoin the collection of so much of the tax levied for building purposes as is not needed therefor.

A tax levied as a building tax must be used in good faith for that purpose alone.

Appeal from the decree of the Common Pleas of Schuylkill County.

Bill in equity, filed by the Delano Land Company, the City of Philadelphia, the Philadelphia and Reading Coal and Iron Company, the Mill Creek Coal Company, and Joseph F. Fitch, against Thomas Conners, James Brennan, Michael Keiper, James Ryan, John Stanton, and Patrick Shaughnessy, school directors of the school district of the township of Mahonoy, and Lawrence Ryan, treasurer, and Joseph Wall, collector for the said school district, and John John C. Noonan to act as superintendent of the schools, contrary to law, because the said school district is not a city or borough entitled by law to a district superintendent, but is subject to and under control of the county superintendent; that George W. Weiss is the duly qualified county superintendent; that the total valuation of real estate in said district is $1,128,951, of which the plaintiffs own $984,194; that the said school directors have levied a tax of 13 mills upon each dollar of valuation for the ordinary school purposes for the school year of 1882–83, which the plaintiffs alleged was amply sufficient to defray all the necessary expenses, including the erection of the building contemplated by the board for the said school year, and keep all the schools open far beyond the time required by the statute; that the school directors have, without authority of law, levied a tax of 2 mills upon each dollar of the said valuation for building purposes for said year, for the reason that the only building proposed to be erected for school purposes by said directors in the district for the current school year had been contracted for by the said school directors to be erected and completed for the sum of $640, being the only building necessary, if at all, for the said school district, and the said 13 mills levied, as hereinbefore stated, would yield more than sufficient to defray all lawful current expenses pertaining to the said school district, including the erection of the proposed new building, and therefore making said building tax unlawful, unjust, and burdensome to the plaintiffs, and that the directors have placed their warrant in the hands of defendant Wall, to collect the school and building taxes from plaintiffs.

The bill prayed, (1) that the contract with Noonan might be rescinded, (2) that the defendants might be restrained from paying Noonan for services as district superintendent, (3) that defendant, Wall, collector, be restrained from collecting said building tax of 2 mills for the current year, and (4) other relief.

In their answer the defendants admitted the foregoing facts as set out in the bill, but denied that a tax of 13 mills on each dollar of valuation for school year 1882–83, is amply sufficient to defray the necessary expenses, *including erection of buildings* contemplated by the school board for said year, and to keep all the schools open as alleged by the plaintiffs, they averred that said tax would produce in the gross say $14,676, and after deducting exonerations, collector's and treasurer's fees, in the net about $12,600, that the defendants estimated that it would require

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of $13,688, the State appropriation being about $600, and redemptions and taxes paid to the county treasurer for use of school district being about $1000.

The defendants admitted that they had levied a tax of 2 mills for building purposes for said year, but denied that it was unlawful or excessive, averring that the requirements of the board for building purposes were such as in the exercise of the judgment of the board made such tax of 2 mills necessary, that the said tax would produce gross say $2257, less exoneration and commissions about $340, leaving net, $1917, that out of this $1917, the board would have to pay the contract price for the building now erecting, $630, furniture for the same $120, and repay to the general fund $660 for new building, and $120 for furniture paid last year out of the general fund, there being no building fund out of which the same could then be paid, it then being the understanding among the directors that the said sums of $660 and $120, should be repaid to the general fund out of a building fund to be raised by a levy during the year 1882–83. The defendants admitted that the warrant for the collection of school and building taxes was in the hands of Wall.

The Court, GREEN, J., entered a decree enjoining the defendants from collecting a greater building tax than four-fifths of one mill.

The defendants took this appeal, assigning for error the action of the Court in entering the said decree.

James B. Reilly, *James F. Grady*, and *Charles W. Wells*, for appellants.

Where a tax is levied by the legislative body of the taxing district, and such body has jurisdiction of the subject matter, and the legal right to levy a tax for the purpose existed, and there is no allegation of fraud, gross negligence or irregularity, a court of equity has no power to restrain the collection of such tax merely upon the ground that the tax is in excess of the amount required for the purpose for which it is intended.

Wharton *v.* School Directors, 6 Wr. 358.

It is the function of the Legislature to say when a tax shall be levied, and how much shall be levied. The view contended for on the other side would lead to usurpation by the judiciary of the functions of the Legislature.

The authority to levy this tax lies in the Act of May 8, 1854, the 33d section of which provides:—

"The board of directors may, at any time, not oftener than once in each school year, levy a special tax not exceeding the amount of the regular annual tax for such year, to be applied solely to the purpose of purchasing or paying for the ground, and the building, or erection of school buildings thereon; which said tax shall be levied and collected at the same time, in the same manner, and with like authority, as the regular annual tax."

Section 28 of the same Act, authorizing the levy of the regular annual tax provides as follows:—

"Shall determine the amount of school tax which shall be sufficient and necessary to keep the schools of the district in operation."

In the case of St. Clair School Board's Appeal (24 Sm. 252), there was fraud or gross negligence which distinguishes that case from the one at bar. But the other side have no standing, unless they can show misuse of power. Such taxing power is legislative and not judicial.

Iron City Bank *v.* Pittsburgh, 1 Wr. 340.

The real question here relates to the disbursement of money and not to the authority to levy and collect the tax; the injunction to restrain the collection of the tax is not the proper remedy.

Truesdell's Appeal, 8 Sm. 148.

Moore *v.* School Directors, 9 Sm. 232.

William B. Wells, for appellees.

The building tax of a school district cannot be diverted to ordinary school purposes.

German Township School District *v.* Sangston, 24 Sm. 454.

That a court of equity may enjoin against the collection of a tax levied without authority of law is undoubted. Even when legislative authority is given to tax for a certain purpose, yet if the tax levied is clearly in excess of the sum required for that purpose, its collection may be enjoined.

St. Clair School Board's Appeal, 24 Sm. 256.

May 7, 1883. THE COURT. Although legislative authority be given to impose a tax for a certain purpose, yet if the tax levied be clearly in excess of the sum required for that purpose, its collection may be enjoined. (St. Clair School Board's Appeal, 24 P. F. Smith, 252.) When the tax is levied without authority of law, the right to enjoin against its collection is undoubted. Here the attempt was to levy and collect a building tax in one year for the purpose of using a portion thus collected to pay a deficit in the general fund for the preceding year. It is settled that the building tax of a school district cannot be diverted to ordinary school purposes. (German Twp. School District *v.* Sangston, Id. 454). The Court was clearly right in enjoining the collection of so much of the tax levied for building purposes, as was not needed or intended to be used therefor. When levied as a building tax it must be used in good faith for that purpose alone. Although *in form* it may be levied for that purpose, yet if in fact there is no expectation or intention of so using the greater portion thereof, such excess is without authority of law. The rights of tax-payers cannot thus be set at nought, and their property be taken from them.

Decree affirmed, and appeal dismissed at the costs of the appellants.

PER CURIAM. F. J. A.

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Common Pleas—Law.

C. P. No. 1. December 29, 1883.

Huber v. Grossman.

Practice—Rule to strike off judgment—The Supreme Court having opened a judgment in ejectment entered upon a warrant of attorney, accompanying a lease, on the ground that there was not sufficient evidence of breach of condition; upon an application subsequently made to strike off the judgment: Held, that the rule must be discharged and the record placed in a position to have the question of breach adjudicated.

Rule to strike off judgment.

Judgment in ejectment was entered February 20, 1882, on a warrant of attorney contained in a lease for an alleged breach of condition not to assign.

On February 24, 1882, the administratrix of defendant obtained a rule to open the judgment on the grounds: (1) that defendant was dead at the time of the entry of judgment, and (2) that there had been no breach. Depositions were taken in support of both points, and at the argument defendant's counsel asked the Court to strike off the judgment but did not file this motion of record.

On April 1, 1882, defendant's rule was discharged, and on April 21, 1882, an appeal was taken to the Supreme Court.

On October 1, 1883, the Supreme Court filed an opinion refusing to consider the rule to strike off, it not appearing of record, but making absolute the rule to open, and awarded a procedendo.

On November 13, 1883, the present rule to strike off the judgment was entered.

Wm, F. Johnson, for the rule.

A judgment entered on a warrant of attorney against a dead man is irregular, and should be stricken off. The power of attorney is purely personal, and upon the death of the creator of the power becomes *functus officii*.

Short *v.* Coglin, 1 Anstruther, 225.
Cook *v.* Gilbert, 8 S. & R. 566.
Tobias *v.* Dorsey, 2 WEEKLY NOTES, 15.
Lewis *v.* Ash, 2 Miles, 110.
Raw *v.* Alderson, 1 Moore, 145.
Chell *v.* Oldfield, 4 Dowling's P. C. 629.
Croft *v.* Egmont, 8 Id 95.
Richardson *v.* Scholefield, 2 Downing's N. S. 36.
Lot *v.* Anderson, 1 Id. 305.
Heath *v.* Brindley, 4 N. & M. 235.
Wood *v.* Hopkins, 2 Pen. 689.
Hunt *v.* Chamberlin, 3 Halstead, 336.
Gainsborongh *v.* Follyard, 2 Stra. 1121.

Bedell and *Frederick B. Vogel*, showed cause.

If the Court is to take notice that this same rule was argued and discharged in 1882, although it does not appear upon the record, then it is *res adjudicata*. If it is to be considered as never having been argued, then the present application comes too late, the defendant having submitted to the judgment of which she had full knowledge for nearly two years.

Henderson *v.* Henderson, 13 WEEKLY NOTES, 533.

As the depositions taken to establish the death of the defendant are no part of the record (Bain *v.* Funk, 11 Smith, 185), there is no irregularity appearing upon the face of the record, and therefore the Court has no power to strike off the judgment.

O'Hara *v.* Baum, 1 Norris, 416.

Where a warrant of attorney is coupled with an interest in the thing itself over which the power is to be exercised, and not merely in the execution of the power, a judgment entered thereon after the defendant's death is not irregular, and the power is not revoked by his death.

2 Kent's Commentaries, 646.
Berger *v.* Bennett, 1 Caines's Cases, 1.
Hunt *v.* Ennis, 2 Mason, 244.
Hunt *v.* Rousmanier, 8 Wheaton, 174.
Lightner's App., 1 Norris, 301.
Wharton on Agency, § 105.
Knapp *v.* Alvord, 10 Paige, 205.

C. A. V.

January 5, 1884. THE COURT. The Supreme Court appears to have opened this judgment, not because taken after the death of the lessee, but because the evidence was not satisfactory that there had ever been an assignment of the lease contrary to its terms, and it was to decide that question that the judgment was opened. The question of striking off the judgment was not considered, as not having been raised in the Court below. As it is now made, we discharge the rule, and thus place the record in a position to have that question adjudicated.

Opinion by BIDDLE, J. G. S. P.

C. P. No. 1. January 12, 1884.

Wedman v. Kendall and Cook.

Ships and shipping—Trespass—Sufficiency of affidavit for capias—Liability of master of vessel for trespass committed by a subordinate officer.

Rule to show cause of action, and why defendants should not be discharged on common bail.

This was an action of trespass *vi et armis*, for an assault committed by the mate of a vessel in the presence of the master. Plaintiff alleged in his affidavit for a *capias*, that he had shipped as a seaman on a vessel of which Kendall was master, and Cook mate; that Kendall repeatedly

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struck and kicked him; that on a certain day, when aloft, the mate came up and beat him in the face, inflicting serious injuries; and that when plaintiff, upon coming on the deck, told Kendall what had been done, the latter, refusing to let him go below to wash the blood from his face, sent him to the wheel, and when he could not see clearly on account of blood, kicked him, and failed to rebuke the mate or forbid him to strike plaintiff, although cognizant of his treatment.

Edmunds and *Long*, for defendants.

Plaintiff's affidavit fails to show concert between defendants. This is a fatal defect.

Bard *v.* Yohn, 2 Casey, 482.
Jackson *v.* Cheney, 2 WEEKLY NOTES, 569.
Chase *v.* Ricketts, 3 Luz. L. Obs. 110.

Pugh, for plaintiff, cited—

Hanson *v.* Fowle, 1 Sawyer, 539.

January 19, 1884. THE COURT. In view of the rule followed in Hanson *v.* Fowle (1 Sawyer, 539), the facts alleged in the affidavit must be regarded as sufficient, if proved, to establish an assault, adopted and approved by the master.

Rule discharged.

Oral opinion by ALLISON, P. J. F. M. L.

C. P. No. 4. December 22, 1883.

Pennypacker v. The Camden & Atlantic Railroad Co.

Railroad bonds—Guarantee by one company of the bonds of another—What constitutes an original liability—Surety—Construction of the words "Payable at the office of" the defendant company—Affidavit of defence law—Province of averments—Averment of the fact out of which the power of a corporation to guaranty the bonds of another arises.

Rule for judgment for want of a sufficient affidavit of defence.

The plaintiff filed copies of bonds, coupons, and endorsements, which were in the following form:—

BOND.

$500. UNITED STATES OF AMERICA. $500.
STATE OF NEW JERSEY.

May's Landing and Egg Harbor (No. 46) City Railroad Co.

The May's Landing and Egg Harbor City Railroad Company acknowledge themselves indebted to Robert Frazer in the sum of five hundred dollars, which sum they promise to pay to the said Robert Frazer, or bearer, the first day of October, A. D. 1900, with interest at the rate of seven per cent. per annum, payable half yearly, on the first days of April and October, each year, on the presentation and delivery of the proper coupon hereunto annexed, at the office of the Camden and Atlantic Railroad Company, in Camden.

The holder of this bond is secured by a first mortgage, dated October 1, 1871, on all of the estate of the company, executed and delivered to John H. Doughty and Israel S. Adams, in trust, to secure the full and final payment of such bonds as shall be issued by the said company, not exceeding in the whole $37,500, according to the terms of said mortgage deed.

In witness whereof, the said company have caused this bond to be attested in their behalf by their president and secretary, and their common seal to be hereunto affixed at their office, in the village of May's Landing, this first day of October, in the year of our Lord one thousand eight hundred and seventy-one.

C. R. COLWELL, *Secretary.* J. E. P. ABBOTT, *President.*

{ SEAL. M. L. & E. H. C. R. R. CO. }

The within bond, No. 46, is one of those bonds issued by the May's Landing and Egg Harbor City Railroad Company, to the amount of $37,500, and the mortgage therein created has been duly executed, recorded, and delivered.

JOHN H. DOUGHTY,
ISRAEL S. ADAMS,
Trustees.

No. 19. ANNEXED COUPON. $17 50.

Warrant for seventeen $\frac{50}{100}$ dollars. Being half-yearly interest on Bond No. 46 of the May's Landing and Egg Harbor City Railroad Company, payable April 1, 1882.

C. R. COLWELL, *Secretary.* J. E. P. ABBOTT, *President.*

INDORSEMENT ON BOND.

Payment of the principal and interest of the within bond is guaranteed by the Camden and Atlantic Railroad Company.

ROBERT FRAZER,
President Camden and Atlantic Railroad Company.
Attest, H. WHITEMAN, *Secretary.*

{ SEAL. C. & A. R. R. CO. }

The plaintiff also filed the following averment:—

The plaintiff avers that the Act of the Assembly of the State of New Jersey, approved March 19, 1852, incorporating the defendant company, provides, *inter alia*, as follows:—

"Provided always that it shall be lawful for the said company to make or construct two branch railroads from some convenient point on the said main road, to be determined on by the said company, the one to run to the village of Batsto, in the county of Burlington, and the other to the village of May's Landing, in the said county of Alantic."

The plaintiff further avers, that the Act of Assembly of the State of New Jersey, incorporating the May's Landing and Egg Harbor City Railroad Company, approved March 22, 1871, provides, *inter alia*, as follows:—

"7. And be it enacted that the said railroad is hereby authorized to lease its railroad to or consolidate with any other railroad company, which is hereby authorized to take such lease and operate the same for such term or

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times, and upon such terms as the said parties may agree upon.

"18. And be it enacted that any railroad company is hereby authorized to indorse or guarantee the bonds of the said May's Landing and Egg Harbor City Railroad, and in any other way which the parties may agree upon, aid the said company in the construction of its said railroad."

The plaintiff further avers, that all of the coupons, copies of which are herewith filed, were presented at the office of the Camden and Atlantic Railroad Company, in Camden, on the third day of April, A. D. 1883, by H. C. Pennypacker, agent for the plaintiff, who was at that time the owner of the said coupons, and the payment of the same was refused."

The defendant filed the following affidavit of defence:—

"D. M. Zimmerman being duly sworn according to law, doth depose and say that he is the secretary of the corporation defendant, and on its behalf deposes that he is advised, and he so believes that the instruments, copies of which are filed, are not such as entitle the plaintiff to enter judgment for want of an affidavit of defence."

S. W. Pennypacker, for the rule.

In a former suit upon earlier coupons of the same bonds, the Supreme Court (January Term, 1883, No. 38½) held that the Act creating the power to guaranty the bonds should have been averred. We have now averred the Act of the Legislature of New Jersey, and brought ourselves within that ruling.

The papers show an original liability on the part of defendant. "Payable . . . at the office of" the defendant is only another way of saying that the official of the corporation will pay the coupons. When the defendant indorsed its guaranty it adopted this promise. The instrument shows that the president of the defendant put the bonds on the market.

Snevily *v.* Johnston, 1 W. & S. 309.
Amsbaugh *v.* Gearhart, 1 Jones, 482.
Ashton *v.* Bayard, 21 P. F. Smith, 139.

If the defendant is not primarily liable, it is a case of suretyship.

Campbell *v.* Baker, 10 Wr. 243.
Roberts *v.* Riddle, 29 P. F. S. 468.
Street *v.* Silver, Brightly's Rep. 96.
Reigart *v.* White, 2 P. F. S. 438.
Woods *v.* Sherman, 21 P. F. S. 104.

D. W. Sellers, for the defendant.

The defendant is only liable as a guarantor. The instruments show a pure guaranty. The averments do not show the power to guaranty, and only set up a statute incorporating another company. It does not appear that this statute was even accepted by the defendant company.

Timlow *v.* R. R. Co., 11 WEEKLY NOTES, 218; s. c., 3 Out. 284.

Eo die. THE COURT. Rule absolute.

W. H. W.

C. P. No. 4. December 13, 1883.

Davies v. Gallagher, Defendant, and Cassidy, Garnishee.

Practice—Attachment Execution—Public officer—Money or goods in custodia legis—Act of April 23, 1829—Attachment execution will not lie against the warden of the Eastern Penitentiary for moneys of a prisoner in his official possession.

Appeal from judgment of a Magistrate's Court.

A case was stated for the opinion of the Court in the nature of a special verdict substantially as follows:—

Davies, the plaintiff, obtained judgment against Gallagher, for $100, for professional services rendered in defending him in the Court of Quarter Sessions, June 19, 1883. The prisoner, on his arrest, had given Davies an order upon the police Lieutenant Crout, for $100, which Crout refused to honor, and which order Davies then returned to Gallagher. After Gallagher's conviction, Davies asked the Court to make an order upon the clerk of the Court of Quarter Sessions, to pay over to him (Davies) $100, out of said money of the defendant's in the clerk's possession. The money had been previously passed over by Crout to said clerk. The Judge asked the prisoner whether he was willing that the order should be given. The prisoner expressed his unwillingness that the order should be given, he stating that he had paid a fee, and was only to be indebted further in case he was acquitted.

The Judge then ordered the clerk to hand the money in his possession to the warden of the Eastern Penitentiary, to which the prisoner was sentenced. The warden has also in his possession other property taken from Gallagher, on his entrance into the penitentiary. The warden, Cassidy, holds all this property in charge for the prisoner to be given to him on his discharge.

Gallagher was sued by said Davies, and a judgment regularly obtained for $100 for services; afterwards a writ of attachment in execution was issued, and Cassidy, warden of said penitentiary, made garnishee. Judgment was obtained against said Cassidy as garnishee through default of said Cassidy. Afterwards, by agreement between counsel, Cassidy was allowed to take his appeal from the said judgment obtained against him before Magistrate List, so as to raise the question whether the fund in the hands of the warden was the subject of attachment.

John C. Redheffer, for plaintiff.

The warden of the Penitentiary is a mere depositary. He is not a public officer within the spirit of the decisions.

David Wallerstein, contra, for the garnishee,

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cited and relied upon § 8, art. 5, of Act April 23, 1829 (10 Smith's Laws, 449).

Ross *v.* Clarke, 1 Dallas, 354.
Corbyn *v.* Bollman, 4 W. & S. 342.
Riley *v.* Hirst, 2 Barr, 347.
Bulkley *v.* Eckert, 3 Barr, 369.

C. A. V.

December 29, 1883. The COURT (after stating the facts). The question is whether the money in the hands of the warden is liable to an attachment execution. By the Act of 23d of April, 1829, sec. 8 (P. L. 351), regulating the penitentiaries of the State, the warden is made the official custodian of all property found in the possession of the convict at the time of his commitment. "All the effects on the person of the convict, as well as his clothes, shall be taken from him or her and specially mentioned and preserved under the care of the warden, to be restored to him or her on his or her discharge." The warden is the chief executive officer of the Penitentiary, and the duties and responsibilities imposed upon him by the Act are very onerous. He is required to reside in the Penitentiary, to visit every cell and apartment, and to see every prisoner at least once every day. There are now more than one thousand such prisoners. He must keep a journal, in which are to be entered all receptions, discharges, deaths, pardons, and escapes of prisoners, and all complaints made, and punishments inflicted, the visits of the inspectors and physician, and all other occurrences that concern the state of the prison. He is to appoint and dismiss all the underkeepers and servants, to report to the inspectors all infractions of the rules and inflict all punishments. His duties are in short so exacting, and require such constant attention, that he is prohibited by law from absenting himself from the Penitentiary for a single night without permission in writing from two of the inspectors. His necessary and imperative duties demand and fill up his whole time. That such a public officer should be harassed with attachments against his prisoners, in which he is made garnishee, is clearly against public policy and contrary to law. Considerations of public policy and convenience require that money in the hands of such officers shall not be stopped whilst in *custodia legis*. If the warden should be obliged to answer such attachments his attention would necessarily be diverted from his duties, to watching the progress and conducting the proceedings of lawsuits. He belongs to that class of public officers which is exempt from the process of attachment against funds in their official custody, like the treasurer of a board of school directors (Bulkley *v.* Eckert, 3 Barr, 368), the prothonotary of a court (Ross *v.* Clarke, 1 Dal. 354), a justice of the peace (Corbyn *v.* Bollman, 4 W. & S. 342), a sheriff (Bentley *v.* Clegg, 1 Clarke, 411), a constable (Crossen *v.* McAllister, 1 Id. 257), State and county treasurers and officers of municipal bodies (The City of Erie *v.* Knapp, 5 Casey, 174). The performance of public duties by officers of this class is sufficiently difficult and onerous without complicating them with lawsuits between other persons in regard to funds in their official custody. Besides the warden holds the personal property of the prisoners in his charge upon an official trust created by law. It is to be "preserved by the warden and to be restored to the prisoner on his discharge." It is *in custodia legis*. It cannot be seized by a creditor, or diverted to any other purpose. The warden's duty is to keep it for the prisoner, and he cannot lawfully rid himself of the trust except by delivering the property to the prisoner when he is discharged. We are of opinion that the money of the prisoner in this case is in the official custody of the warden. It can make no difference that the money, instead of being taken from the prisoner's person by the warden, was taken from him by the officer and delivered to the warden by order of the Court. If it had been delivered to the prisoner instead of the officer it would have come into the warden's possession all the same. That, for safety, it was carried to the Penitentiary in the pocket of the officer who accompanied the prisoner instead of the prisoner's pocket, does not affect the principle. It was constructively in the prisoner's possession, and when received by the warden from the hands of the officer who delivered the prisoner was the same as if it had been received from the prisoner himself. The plaintiff had no title of any kind to the money. The order which the prisoner had given him for it had been returned to the prisoner, and the money was not liable to attachment in the hands of the warden. His custody of it is perfectly defined and protected by law, and he can lawfully deliver it to no one but the prisoner himself when he is discharged.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, FEB. 21, 1884.* [NO. 11.

Supreme Court.

Oct. & Nov. '83, 59. October 26, 1883.

Bruce v. Reed et al.

Libel—Newspaper—Agent—Liability—Punitive damages—Evidence.

Where the proprietors of a newspaper give to an agent charge and control of an editorial column, limiting him only by his discretion, and reserving no supervision, they are liable, in an action on the case for libel, for injuries resulting from an act of his, incident to, and in the scope of his employment, whether the wrong resulted from mere negligence, or from wanton recklessness.

Evidence is admissible, in such action, to prove the careless, reckless, or wanton conduct of an employé of the defendant, in writing an article, in execution of authority given him by his principal, for the purpose of increasing the damages.

The right to recover punitive damages is not removed, because the defendants had no personal knowledge of the article before it was published, and after its publication did what was reasonable to make amends. Such facts are for the jury to consider in mitigation of damages; in connection with all the other evidence submitted to the jury tending to enhance the damages.

Error to the Common Pleas No. 1, of Allegheny County.

Case, by David D. Bruce against Josiah King, Nelson P. Reed, and George W. Reed, proprietors of the Pittsburgh "Commercial Gazette," under the firm name of King, Reed & Co., to recover damages for libel. Plea, not guilty.

On the trial, before STOWE, P. J., the following facts appeared: The "Commercial Gazette," of February 1, 1882, in a column headed "Editorial Etchings," published the following:—

"David D. Bruce informs reporters that he considers it unprofessional for him to open his mouth, except he sees or smells a fee somewhere. The query naturally arises in the mind of the reader, who pays him for his lengthy disquisitions in Council? He must realize a splendid income from that source if he carries out his principles there as sedulously as he assumes to with reporters. Fortunately for the public, there are other lawyers whose views of professional etiquette do not coincide with Mr. Bruce's."

This constituted the libel declared on in the narr.

On the day succeeding the publication of the above the paper contained another article in which it was stated that the libellous article was not warranted, and was written under a misapprehension.

Plaintiff's counsel offered to show the facts and circumstances connected with the libellous publication prior thereto, which were substantially the following:—

On January 31, 1882, a reporter connected with the "Commercial Gazette" called upon Mr. Bruce at his office, and asked him for an expression of his opinion as to the right of a landlord to levy on the goods of subtenants, with a view to publishing an article on that subject. Mr. Bruce replied, in substance, that it would be unsafe to formulate any general rule on the subject that would apply to all cases, and that the prudent course for any person having a practical interest in the question would be to present his special facts to his own attorney, and obtain advice thereon. This ended the interview.

Further, that this was reported to the party having charge and management of the column in which the libel appeared without any supervision on the part of the defendants, and was succeeded by the publication of the libel; this as part of the *res gestæ*, and as bearing on the question of malice.

Objected to by defendant as incompetent and irrelevant, because the plea is "not guilty," the declaration contains the charge made against the defendants, to which defendants pleaded "not guilty," and the only question here is the question of publication; that any conversation between the reporter and Mr. Bruce prior to the publication would not affect the defendants, who were not present, and had no knowledge of it. Objection sustained. Exception. (First assignment of error.)

Plaintiff's counsel renewed above offer in a slightly modified form, and further offered to prove that when the reporter reported to Dr. Palmer the result of his interview with the plaintiff, he (Dr. Palmer) said, "What, David Bruce, whom we have always backed up and supported in Councils, won't give any opinion?" and that he subsequently wrote and the defendants published the libel described in the declaration; and that the said Dr. Palmer was pecuniarily irresponsible, and is now dead, and that subsequent to the publication he was retained by the defendants in the same situation that he occupied at the time of, and prior to said publication. This, as part of the *res gestæ*, and as bearing upon the question of malice, and upon the question of damages.

Defendants' counsel does not object to any evidence tending to prove the publication of the matter alleged to be libellous, but to the residue of the offer as incompetent and irrelevant, because the defendants are only responsible, if at

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all, for what they actually published—what is alleged as libellous in the declaration—and not responsible for words spoken at a conversation between the plaintiff and a reporter. Objection sustained. Exception. (Second assignment of error.)

Plaintiff submitted, *inter alia*, the following points:—

(3) That the defendants, by producing evidence in mitigation of damages, admit the charge to be false. *Refused.* (Fifth assignment of error.)

(6) That under the evidence the jury may give exemplary damages.

Answer. If the jury believe that the defendants had no personal knowledge of this article before it was published, and in good faith did what was reasonable to make amends and reparation after the facts became known to them, this is not a case for punitive damages. There is no fixed standard by which damages are to be computed. The object is compensation in a case such as I have mentioned, but it is for the jury in its best judgment and discretion to fix upon such an amount as under the evidence in the case may be just and reasonable for the damage actually done the plaintiff. But if the defendants published or caused to be issued copies of the paper after they had personal knowledge of this article, then the jury may give damages by way of punishment, if, in view of all the evidence, they think it proper. (Sixth assignment of error.)

Verdict for plaintiff for $270, and judgment thereon. Plaintiff thereupon took this writ, assigning for error, *inter alia*, the exclusion of plaintiff's offers of evidence, and the answers to plaintiff's third and sixth points.

John Dalzell (*S. A. McClung* with him), for plaintiff in error.

The first and second assignments of error, are in effect, *first*, to show actual malice on the part of the writer of the libellous article; *second*, to show he was irresponsible; *third*, to show he had charge of the particular column of defendant's paper in which the article was published, without any supervision, *i. e.*, that he was the "Commercial Gazette;" *fourth*, that he was retained by the defendants after the time of the publication, and their knowledge of it, in the same situation.

The question presented is, would not this have justified the jury in imposing punitive damages upon the defendants?

It has been repeatedly held that a corporation may be held responsible for a libel, and that the malice of the agent, acting within the line of his duty, is the malice of the corporation. The members of a partnership of publishers are undoubtedly liable for the malice of one member expressed in a libellous article, and this simply on the ground that the guilty party is the accredited agent of all. The defendants could not escape the consequences, if after knowledge of his act they retained him. This amounted to an adoption by them of his act.

Goddard *v.* Railroad Company, 57 Maine, 202.
R. R. Company *v.* Rogers, 38 Ind. 116.
Sanford *v.* R. R. Company, 23 N Y. 343.
Com'th *v.* Willard, 9 WEEKLY NOTES, 525.
Wood on Master and Servant, § 277.
Roscoe's Crim. Evidence, 677.

The fifth assignment of error covers the refusal of the Court to affirm the third point, which is identical in terms with one that was submitted and affirmed in Barr *v.* Moore, 6 Norris, 385.

There was no evidence of a proper *retraxit.* What is called a *retraxit* admits that the libel was the act of the "Commercial Gazette," and says it was the result of a misapprehension, and that the paper has always considered Mr. Bruce a very nice man. No apology was offered the injured party; no offer of reparation made; no justification, no explanation offered.

Day *v.* Woodworth, 13 How. 363.
McBride *v.* McLaughlin, 5 Watts, 376.
Barr *v.* Moore, 6 Norris, 385.

A. M. Brown, for defendant in error.

As soon as the libel came to the notice of defendants, which it did on the morning of publication, they immediately discharged Dr. Palmer, and wrote and had published in the next issue of their paper an ample apology and retraction. This was made voluntarily and at the earliest moment. Dr. Palmer was required to go and make an apology to Mr. Bruce, which he did, and reported him satisfied, when they permitted him to resume his former position. Burr *v.* Moore (6 Norris, 385), cited by plaintiff to sustain plaintiff's third point, does not do so.

The defendants had the right, under the plea of not guilty, to give evidence, in mitigation of damages, that they had no actual malice against the plaintiff, and as to the circumstances under which the publication was made.

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January 7, 1883. THE COURT. The defendants are the proprietors of a daily newspaper, called the "Commercial Gazette," published in the city of Pittsburgh. This suit is to recover damages for the composing and publishing as editorial in the columns of that paper, an article, reflecting on the plaintiff, which the jury have found to be libellous.

The first and second specifications of error are to the rejection of evidence, of substantially the same character, offered by the plaintiff. Whether the evidence was properly rejected depends on the liability of the defendants for the conduct of Dr. Palmer, who was one of the editors of the paper. A master is liable for the wrongful act of his servant when the injury is committed by authority of the master, either expressly conferred or fairly implied from the nature of the employment and the duties thereby imposed. (1 Black. Com., 429; Wood on Master and Servant, sect. 279.) He is liable for the act of his servant, within the scope of his employment, and incident to the performance of the duties intrusted to him, although the specific act of injury be in opposition to the express and positive command of the master. (Id., sect. 305; Mechanic's Bank *v.* Bank of Columbia, 5 Whea. 326). This may be said to be the settled rule of law applicable to the liability of masters generally for the acts of their agents.

The liability of the proprietors of a newspaper for the act of an agent, to whose management they have intrusted the paper, is more broad. The proprietor is presumed to have published the libel which appears therein, and in a criminal prosecution therefor, it is no defence for him to show that it was published without his knowledge and in his absence. (Rex *v.* Walter, 3 Esp. 21; King *v.* Gutch, 1 Moody & Malkin, 433; Roscoe's Crim. Ev., 6 Am. ed. 621; Commonwealth *v.* Morgan, 107 Mass. 199.)

The material for this libel appears to have been drawn from the fact that a reporter of the paper sought to "interview" the plaintiff, and asked his opinion, for publication, on a question of law, which the plaintiff declined to give, and stated reasons therefor. The offers, *inter alia*, were to prove this conversation, and that it was reported to Dr. Palmer who was in the employ of the defendants; that he had the charge and management of the column, in which the article was published, not subject to the supervision of the defendants; that he subsequently wrote, and the defendants published the libel in question; and that Palmer was pecuniarily irresponsible, and is now dead. The defendants objected to the evidence claiming it to be incompetent as the plea was "not guilty" and the only question was that of publication. They made no objection to proving the publication of the libellous article, but claimed their liability was restricted to what they actually published. The Court rejected both offers.

If the defendants gave to Palmer such charge and control of an editorial column, reserving no supervision, he was practically authorized by them to write and publish therein any article he thought proper. The very purpose of his employment was to collect information and write articles for publication. If they imposed such duties upon him, and gave him such powers, limited only by his discretion, they are liable for injuries resulting from an act of his, clearly incident to the performance of his duties, in the scope of his employment. He stood in their place. If the libel was written under the authority of his employment, and in furtherance of their business, they are responsible whether the wrong resulted from his mere negligence, or from a wanton and reckless purpose to accomplish the business in an unlawful manner. (Howe *v.* Newmarch, 12 Allen, 49; Ramsden *v.* Boston & Albany Railroad Company, 104 Mass. 117; Hawes *v.* Knowles, 114 Id. 518.) Or from his wilfulness. (Wood on Master and Servant, pp. 576 and 583.) If Palmer were still living he might be sued jointly with them for this libel, or he and they might be sued separately. (Odgers on Libel and Slander, pp. 157, and 294.) Every one in any way connected in the publication of a libel is equally responsible for all the damages which flow from that publication, (Id. 328.)

It is true it has been held that express malice in an employé who has written a libel, cannot be invoked to swell the damages against the employer, if he was ignorant of the publication and not negligent. (Detroit Post Co. *v.* McArthur, 16 Mich. 447; Scripps *v.* Reilly, 38 Id. 10; Robertson *v.* Wylde, 2 Moo. & Roby, 101.) It was, however, held in Goddard *v.* Grand Trunk Railway Co. (57 Me. 202) that whenever exemplary damages would be recoverable, if the act had been done by the master himself, they are equally recoverable when the act is done by his servant. So in Wood on Master and Servant, sect. 323, it is said: "In many instances it has been held not only that the master is liable for the wanton and malicious acts of his servant in the execution of the authority given him by the master, but also that in all such cases the wantonness and malice may be shown to enhance the damages," citing Hawes *v.* Knowles, *supra*. This conclusion flows logically from the ground on which the liability of the master rests. If he so authorized the act that he commits it through the agency of another, he cannot claim exemption from any of the legal consequences flowing from the act.

If this rule of law is applicable to any em-

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ployer, we are unable to see why it shall not apply to the proprietor of a newspaper, who employs others to write for its columns. The proprietors do not always reside in the city in which the paper is published. They may be in foreign countries much of their time; they direct as to the general course to be pursued, but do not restrict the writers as to the specific means by which the desired end shall be reached. If the proprietors are asked to give the name of the author of any article, and they refuse to do so, a person aggrieved, as a general rule, has no means of ascertaining the name of the writer. If they are not held responsible for what they cause to be written and published, every person connected therewith may escape those punitive damages which the law frequently imposes. As was said in Barr *v.* Moore (6 Norris, 385): "The liberty of the press should at all times be justly guarded and protected; but so should the reputation of an individual against calumny. The right of each is too valuable to be encroached on by the other."

The defendants are charged with having composed, as well as having published, the libellous article. It follows that evidence was admissible to prove, for the purpose of swelling the damages, the careless, reckless, or wanton conduct of the employé in writing the article, in execution of authority given him by the defendants. Under their plea of not guilty the defendants may prove in mitigation of damages the facts and circumstances which induced the writer to erroneously make the charge, provided such facts and circumstances do not tend to prove the truth of the charge made.

It follows, from reasons already given, the learned Judge erred in charging, substantially, as matter of law, that if the defendants had no personal knowledge of the article before it was published, and afterwards in good faith did what was reasonable to make amends and reparation, it was not a case for punitive damages. If the facts were found as stated they were for the jury to consider in mitigation of damages; but they should not be considered alone, as controlling such damages; they should be considered in connection with all the other evidence submitted to the jury justly tending to enhance the damages.

We discover no error in the third and fourth assignments to correct. The language of the article did not expressly charge any fraudulent or corrupt conduct or motives. In the declaration the plaintiff put his construction on the meaning of the language used; the learned Judge charged, if the jury found the meaning to be as there averred, it was libellous.

The plaintiff has no just cause of complaint with this answer; besides the jury found the language to be libellous. There is no merit in the fifth assignment.

Judgment reversed, and a venire facias de novo awarded.

Opinion by MERCUR, C. J.

GREEN, J., absent. W. R. S.

Oct. & Nov. '83, 203. November 6, 1883.

Wallace's Appeal.

Equity—Pledge of an interest in a copartnership—Possession by pledgee not essential to validity of pledge in such case—Such pledge an exception to the general rule, requiring possession by pledgee.

The pledge of an intangible interest, to wit, the interest of a partner in a copartnership, is an exception to the general rule, that possession of the thing pledged must be taken by the pledgee in order to make the pledge valid against the creditors of the pledgor.

A., a partner in a firm, borrowed by B.'s indorsement, $12,500, which he put into his interest in the firm, and, in consideration of said indorsement, assigned his interest in the firm to B., agreeing that, in case the note B. indorsed was not paid at maturity, then he, B., should take possession of, and convert said interest to his own use. A., in the meantime, remained in possession and carried on the business as a partner. At the time of this assignment, A. was indebted to C. for $5000, secured by a judgment note. B. knew that the $12,500 was to go into A.'s interest in the firm, and A.'s partners knew that this money, so put in, was borrowed. A. did not notify his partners of the assignment; nor did he notify C. until a few days before the $12,500 note came due. At that time, B. being sick, A. applied to C. for pecuniary aid; and, on being pressed, told C. of the assignment to B. C. then demanded a judgment note for $4500, for money he had already loaned A., in addition to the $5000 aforesaid, which note A. gave him. C. at once entered up his judgment notes, and, on execution thereon, sold A.'s interest in the firm, which was bought by A.'s partners for $10,700, which was appropriated by the sheriff to the payment of C.'s judgments. On the day of the levy, and before it was made, B. exhibited A.'s assignment to the other partners, and demanded possession of his interest in the firm, which was refused. The Master and Court below both found as a fact, that there was no actual fraud on the part of either A., B., or C., and it was also found that A.'s interest was of sufficient value to pay the claims of both B. and C. On a bill in equity by B. against A., C., and the partners of A., for an account of A.'s interest in the firm, the Supreme Court (reversing the Court below) entered a decree in favor of B. for the amount of his claim, interest, and costs.

Collins's Appeal, 41 Leg. Int. 55, followed.

Appeal by R. P. Wallace, from a decree of the Common Pleas No. 2, of Allegheny County, dismissing a bill in equity, filed by him against Edward Agnew, John Fleming, John Hamilton, and David Sands, for an account of Edward Agnew's interest in a late copartnership between said Agnew, Fleming, and Hamilton.

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The facts of the case, as found by the Master and the Court below, were briefly as follows: In 1879 Agnew gave to Sands a judgment note for $5000, which debt he, Sands, had assumed on account of money borrowed by Agnew some years before, to put into the firm of Fleming, Agnew & Co. At the same time Sands was liable as indorser for Agnew for about $4500 additional.

On April 1, 1880, Agnew, by virtue of Wallace's indorsement of his note at ten months, borrowed $12,500, and paid the same into the firm of Fleming, Agnew & Co., to his credit, and to the increase of his interest in the firm to that amount. At the time of procuring the indorsement, Agnew gave Wallace a bill of sale or mortgage of his interest in the firm in the following words:—

"Whereas, R. P. Wallace, of the city of Allegheny, has this day indorsed my note of this date for $12,500, payable in ten months; for the purpose of securing said R. P. Wallace from loss on account of said indorsement, I hereby sell, assign, transfer, and set over unto him, his heirs, and assigns, all my interest in the firm of Fleming, Agnew & Co., now engaged in the manufacture of stamped and other goods, and wholesale business in the city of Pittsburgh; and in case said note is not paid by me at maturity, said R. P. Wallace may at once take possession under this instrument, and convert said interest to his own use and benefit, free from any claim by me or my personal representatives.

"Witness my hand and seal this First April, 1880."

Wallace knew that the money borrowed was to go into Agnew's interest in the firm. Fleming and Hamilton knew that the money, so put into the firm as capital, was borrowed. Wallace did not notify the other partners of his assignment, nor did Sands hear of it until near January 24, 1881. Nor did Wallace know of Agnew's indebtedness to Sands and others. In the mean time, Agnew continued to act in the business of the firm as a partner as usual, until February 2, 1881.

On February 4, 1881, Agnew, desiring to raise money to meet the $12,500 note above mentioned, and Wallace being sick, applied to Sands for aid, when, on being pressed, he gave Sands information of the note, of Wallace's indorsement, and of his being secured by a paper on his interest in the firm. Sands then demanded a judgment note to secure him for his indorsements, and Agnew thereupon gave him a judgment note for $4500, dated January 24, 1881. On February 2, 1881, Agnew gave to Sands and his counsel a full statement of the terms of the bill of sale to Wallace, and thereupon, and on account of that information, Sands on the same day entered judgment on both his notes, and issued execution thereon, and had the sheriff levy on the interest of Agnew in the firm, and on February 14, 1881, the sheriff sold the said interest to Fleming and Hamilton for $10,700, all of which was appropriated to the judgments of Sands. Fleming and Hamilton, before the levy was made, and also at the time of sale, had notice from Wallace of his bill of sale and claim to be paid from the interest of Agnew. The Master further found that there was no collusion or arrangement between Fleming, Hamilton, and Sands; and, on the part of Wallace, entire good faith, and absence of all actual fraud. It was also found that the interest of Agnew was of sufficient value to pay the claims of both Wallace and Sands in full.

On these facts the Master (John E. Shaw, Esq.), found that the assignment to Wallace was not within the statutes of 13th and 27th Elizabeth, under the authorities, and reported a decree in favor of Wallace for $12,500 with interest and costs.

To this report, exceptions were filed, and after argument were sustained by the Court below EWING, P. J., upon the ground that under the law of Pennsylvania, the assignment of Agnew's interest to Wallace, without a transfer of possession, was a fraud upon the other creditors of Agnew, and a decree was entered, dismissing the bill at costs of the complainant. From this decree, the complainant took this appeal, assigning as error this action of the Court.

Geo. Shiras, Jr., and *W. B. Rogers*, for appellant.

Admitting that retention of possession is *prima facie* sufficient to defeat vendee's title, yet it is clearly the law, that this presumption may be rebutted, and the question of fraud is always a question of fact for decision by the Court or jury.

Clow *v.* Woods, 5 S. & R. 275.
Crawford *v.* Davis, 99 Pa. 576.
Billingsby *v.* White, 59 Pa. 464.
Barr *v.* Reitz, 53 Pa. 256.
Parks *v.* Smith, 94 Pa. 46.
Pearson *v.* Carter, Id. 156.
Sheldon *v.* Sharpless, 2 WEEKLY NOTES, 311.
Barr *v.* Boyles, 96 Pa. 31.
McPherson *v.* Kinnear, 12 WEEKLY NOTES, 40.
Frantz *v.* Ruggles 7 Luz. Leg. Reg. 73.
Evans *v.* Scott, 89 Pa. 136.
Edwards *v.* Harben, 2 Term Rep. 587.
Luckenbac *v.* Brickenstein, 5 W. & S. 149.
Williams *v.* Downing, 18 Pa. 60.

Actual notice of a transfer will bind a purchaser, and the execution creditor of such purchaser.

Shaw *v.* Levy, 17 S. & R. 100.
Stowe *v.* Meserve, 13 N. H. 46.
Coble *v.* Nonemaker, 2 WEEKLY NOTES, 373.

Upon a fair sale delivery of possession is not a duty owed to creditors who have no execution.

Smith *v.* Stern, 17 Pa. 360.
Kendall *v.* Samson, 12 Vt. 515.
McMarlan *v.* English, 74 Pa. 296.
Ludwig *v.* Highley, 5 Barr, 141.

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The delivery, or its equivalent, must be according to the nature of the thing transferred.

McKibbin *v.* Martin, 13 Smith, 352.
Benford *v.* Schell, 5 Id. 393.
Chase *v.* Ralston, 6 Casey, 540.
Dunlap *v.* Bournonville, 2 Casey, 72.
Hugus *v.* Robinson, 12 Harris, 9.

The thing transferred in this case was an incorporeal thing; a mere right to an account, a *chose in action.*

Whigham's Appeal, 63 Pa. St. 194.

Hampton and *Dalzell*, for the appellees.

This assignment or mortgage was fraudulent and void in law as to creditors of the mortgagor, whether the debts were contracted antecedently, or subsequently to it.

Wilt *v.* Franklin, 1 Binney, 520.
Dawes *v.* Cope, 4 Binney, 258.
Sturtevant *v.* Ballard, 9 Johnson, 337.
Clow *v.* Woods, 5 S. & R. 275.
McKibben *v.* Martin, 14 Smith, 352.

Where there is an express agreement that the vendor shall retain possession the question is entirely for the Court.

Milne *v.* Henry, 4 Wright, 352.

It is only where the evidence of a change of possession is conflicting that the question is for the jury; and hence the long line of cases cited by appellant's counsel is inapplicable. A *chose in action* is subject to the rule which requires change of possession.

Welsh *v.* Bekey, 1 P. & W. 60.
Ryall *v.* Rolle, 1 Wills, 260.
Clow *v.* Woods, *supra.*
Elliot's Appeal, 14 Wright, 75.
1 Powell on Mortgages, 28.
Woodridge *v.* Perkins, 3 Day (Conn.), 364.
Whigham's Appeal, *supra.*

These cases show that delivery of a *chose in action* is by notice. The delivery should accompany the transfer, or should follow as soon after as the nature of the property will permit.

Carpenter *v.* Mayer, 5 Watts, 483.

Failing the delivery, subsequent notice cannot avail.

Stark *v.* Ward, 3 Barr, 32.
Hower *v.* Geesaman, 17 S. & R. 254.
Pritchett *v.* Jones, 4 Rawle, 260.

The rule declared in Clow *v.* Woods, and strictly adhered to ever since, has its foundation in public policy. To reverse the ruling below in this case would open the door to frauds, and would unsettle the foundations of commercial credit.

interest which he was to acquire in the future with the money loaned him by Collins, that Hulse was to be in the possession of the interest until such time as Collins might demand an assignment of it, and upon such demand being made Hulse was to make the assignment and deliver possession of the said interest to Collins." Hulse never transferred possession of the subject of the pledge to Collins. The fund for distribution was raised from the sale of that subject, and the question was, "whether a valid and binding pledge can be given of the interest of the pledgor in a partnership to be subsequently created so as to secure to the pledgee a priority of lien as against the unsecured creditor." It was ruled that from the moment the interest came into existence it was subject to the operation of the pledge, that as Hulse was bound by his contract, all claiming under him were so bound, except purchasers for value without notice, and that the right of a general creditor is inferior and subordinate to that of the pledgee.

To repeat the reasoning and exhaustive review of the authorities by Justice GREEN in that case, would be vain. He remarks that "possession of the pledge is an almost universal requirement in the law of pledge to perfect the pledgee's title;" also notes the distinction between a mortgage and a pledge, and puts stress upon the fact that such distinction is disregarded where by the agreement of the parties the pledge is to remain with the pledgor, in which case as he is bound by his contract so all are bound who claim under him, except innocent purchasers; and adds that as that doctrine has been applied in the case of specific chattels it would apply with much greater force in case of an expectancy or intangible interest. Hulse pledged an expectancy of an intangible interest. This pledge operated upon that interest as soon as it came into existence, the interest remained in possession of the owner, who controlled it with his partners, and such possession was in accord with the agreement, for Collins did not demand an assignment.

Fleming, Agnew & Co. were partners, and, on April 1, 1880, Agnew borrowed $12,500 which he put into the firm as capital. Wallace, knowing that the money borrowed was to be used to increase Agnew's interest in the partnership, indorsed for Agnew and took a bill of sale or mortgage of said interest, to secure him

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execution was issued by Sands, upon which Agnew's interest in the partnership was seized and sold. The Master and Court below agree that there was no intention on the part of Agnew to defraud Sands, that Wallace did not know of Agnew's indebtedness to Sands, that the loan and bill of sale were not intended to and could not defraud the other partners, and that on the part of Wallace there was entire good faith and absence of all actual fraud; and no other conclusion is warranted by the testimony.

By the agreement, Agnew was to retain possession of the mortgaged interest until maturity of the note—a period of ten months. He had joint possession with his partners of the entire property of the partnership, and the direct implication of the agreement is, that Agnew and Wallace intended that the business of the firm, until the end of said period, should be conducted as if the bill of sale had not been made. Both were interested in the prosperity of the business. A transfer of possession was in fact impossible, for Agnew had no separate possession nor had he the right to put another man in his place as a partner in the business. "Partners have no separate title in any aliquot part of the partnership property. Their interest is an incorporeal—intangible thing—a right to an account, and to their share of the balance after all the partnership debts are paid and all equities between the partners adjusted" (Whigham's Appeal, 63 Pa. St. 194). When the parties say that Wallace "may at once take possession," in case the note shall not be paid by Agnew at maturity, they mean that the right shall then vest in Wallace to demand an account. That is the right of the purchaser of a partner's interest either at a private or judicial sale. In the interest itself is the reason why Wallace, as mortgagee or pledgee, could not have taken actual possession, and the circumstances show good faith in the naming of a future time when he should be clothed with the right to ascertain the amount or value of his security and recover the same.

Upon the authority of Collins's Appeal, Wallace had a valid lien as against the the general creditors of Agnew. Sands had full notice of the lien before he did any act for recovery of his debt. Fleming and Hamilton purchased with like notice, and they hold subject to the right in Wallace. We are of opinion that the appellant is entitled to a decree in accord with the Master's report.

The general rule that possession of the thing pledged must be taken by the pledgee to make the pledge valid against the creditors of the pledgor, was recognized in Collins's Appeal, and the pledge of an interest in expectancy, or of an intangible interest under certain circumstances was considered an exception. Whether in Pennsylvania, there can be any other exception need not now be determined.

And now, January 7, 1884, upon consideration of this cause, it is ordered, adjudged, and decreed that the decree be reversed; that the bill be dismissed as to the defendant, David Sands, with costs, that the defendants, Edward Agnew, John Fleming, and John Hamilton, pay to the plaintiff the sum of fifteen thousand three hundred and twenty-seven dollars ($15,327) with costs of suit, including the Master's fee and the costs of this appeal; and that the record be remitted for the execution of this decree.

April 1, 1880.	$12,500.
Interest to January 7, 1884	$2,827.
	$15,327.

Opinion by TRUNKEY, J.
CLARK, J., absent. W. R. B.

Oct. & Nov. '83, 15. Oct. 23, 1883.

Bryant's Appeal.

Practice—Distribution—Costs—Municipal lien under Act of April 2, 1870, relating to city of Pittsburgh—Not divested by judicial sale.

Where the fund produced by a sale of real estate is insufficient to pay prior liens, the plaintiff in the writ on which the land is sold, shall receive out of the proceeds *the costs incurred in order to effect the sale only*, and not those incurred prior to his execution.

Where upon execution real estate is sold in parcels for separate and distinct sums, the costs on the writ are to be divided into as many equal parts as there are separate and distinct parcels sold, and one portion thereof charged to the fund realized from each.

A municipal lien under the Act of April 2, 1870, P. L. 796 (the Penn Avenue Act), is not divested by a judicial sale, and is not payable out of the fund realized thereby.

Appeal, by Sarah M. Bryant, from a decree of the Court of Common Pleas No. 1, of Allegheny County, confirming sheriff's special return of distribution of proceeds of sale of real estate of Charles Stoehr.

The facts of the case were as follows: On a fi. fa. issued on a judgment in favor of one Trauerman against Charles Stoehr, the sheriff levied upon and sold certain real estate of Stoehr, in the Fourteenth Ward of the city of Pittsburgh, viz., a certain lot fronting on Forbes Street, which was sold for $700, and two lots situate in the Twenty-third Ward of said city, which were sold together for $40. The Forbes Street lot was subject to a municipal claim for improvement of said street, under the provisions of the Act of

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April 2, 1870, P. L. 796;* and also to certain tax liens, and a mortgage for $600, held by the appellant. This mortgage was at the time of sale, prior to all other liens, except the assessment and taxes aforesaid.

In his special return (made in pursuance of the special Act of April 10, 1862, P. L. 364, relating to distribution of proceeds of sheriff's sales in Allegheny County), the sheriff appropriated the $40, realized from the sale of the Twenty-third Ward lots, to certain tax liens against them and costs thereon; charging all the costs on the writ, including $6.75 of costs accrued before execution to the proceeds of the Forbes Street lot. He also appropriated the sum of $191.54 in full of the municipal assessment above mentioned.

To this return the appellant filed the following exceptions: 1st. To the appropriation to said costs accrued before execution; 2d. To the appropriation of sums amounting to $40 to the liens on the Twenty-third Ward lots; 3d. To the appropriation of $191.54 to the municipal lien aforesaid.

After argument, the Court below filed an opinion, dismissing the exceptions, and confirming the sheriff's return. From this decree the appellant took this appeal, assigning as error this action of the Court.

John D. Shafer and *Geo. Shiras, Jr.* (*C. C. Dickey* with them, for appellant).

The costs accrued before issuance of a fi. fa., are not payable out of the proceeds of a sale as against prior lien creditors.

Fry's Appeal, 26 Smith, 82.

One-half the costs should have been charged to the Twenty-third Ward lots.

In interpreting a statute, judges are not to presume the intention of the Legislature, but are to collect it from the words used, where the latter are clear and unambiguous. Where the words are plainly expressive of an intent, the interpretation must be in accordance therewith. There is no room in such a case for construction.

Rex *v.* Ramsgate, 6 B. & C. 712.
Rex *v.* Inhabitants, etc., 10 B. & C. 52.
Green *v.* Wood, 7 Q. B. 178.
Sedgwick on Construction of Statutes, 220.
Bradbury *v.* Wagenhorst, 54 Pa. 180.
Howard Ass'n Appeal, 70 Pa. 344.

The Legislature, in the case before us, have spoken in no doubtful terms. They have expressly said, that the lien shall not be divested by any judicial sale. If the lien is not divested it cannot be transferred to, and payable out of the fund. But the learned Judge of the Court below held that the meaning, spirit, and real intent of the Act is that where enough is realized to pay the lien it is divested, and payable out of the fund. The answer to that is, that the legislature have frequently in other statutes expressed that intention, and have used apt words for so doing. As the following:—

Act of March 26, 1867, sect. 17, P. L. 555.
Act of May 1, 1861, sect. 24, P. L. 450.
Act of January 6, 1864, sect. 19, P. L. 1131.

This Act contains no clause expressing such intent; and effect cannot be given to a supposed intent, not expressed.

Rex *v.* Skone, 6 East, 518.
Haworth *v.* Ormerod, 6 Q. B. 307.
Sedgwick on Construction of Statutes, 205–208.

Pittsburgh's Appeal, 70 Pa. St. 142, arose upon the Act of January 6, 1864, *supra*, and does not apply to this case.

The words of the Act are substantially the same as those of the Act of March 23, 1867 (Purd. 479, sect. 111), which provides that the lien of a mortgage shall not be divested under certain circumstances. Besides the reasons for the provision for non-divestiture are easily discoverable. Under this Act thousands of liens were to be filed, payable in instalments extending over ten years, and the city attorney would be obliged to watch every sale during all that time, lest the lien be divested without money being realized to pay it, or if realized, lest it be not appropriated to it.

Josiah Cohen, for the appellee.

If there be sufficient realized to pay the lien, the city has a right to demand an appropriation of enough to pay it. By this construction costs are saved to the defendant; the interests of the city are fully protected; the interest of the defendant to have his land bring its full value, and the interest of the purchaser to get his property unincumbered, are both regarded. If the appellant is right in saying that "*no* judicial sale shall divest the lien," it follows that the lien will not be divested by a sale on a lev. fa. issued upon the lien itself. The argument becomes, therefore, unreasonable, when we stand absolutely on the language.

This case is ruled by—

Pittsburgh's Appeal, 70 Pa. 142.

* This Act entitled "An Act to provide for the improvement of Penn Avenue, and other Avenues and Streets in the city of Pittsburgh," provided, *inter alia*:—

"Section 19. Said assessments, with the interest accruing thereon, shall be a lien upon the property abutting

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burgh, was sold for $700, and the two Twenty-third Ward lots were sold together for $40. The Forbes Street lot was subject to a municipal lien, filed October 12, 1877, in favor of the city, for paving, etc., under the Penn Avenue Act, which provides, *inter alia*, that the cost of grading, curbing, and paving streets shall be assessed against the property fronting thereon, and shall be paid in ten equal annual instalments, with interest, etc. It was also subject to liens for unpaid taxes, and mortgage of $600, in favor of appellant, dated and recorded April 16th, 1881; which mortgage was prior to all other liens, except the paving and tax liens above mentioned. The Twenty-third Ward lots, were subject to tax liens for the years 1881 and 1882, aggregating $27.81 and costs thereon, which together amount to a sum sufficient to absorb the entire proceeds of those lots. In his special return, the sheriff appropriated the $40, proceeds of the Twenty-third Ward lots to the tax liens and costs thereon, and thus, in effect, took all the costs as taxed on the writ, out of the proceeds of the Forbes Street lot. These costs amount to $59.95, including $6.75, costs accrued on the judgment prior to issuance of the execution. He also appropriated out of the same fund $191.54, to the paving lien, in full, and the residue $259.77, to appellant's mortgage. Exceptions to the special return were overruled by the Court, and the fund distributed as above stated.

The subjects of complaint in the several specifications of error, are, 1st. That no part of the fund should have been appropriated to the $6.75 costs on the judgment, upon which the execution was issued; 2d. That the $40, realized from the Twenty-third Ward property was not appropriated as it should have been, first to half of the costs incurred in effecting the sale, to wit, $20.60, which consists of one of the costs taxed on the writ less the costs of the judgment, and $12 sheriff's poundage; and, 3d. That the sum of $191.54 was not appropriated to appellant's mortgage instead of the Forbes Street paving lien.

As to the first and second subjects of complaint, there is manifest error in the appropriation. When two or more pieces of real estate are sold on a junior judgment, which is clearly not entitled to participate in the fund realized from the sale, the costs of effecting the sale, that is, the costs incurred on the execution process alone, including advertising and excluding costs of the judgment proper, should be divided into as many equal parts as there are separate pieces of property sold, and one portion thereof charged to the fund realized from each. In this case one-half of the execution costs should have been charged to the proceeds of the Twenty-third Ward lots, and the other to the fund realized from the Forbes Street lot. In no other way can the rights of respective lien creditors, on different pieces of property, be preserved. In Lahr's Appeal (9 Norris, 507) it is said, the plaintiff in a judgment not reached in distribution of the proceeds of real estate, is not entitled to any costs except such as are actually necessary to effect the sale. The costs incurred upon prior fruitless efforts to bring about a sale cannot be allowed to affect prior lien creditors. This is merely a re-affirmance of a principle settled by prior adjudications, among which are, Malone's Appeal, (29 P. F. Smith, 481), and Fry's Appeal (26 P. F. Smith, 82). In the latter case, the present Chief Justice said: "In the distribution of money raised by sheriff's sale of real estate, the costs of sale should first be paid, and the residue of the fund applied to the liens divested by the sale according to their priority. The costs thus preferred do not include those made in obtaining the judgment, but commence with the issuing of the execution necessary to effect the sale." The amount of costs involved in this contention is small, but the principle is nevertheless important, and should not be disregarded.

The remaining contention involves a new and important question, arising under the Act April 2d, 1870, P. L. 796, entitled, "An Act to provide for the improvement of Penn Avenue and other avenues and streets in the city of Pittsburgh," commonly known as the Penn Avenue Act. By that Act a system of street improvement, on the credit of the property fronting thereon, was inaugurated and extensively practised. It provides that the funds necessary to make the improvement on each particular street shall be raised by sale of bonds issued by the city; that the cost of the improvement when completed shall be assessed, per foot front, on the property bounding on the street or avenue, and the amount thus assessed shall be paid to the city in ten equal annual instalments, with interest at the rate of seven per cent. The nineteenth section of the Act declares that "said assessments, with the interest accruing thereon, shall be a lien upon the property abutting on said avenue, from the commencement of the work, and shall remain a lien until fully paid. They shall have precedence over all other liens, and shall not be divested by any judicial sale; provided that the lien shall be limited to the lots bounding or abutting on said avenue, and not exceeding in depth from said avenue one hundred and twenty feet." The Forbes Street paving lien was filed pursuant to the provisions of that Act, and the question presented by the record, is whether the lien is entitled to any part of the proceeds of the lot incumbered thereby. It is very clear that it is not entitled to participate in the distribution, unless the lien was wholly or partially divested

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by the sale, because it is only by reason of its divestiture that any lien is transferred to, and follows the fund arising from the sale of the property upon which it rested. The Penn Avenue Act in express terms declares that the assessment shall be a lien from the commencement of the work, and shall remain a lien until fully paid; that it shall have precedence over other liens, and "shall not be divested by any judicial sale." The language employed is perfectly clear and unambiguous, and too plainly expressive of the legislative intent to admit of any doubt whatever. The distinctive properties of the lien are, continuance until fully paid, precedence over all other liens, and non-divestiture by any judicial sale; and these are defined with such precision, as to exclude the idea of divestiture in any other way than by voluntary payment, or payment by virtue of execution process on the lien itself. If the non-divestible quality had not been so distinctly impressed upon Penn Avenue liens, there would be some reason for holding, as has been done in the case of other municipal charges, that the lien in question is entitled to payment out of the fund for distribution. The learned Judge of the Common Pleas appears to have thought that the true spirit and meaning of the Act required him to hold that, inasmuch as a sum sufficient to pay the lien was realized, it was divested, and therefore entitled to payment out of the fund; but, it will be found, on examination of the other Acts creating municipal liens, that whenever such divestiture was intended by the Legislature, they have used apt words for that purpose. In the Act of March 26, 1867, P. L. 555, relating to the Allegheny City Park, it is provided that "the liens shall not be divested, except so much as the proceeds of such sale shall satisfy and pay." So, also, in the Act of January 6th, 1864, P. L. 1131, which was considered in Pittsburgh's Appeal (20 P. F. Smith, 142), it is provided that "if on any sheriff's sale or other judicial sale, enough be not realized to pay off the lien, it shall continue to be a lien until the whole amount with costs be paid in full." Other Acts creating liens contain similar provisions, indicative of legislative intention to divest the liens by judicial sale to the extent of the net proceeds of sale. There is a wide distinction between those Acts and the Penn Avenue Act. Instead of recognizing and providing for divestiture of the lien, the latter Act, as we have seen, expressly prohibits it. The language of the Act is substantially the same as the mortgage lien Act of March 23d, 1867, Purd. 479, which provides, "when the lien of a mortgage upon real estate, is or shall be prior to all other liens on the same property, ... the lien of such mortgage shall not be destroyed, or in any way affected by any judicial or other sale whatever." Hence, it follows that a sale made on a subsequent judgment will not divest a first mortgage lien, and of course no part of the proceeds is applicable thereto. The substantial identity of the language used in the two Acts clearly indicates that the Penn Avenue Act was intended to give the city a fixed and permanent lien as security for the assessments. And there are good reasons why it should be so. Liens under that Act are payable in ten annual instalments, and if they are liable to divestiture by judicial sales, not based on the lien itself, property owners would be deprived of the extended credit intended by the Act, and the law officer of the city would be obliged to watch every sheriff's sale, for the purpose of protecting the interests of the city in the very numerous liens created by the Act. It is enough, however, to rest on the words of the Act itself which declare, in terms too plain to be misunderstood, that the lien shall not be divested by any judicial sale.

We are clearly of opinion that the Forbes Street lien was not divested by the sheriff's sale on the junior judgment, and therefore not entitled to participate in the distribution.

Decree reversed at the costs of the appellees, and record remitted to the Court below with instructions to distribute the fund in accordance with this opinion.

Opinion by STERRETT, J.

GREEN and CLARK, JJ., absent. W. R. B.

Quarter Sessions.

Q. S. of Fayette Co. December 22, 1883.

Commonwealth v. Madison J. Menefee.

Indictment for fornication and bastardy—Where facts are stated from which birth is a necessary inference, indictment need not state fact of birth expressly—Nor that the child was born within the county—Nor that it was born alive.

Sur motion in arrest of judgment.

This indictment contained two counts. The second count was in the common form for seduction, and the first count charged fornication and bastardy, and was as follows:—

"The Grand Inquest of the Commonwealth of Pennsylvania now inquiring in and for the body of the county of Fayette, upon their oaths and solemn affirmations, respectively, do present, that Madison J. Menefee, late of the county aforesaid, yeoman, on the third day of December, in the year of our Lord one thousand eight hundred and eighty-three, in the county aforesaid, and within the jurisdiction of this Court, did commit fornication with a

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certain Sarah E. Murphy, and *a male bastard child* on the body of the said Sarah E. Murphy, then and there did beget, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

The defendant was found guilty on the first, and not guilty on the second count. He thereupon moved to arrest the judgment for the reason that the count for fornication and bastardy on which he was convicted was defective: (1) In not stating that the child was born, and, if born, was alive at its birth; (2) In omitting to state that the alleged bastard child was born within the county of Fayette, and within the jurisdiction of this Court.

S. L. Mestrezat, for defendant, cited—

Act March 31, 1860, §§ 37 and 38, Purd. 325.
Arch. Cr. Pr. and Pl. (8th ed.) pp. 262, note 1, and 341 and note.
Simmons *v.* Comth., 1 Rawle, 142.
Comth. *v.* Zep, 3 Clark, 311.
Hauser *v.* The People, 46 Barb. (6 Am. L. Reg.) 119.
Comth. *v.* Sentman, 12 Lan. Bar. 191.

In this last case the Court held that an indictment in these very words was defective in *substance* in not alleging that the child was born within the county of Lancaster and within the jurisdiction of the Court, and, after conviction, arrested the judgment.

Johnson, District Attorney, and *M. M. Cochran*, for Commonwealth.

This indictment is sufficient.

Comth. *v.* Wentz, 1 Ashmead, 269.
Wharton's Precedents of Indictments, § 1003.

C. A. V.

January 3, 1884. THE COURT. (WILLSON, P. J.) It is ordered and directed that the motion in arrest of judgment be overruled and refused.

Q. S. Feb. 8, 1884.

Commonwealth ex rel. John McCoy v. Superintendent of County Prison.

Criminal law—Habeas corpus—The commitment of a magistrate is final, and he has no power to review it or alter the sentence. In the event of an improper commitment under the Act of March 13, 1862, providing for the summary conviction of professional thieves, the defendant is fully protected by the Habeas Corpus Act.

Habeas Corpus.

On January 12, 1884, Magistrate Riley committed John McCoy under the Act of March 13, 1862, as a professional thief, for ninety days. On January 30, 1884, said magistrate reconsidered his decision and ordered the discharge of the defendant. The discharge duly signed was presented to Mr. Howard Perkins, the superintendent of the County Prison, who, under the advice of the District Attorney, refused to recognize the order; whereupon a writ of habeas corpus was sued out before HARE, P. J., and heard in the Court of Quarter Sessions.

Ormond Rambo, for the relator.

It is the undoubted power of the Court of Quarter Sessions to reconsider their sentences within the term.

Com'th *v.* Brown, 35 Leg. Int. 5.
Id. *v.* Weymouth, 2 Allen, 144.
Id. *v.* Mayloy, 57 Penna. St. 300.

Proceedings before a magistrate remain at all times within his bosom knowledge and power; they never become matters of record, and he may reconsider or reverse his judgment at any time before expiration of sentence. The power of a justice to set aside his judgment has been recognized as established.

Paul *v.* Cunningham, 9 Barr, 106.
Larue *v.* Hagarty, 5 Phila. 530.

The Act of March 13, 1862, was cited and commented upon.

The magistrate may in the lawful exercise of his powers and in the interest of a correct administration of justice, reconsider his decisions and resentence or discharge in all cases where in his judgment injustice has been done. The superintendent of the County Prison being a ministerial officer, cannot question the mandate of the magistrate.

George S. Graham, District Attorney, contra.

The commitment of a magistrate is a final judgment, and cannot be altered or changed in any manner by him. To hold otherwise would be to introduce a pernicious system by which magistrates might change their judgments at will, and without notice to the proper authorities. It would create a temptation to fraud, favoritism, and corruption. If the defendant has been improperly committed, he has his remedy, one frequently exercised, of having his case reviewed on the merits by a Judge of this Court. If he has not been improperly committed, then he ought to serve out his term.

HARE, P. J. The magistrate's commitment is final, and he has no power to review it or alter the sentence. The defendant is fully protected by the Habeas Corpus Act. The superintendent was right in refusing to obey the discharge of the magistrate. The relator is remanded, and the writ dismissed.

T. W. B.

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Common Pleas—Law.

C. P. No. 1. January 5, 1884.

Hambleton v. Mendenhall.

Wills—Issue devisavit vel non—Verdict obtained by agreement of counsel—The nominal parties to the record in a feigned issue to test the validity of a will cannot consent to a verdict so as to bind those not parties to the agreement. Sheetz v. Whitaker, 7 Weekly Notes, 403, followed.

Rule to show cause why the verdict should not be set aside, and a new trial granted.

The facts of the case were as follows:—

William Neal died June 30, 1881. An alleged will was offered for probate to which a *caveat* had previously been entered by a nephew and niece, who were heirs under the intestate laws (and also legatees under the alleged will), and testimony was taken before the register showing mental incapacity. Afterwards on petition of these and other heirs, the register, without granting letters, issued a precept to the Common Pleas, and an issue thereon was framed to try the validity of the alleged will.

An administrator *pendente lite* was also appointed. A citation issued to nearly all the parties in interest in 1881, and was returned with acceptance of notice. One of the parties thus accepting notice, Mary D. Yocum (then without a guardian), added to her signature the word "minor." Two days before the trial, an agreement was made between the counsel for the will, and counsel for a majority of those in interest under the intestate laws, a copy of which is as follows:—

"For the purpose of ending all litigation connected with the will of William Neal, deceased, and his estate, and obtaining a final settlement thereof, it is agreed:—

"1. That the will be established by verdict of jury and judgment; that executor file account so that it may be adjudicated in December and distribution made of all that can be got from Provident Co., and converted into money by that time.

"2. The executor to be allowed 5 per cent. commissions (besides commissions charged by Provident), and on such allowance being confirmed by the Court that he pay to John M. Broomall, Esq., attorney for contestants, two thousand dollars.

"3. In the executor's account counsel fees of two thousand dollars in contested will case (half to J. Cooke Longstreth and half to J. M. Broomall), to be charged and

In pursuance of this agreement the case was tried without any witnesses being called for defendants, and without any cross-examination of the subscribing witnesses to the will. The verdict was for the plaintiff, Neal Hambleton, executor of the alleged will.

The above rule was granted Dec. 29, 1883, on the petition of the Real Estate Title Insurance and Trust Co., guardian of Mary D. Yocum, and of Joseph W. Hambleton, a nephew of decedent (on behalf of himself and his nephews and nieces), whose petition set forth, *inter alia*, as follows:—

"That the counsel making said agreement did not represent your petitioner, nor three of his brothers, nor the representatives of his sister Lydia N. Shields, who has died since the death of said William Neal, being five of the nieces and nephews of said William Neal, deceased, nor any of the representatives of the five deceased nieces and nephews of the 'Hambleton Branch' making ten out of twenty-eight shares into which said estate would be divided under the intestate law. . . .

"Your petitioner charges that the said William Neal was not, at the time of the making of said alleged last will, of sound and disposing mind, memory, and understanding, and that the said writing was procured by duress and fraud, and the exercise of undue influence.

"That your petitioner's interest is greater under said will than as an heir-at-law, but he is satisfied that gross injustice will be done to his nieces and nephews, being the representatives of the five deceased nieces and nephews of said 'Hambleton Branch' as hereinbefore stated (who would otherwise be entitled under the intestate laws to share in the estate of the said William Neal), by allowing said verdict to stand."

The depositions showed that the $2000 named in the agreement was to be paid for the benefit of Anna Mendenhall and Edward P. Taylor, two of the twenty-three grandnephews and nieces of decedent, who would be entitled to a share of decedent's estate under the intestate laws.

George M. Conarroe, for the rule.

The Court of Common Pleas may grant a new trial in a feigned issue to determine the validity of a will whenever the circumstances may require it.

Vanlear *v.* Vanlear, 4 Yea. 3.

The proceedings upon the issue are *in rem*,

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J. Cooke Longstreth, contra—

Contended that the verdict could not be set aside except for matter appearing on its face. That the service on Mary D. Yocum was good, equitably, because the "minor" was living with her brother at the time, who accepted service for other minor heirs for whom he was guardian. And it was good in law, because the statute makes no exception in the case of minors.

Girard Ins. Co. *v.* Bank, 7 Smith, 388.
Warfield *v.* Fox, 3 Id. 382.
Folmer's Appeal, 18 Id. 482.

Conarroe, in reply.

Whether the minor was or was not properly served in 1881 is apart from the present question before the Court. A citation in 1881 is no justification for a collusive agreement in 1883, for a verdict, without the knowledge or consent of some of the parties in intere t.

C. A. V.

January 12, 1884. THE COURT. This was a feigned issue to try the validity of the will of William Neal, late of this city. It appears that a verdict was taken in the case under an agreement with some of the parties, and judgment entered upon the verdict. Afterwards, several of the parties in interest came in and alleged that that was done by agreement with several others of the parties in interest, and that they had no notice, and that their rights were prejudiced thereby, and asked that the verdict and judgment should be set aside and a new trial granted. The case, we think, is clearly within the ruling in the case of Sheetz *v.* Whitaker (7 WEEKLY NOTES, 403), in which precisely the same question arose, a verdict having been taken by consent of parties without the knowledge of certain other parties in interest. In that case the question was very fully discussed, and we think the facts appearing in this case bring it within the principle of that case.

Rule absolute.

Oral opinion by PEIRCE, J.

ALLISON, P. J., absent. E. A. B.

C.P. No. 1. January 12, 1884.

Marx v. Goldsmith.

Practice — Execution — Defendant must be warned by sci. fa. before an execution can issue on a judgment over five years old.

Rule to show cause why writ of fi. fa. should not be quashed.

In this case there was a judgment more than eight years old. Plaintiff, without having previously issued a sci. fa., took out a fi. fa. and a sci. fa. together, and levied on defendant's property.

Sulzberger, for the rule.

A defendant must be warned by sci. fa. within five years before fi. fa. can issue on a judgment more than five years old.

Act of June 16, 1836, § 2, Purd. Dig. 634.
Vastine *v.* Rockefeller, 2 S. & R. 426.
Bailey *v.* Wagoner, 17 S. & R. 327.
Stewart *v.* Peterson, 13 P. F. S. 230.
Bannan *v.* Rathbone, 3 Grant, 259.
Comly *v.* Rissel, 1 Phila. 402.

January 19, 1884. THE COURT. Rule absolute.

Per ALLISON, P. J. F. M. L.

C. P. No. 1. January 12, 1884.

Landell v. Hager.

Practice—Execution—Sheriff's interpleader — Plaintiff is entitled to cross-examine a claimant who offers his own bond as security.

Rule to show cause why claimant should not enter his own bond, etc.

Claimant's affidavit set forth that he was the owner of the goods, having bought the same at sheriff's sale on a judgment obtained by him against defendant; that he paid for and received the same from the sheriff with a bill of sale therefor; that he had ever since been in exclusive possession of the same; and that defendant had no interest therein, and claimant did not derive title by, through, or under defendant.

Hannis showed cause.

The claimant declares he is entitled to file his own bond on the strength of his affidavit alone, and that plaintiff has no right to cross-examine him on his affidavit. He should not be permitted to do this without having first submitted to cross-examination.

Bailey *v.* Vehmeier, 6 WEEKLY NOTES, 271.

Scanlan, for the rule.

This is not like opening a judgment. We are not asking the grace of the Court. We ought not to be compelled to disclose our case before the trial of the interpleader.

THE COURT. If you desire the Court to make an order that you shall be permitted to give your own bond on the facts alleged in your affidavit, you must submit yourself, if requested, for cross-examination as to the truth of the facts set forth in the affidavit.

Rule withdrawn.

Oral opinion by PEIRCE, J. F. M. L.

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C. P. No. 3. Dec. 8 and 29, 1883. Feb. 9, 1884.

City to use, etc. v. Ward.

Municipal claim—Practice—Proceedings must follow the statutory requirements — Scire facias to collect—Acceptance of service and appearance by parties without interest—Striking off such appearance and acceptance of service—When judgment will be struck off—What must support an alias writ—When alias scire facias will be quashed.

On March 1, 1876, a municipal claim for curbing and paving was filed against a certain vacant lot on Girard Avenue, "Harriet Ward, owner, or reputed owner, or whoever may be owner," being named as defendant. The property was registered in the name of Harriet Ward, who had, however, died on February 14, 1872, leaving the bulk of her estate, including the lot in question, to her executor, E. L. Stokes, in trust for her grandchildren. The trustee held the property, but without registering himself as legal owner. Mrs. Ward's daughter, and daughter-in-law (the latter's husband having assigned to her his interest in the testatrix's property) had contested the will, and on February 20, 1879, obtained a verdict in the Common Pleas against its validity, the trustee taking a writ of error to the Supreme Court.

On December 8, 1880, a scire facias issued to collect the claim, notice having been previously served on the testatrix's daughter only, who is described in the affidavit of service of notice as the owner. The counsel for the contestants, John Dolman, Esq., accepted service of the scire facias in their behalf, and appeared for them. In January, 1881, the judgment against the will was reversed by the Supreme Court on a question of the admissibility of certain evidence, and a new trial was granted. In October, 1881, a judgment sustaining the will was obtained in the Common Pleas.

On February 28, 1882, judgment was taken in the present suit for want of an affidavit of defence, and on March 7, 1882, a levari facias issued. Before the day of the sheriff's sale, however, the trustee became for the first time aware of the proceedings, by seeing the advertisement of the property. He applied to this Court for an injunction to restrain the sheriff from selling the property, which injunction the Court refused to grant, whereupon he appealed to the Supreme Court. This appeal was never argued, and was finally discontinued after the judgment (as reported below) had been struck off.

In January, 1883, the Orphans' Court dismissed Mr. Stokes from his position as trustee, and soon after appointed William M. Meredith, Esq., in his place. The new trustee filed suggestions, which by leave of Court were made part of the record, stating the facts as to the title to the property and the want of interest in the parties who had accepted service. The following arguments were then made:—

I. Dec. 8, 1883.

Sur rule to strike off appearance and eliminate acceptance of service from the record.

Wm. M. Meredith, for the rule.

The scire facias never having been served on the legal owner of the property, the appearance and acceptance of service by parties without interest only serve to prejudice his rights. They are irrelevant in fact, but invest the record with a false semblance of regularity.

John Dolman explained the cause of his appearance in the case, but did not oppose the rule.

THE COURT. Rule absolute.

II. Dec. 29, 1883.

Sur rule to strike off judgment and set aside levari facias.

Previous to taking this rule, the trustee had, by order of Court, filed an affidavit showing his connection with the case.

Charles C. Binney, for the rule.

The proceedings on municipal claims are wholly statutory. The provisions of the Act of March 11, 1846 (P. L. 115), with regard to service of the scire facias must be strictly followed. In Wistar *v.* City (5 Nor. 215), a defective return of a possibly regular service was held fatally defective. The present case is still stronger, the record showing no service whatever.

Without service of the writ, the Court has no jurisdiction. In such a case the Common Pleas will even strike off a judgment obtained before a magistrate.

Hafleigh *v.* Winpenny, 2 WEEKLY NOTES, 138.
Huddy *v.* Putt, 13 Phila. 550.
Lacock *v.* White, 7 Har. 495, 498.

There being nothing to support the judgment, it should be struck off, not opened.

When the plaintiff, in the prosecution of his suit, has done all that the law requires of him, a judgment based on the default of the defendant may yet be opened in the interests of justice, and the defendant let in to a defence, the lien being preserved till final judgment. But when, as in this case, the plaintiff himself is in default, his judgment, obtained without due regard to the requirements of the law, must fall and its lien be lost.

The striking off of a judgment may sometimes be a matter of grace, but where an irregularity is evident on the face of the record it is a matter of right.

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City *v.* Katz, 8 WEEKLY NOTES, 502.
Sweesey *v.* Kitchen, 30 Sm. 161.

David W. Sellers, contra.

The acceptance of service by Mr. Dolman was entirely regular on its face. His withdrawal of his appearance does not vitiate the regularity of the proceedings up to that time. The judgment appears to be regular. It may be opened if a defence is shown.

Binney, in reply.

An acceptance of service is always at the plaintiff's risk. If made by parties without interest, it cannot sustain a judgment against the property of persons who did not authorize it. The plaintiffs are not in a position to call for a defence.

C. A. V.

Eo die. THE COURT. Rule absolute.

III. February 9, 1884.

Sur rule to quash alias scire facias.

On January 12, 1884, an alias scire facias issued, which was served on the trustee, and by posting and publication.

Wm. M. Meredith, for the rule.

The Act of March 23, 1866 (P. L. 303), requires notice to be served on the owner ten days before a scire facias issues. This was not done. The person described in the affidavit of service of notice as owner, had no interest in the property. The alternative provisions of the second section of this Act were also not complied with. The scire facias of December 8, 1880, is therefore a nullity.

City *v.* Taylor, 4 WEEKLY NOTES, 36.

The scire facias of January 12, 1884, by name and in form an alias, is in fact an original writ; because an original that is null and void cannot support an alias, and an alias cannot be connected with an original that bears no return, as is the case with the first scire facias.

Reynolds's Appeal, 5 WEEKLY NOTES, 184.
Magaw *v.* Clark, 6 W. 529.
Fulton's Estate, 1 Sm. 204, 209.
Atwood *v.* Burr, 7 Modern, 3.

If this second scire facias is a new proceeding, it has been delayed beyond the statutory limit.

City *v.* Scott, 12 Nor. 25.

The lien and the debt are distinct. The former, being *in rem*, must stand or fall by the record. This second scire facias is irregular and void; no judgment upon it could stand; it should, therefore, be quashed.

Hunter *v.* Lanning, 26 Sm. 25.
Crawford *v.* Stewart, 2 Wr. 34.
Bolton *v.* Robinson, 13 S. & R. 193.
Large *v.* Transportation Co., 2 Ash. 394, 402.

Eo die. THE COURT. LUDLOW, P. J. We disposed of the case when we struck off the judgment. Rule absolute. C. C. B.

Orphans' Court.

January 12, 1884.

Welsh's Estate.

Decedents' estates—Widow's exemption—Act of June 4, 1883—Estates not exceeding $300—Letters testamentary or of administration need not be issued—Appointment of appraisers—Practice.

Sur petition for widow's exemption under the Act of June 4, 1883, § 3 (P. L. 74).

On January 12, 1884, the widow of decedent presented her petition, setting forth that the said decedent died on August 12, 1883, leaving a will, wherein and whereby he bequeathed unto his said widow the whole of his estate, and appointed her the sole executrix thereof; that the said decedent left to survive him his said widow and eight children, all of whom are still living, two of the said children being minors; that at the time of the death of the said decedent he was seised of no real estate whatever, but his said estate consisted exclusively of personal property, not exceeding in value $300; and that the said widow selects the said personal property and desires to have the same appraised and set aside to her, without administering upon his estate, in accordance with the Act of June 4, 1883. Annexed to the petition were two exhibits, one a copy of the will, another a schedule of the personal property therein referred to. The prayer of the petition was that two appraisers be appointed to appraise and set aside to the petitioner the said personal property so selected in the same manner and with the same effect as if letters testamentary had issued, and the appraisers been selected in the usual way.

On the same day the Court ordered that the prayer of the petition be granted; and appointed two appraisers to appraise and set aside to the said widow, the said personal property, and upon so doing to make return according to law.

On January 19, 1884, the said widow presented a second petition reciting the facts contained in the first petition and setting forth, that the said appraisers so appointed had appraised the said personal property of the said decedent so selected by her at the sum of $230, and had set aside the same to her in the same manner and with the same effect as if letters testamentary had issued, and the appraisers been selected in the usual way, and upon so doing had made return according to law. Annexed to the petition was the return of the appraisers, a copy of the order of Court, affidavit of appraisers, and appraisement of the personal property of decedent.

The prayer of this petition was that the said

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return and appraisement be confirmed and that the petitioner be allowed to retain the personal property of the said decedent so selected by and set aside to her, for the use of herself and the family of the said decedent

On the same day the Court ordered that a notice of the presentation and filing of the said petition with the annexed return and appraisement be published twice a week for two weeks in a public newspaper and twice in the Legal Intelligencer in accordance with the rule of Court.

Samuel E. Maires, for petitioner.

On February 9, 1884, due proof having been made of the advertisement as ordered, and no exceptions having been filed thereto, the Court ordered that the prayer of the petition be granted, that the return and appraisement be approved, and that the petitioner be allowed to retain the said personal property of the said decedent so selected by and set aside to her, for the use of herself and the family of the said decedent.

December 19, 1883.

Goldstein's Estate.

Collateral inheritance tax—Mode of appraising present value of life interest—Under the existing legislation the rules by which the collateral inheritance tax is to be ascertained are left to the choice of the individual register—Without evidence the Court is powerless to correct the taxation—Defects in the legislation reviewed.

Sur appeal from assessment of collateral inheritance tax.

The testator gave to his sister, fifty-three years of age, a legacy of a life interest in one per cent. of his estate, the interest being $823.34, remainder to his widow for life, remainder to his niece for life, reversion to the estate.

The life-interest was valued at $493.34, and the tax of five per cent. thereon, or $24.66, was assessed. A tax upon another legacy was assessed upon the same principle.

From this assessment an appeal was taken.

M. Sulzberger, for the appellants.

The register fixed the cash value of the life-estates by taking the ages of the respective legatees, and basing expectancy of life upon the "Carlisle Tables," which are not recognized by our Supreme Court, for the purpose of valuing life-estates. The old common law rule of valuing the life-estate at one-third of the amount of whole estate has been adopted.

The chances of life can only be estimated approximately. There is a finding of fact by an officer of the Court. No matter how he arrived at it, it must be accepted unless overthrown by evidence.

December 29, 1883. THE COURT. The argument of counsel for the appellants demonstrated what experience had already made quite clear, the absolute need of intelligent revision of the laws relating to the collateral inheritance tax. Those laws accomplished the previously impossible feat in legislation of framing a system of taxation which should be wholly destitute of a plan. Twenty-three years after its passage, it was left undecided in Orcutt's Appeal (1 Out. 179) whether the Act of April 22, 1858, repealed that of April 10, 1849, and two years later, Thayer *v.* Commonwealth (12 WEEKLY NOTES, 553) following Gross *v.* Commonwealth (39 Legal Intel. 61), and in direct antagonism to Kinzing *v.* Hutchinson (34 Legal Intel. 365), finally declared against the repeal. During that long interval the Courts were at liberty to allow or to refuse the tax upon a legacy to the wife of a son, just as they held to the doctrine of a repeal or its opposite. By the latter Act, appraisers are required to fix the cash value of all annuities and life-estates upon which the tax is payable; but the rules by which that value shall be ascertained are left to the choice of the individual register, and may consequently equal in number and diversity the counties of the Commonwealth. It goes without argument that any scheme of taxation is fatally defective in which the scale of assessment rests with the judgment of a single officer, and may be high or low, as its subject happens to be domiciled in one or another locality of the same State. We believe that, in most of our counties, the Carlisle Tables are resorted to for determining the average duration of human life, and through that the present value of a continuing legacy. But it is manifest that a calculation based upon those tables, and into which no elements drawn from the circumstances of any single case is allowed to enter, must often result grotesquely. That calculation would show no difference in the chances of life between the man of twenty-five years stricken with paralysis and the trained athlete of the same age, in robust health. In the absence of all symmetry, both of rule and legislation on this subject, the relief which, upon full proofs, we could give in a particular case would be only partial; but we are

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, FEB. 28, 1884.* [No. 12.

Supreme Court.

Oct. & Nov. '83, 222. November 8, 1883.

Pittsburgh, McKeesport and Youghiogheny Railroad Company v. The Commonwealth ex rel. Attorney General.

Public highway—Forfeiture of charter of turnpike company—Act of February 19, 1849.

A turnpike road is a public highway, and upon the forfeiture and repeal of the charter of the turnpike company, the public right of way does not revert to the owner of the fee. The road still remains for the public use, though discharged of tolls.

The charter of an incorporated turnpike company was declared forfeited by legal process in 1881. After the forfeiture of the charter, a railroad company appropriated part of the turnpike road in the construction of its railroad. On a mandamus against the railroad company to compel the reconstruction of the turnpike road under the Act of February 19, 1849 (P. L. 85):

Held, that the use of the turnpike road was still in the public, that it was a highway within the meaning of the Act, and that the railroad company was bound to reconstruct it at its own expense.

Error to the Common Pleas No. 1, of Allegheny County.

Mandamus by the Commonwealth ex. rel. the Attorney-General against the Pittsburgh, McKeesport and Youghiogheny Railroad Company, defendant, to compel the construction of a new public highway, as required by the Act of February 19, 1849 (P. L. 85), in place of an alleged public road taken by defendant for its own use.

On the trial of the issue, on a traverse to defendants' answer, before COLLIER, J., the following facts appeared: "The Birmingham and Elizabethtown Turnpike Company was incorporated under the laws of this State by an Act passed March 31, 1836, and laid out and established in 1836 a turnpike road and public highway with the right to take toll, etc., in Baldwin Township, Allegheny County. Said turnpike road was operated by said company until the year 1881, when its charter was declared forfeited by legal proceedings at No. 349, September Term, 1878, in the Court of Common Pleas No. 1, of Allegheny County (quo warranto), which proceedings were affirmed by the Supreme Court. Said turnpike road was used as a public highway from its establishment up to the time of the forfeiture of the company's charter, and has been used and travelled by the public since the forfeiture up to the time when part of the said turnpike road was taken and occupied by the respondent railroad company.

"The respondent, the Pittsburgh, McKeesport, and Youghiogheny Railroad Company, a corporation organized under the Act of March 4, 1868, has, since the forfeiture of the turnpike company's charter, appropriated and used said turnpike road in the location and construction of its railroad, at a place called Risher's Tipple, by constructing its railroad directly across the turnpike at a grade several feet higher than the turnpike, thereby obstructing travel at that point. Also at another place on said turnpike, between Franey's Tavern and Bird's Run, by occupying the entire turnpike between these points with its railroad and necessary grading, thereby entirely suspending public travel thereon."

The respondent submitted the following point:—

"The Court is respectfully asked to charge the jury that after the decree of forfeiture in the case of the Commonwealth *v.* The Birmingham and Elizabethtown Turnpike Company, at No. 349 September Term, 1878, the ground occupied by the turnpike road reverted to the owners of the fee, and that under the undisputed evidence in this case there is no public road which defendant company is bound to replace."

Answer. Refused and reserved.

The Court directed the jury to find a verdict for the plaintiff, the relator, subject to the opinion of the Court on the question of law reserved. Verdict accordingly.

Afterwards judgment was entered upon the verdict on the reserved question for the plaintiff, the Court saying in an opinion filed, *inter alia*, as follows:—

"We think the principle of law is, that wherever a turnpike or other public road has been constructed and opened under authority of law and used by the public, the easement remains till the turnpike or public road is vacated by legal process, or by abandonment, or it is diverted or put to a different use. And until this is done, the surface of the soil used by the public as a turnpike, or a common public road, does not revert to the owners of the fee. (Mifflin *v.* Railroad Company, 4 Harris, 194; Phillips *v.* Warren and Pittsburgh Railroad Company, 28 Smith, 180.)

"Being then of the opinion that the forfeiture of the charter of the plank road company did not divest the right of the public to use said road, but that it continued to be a public road, and has been so used and travelled by the public until prevented by the acts of the respondent,

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the duty cast upon the respondent by the general railroad Act of 1849 is plain; the Act provides for supplying the public with an easement in substitution for that occupied by the railroad; it says (§ 13): 'If any railroad company shall find it necessary to change the site of any portion of any turnpike or public road, they shall cause the same to be reconstructed forthwith at their own expense on the most favorable locations, and in as perfect a manner as the original road.' Therefore, the company having completely occupied portions of this road, it must reconstruct and supply them in the manner prescribed by the Act. Judgment must be entered for the relator on the reserved question."

Whereupon respondent took this writ, assigning for error, *inter alia*, the answer to its point, and the entry of judgment on the question of law reserved.

Knox & Reed, for plaintiff in error.

The railroad company has appropriated no public highway which it is bound to replace, because at the moment the charter of the turnpike company was forfeited the public use ceased, and the land used as a road reverted to the owners of the fee discharged of the easement.

Fisher *v.* Coyle, 3 Watts, 407.
Ridge Turnpike *v.* Stoever, 6 W. & S. 378.
Lancaster Turnpike *v.* Rogers, 2 Barr, 114.
P. & L. E. R. R. Co. *v.* Bruce, 12 WEEKLY NOTES, 554.
Jessup *v.* Loucks, 5 Smith, 361.
Haldeman *v.* R. R. Co., 14 Wright, 436.
State *v.* New Boston, 11 N. H. 407.
People *v.* Lawrence, 54 Barbour, 589.

Upon forfeiture of the charter of a corporation its assets do not pass to the State.

State Bank *v.* The State, 1 Blackford, 267.
Bacon *v.* Robertson, 18 Howard, 480.
High on Extraordinary Legal Remedies, sec. 755.
West River Bridge Co. *v.* Dix, 6 Howard, 538.

C. A. O'Brien, for defendant in error.

A road constructed and supported by an incorporated turnpike company differs in no essential characteristic from a common highway established by a town or city. Both are public highways created for the perpetual use of the public.

Commonwealth *v.* Wilkinson, 16 Pickering, 175.
Nor. Cent. R. R. *v.* Commonwealth, 9 Norris, 300.
E. & N. E. R. R. *v.* Casey, 2 Casey, 287.

The easement created in making a turnpike belongs to the public, while only the franchise to take tolls vests in the corporation, the repeal of whose charter has the effect of leaving the road a public highway disincumbered of tolls.

The State *v.* Maine, 27 Connecticut, 641.
Craig *v.* The People, 47 Illinois, 493.

January 7, 1884. THE COURT. A turnpike road can be constructed and opened under authority of law only. When used by the public, it becomes a public highway. It was said in Northern Central Railway Company *v.* Commonwealth (9 Norris, 300), the main object and purpose of a turnpike is to provide a public highway of a superior quality. It is very clear that a turnpike is not a private road or way. It cannot be closed by the stockholders against public use. It is constructed by virtue of public authority and for public use. It is for the use of every person who desires to pass over it, on payment of the toll established by law. Its use is common to all who comply with the law. (Id.)

The turnpike now in question was laid out and established in 1836 by a company incorporated on the 31st of March of that year. It was maintained, controlled, and operated as such by the company until 1881, when the charter was declared forfeited by due process of law. The turnpike was used and travelled as a public highway from the time it was constructed until the charter of the company was forfeited, and so continued to be used until the plaintiff in error took possession of the portion thereof which gives rise to this contention.

The question is, Did the forfeiture of the charter of the turnpike company wholly destroy the character of the road as a public highway? The right of the company to take toll was ended. Its liability to keep the road in repair was terminated, yet the road as a public highway remained. No judgment or decree has destroyed its character as such. It had been dedicated to public use. It had been accepted and used as a public highway for some forty-five years. The forfeiture of the charter of the turnpike company destroyed the rights of that corporation; yet the road still remained in fact and in law a public highway. (Craig *v.* The People *ex rel.*, 49 Ill. 495.)

Conceding that the title of the owner of the soil in the fee was not destroyed by the use to which the surface was put by the turnpike company; and also that the forfeiture of its charter terminated all its rights as against the owner, yet these facts did not have the effect to vacate the road as a public highway. It was not then taken for private purposes, but remained open for public use.

It is a general rule of law that the title of the owner of land to the fee is not divested by the construction and maintenance of a public highway thereon. His right to the soil, and the right of the public to pass over the ground both exist at the same time.

When the obligation of the turnpike company to maintain the road ceased, the duty was imposed on the municipality in which it was located to take charge of the road and put and keep it in repair in the same manner as if it were a county road. (Act of 19th of April, 1844, sec. 8, Pur. Dig. 1279, pl. 56.)

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As long as this road continued to be used as a public highway, and had not been vacated by any legal proceedings, the railroad company could not treat it as abandoned. It could not lay its track thereon without incurring the obligation imposed on it by law for the taking and occupying of a public highway. We discover no error in the trial, and the learned Judge was clearly right in entering judgment in favor of the plaintiff below on the question of law reserved.

Judgment affirmed.

Opinion by MERCUR, C. J.

GREEN, J., absent. T. W. B.

April 18, 1883.

Montgomery County Agricultural Society v. Francis et al.

Bond—Interest on—May be sued for though principal not yet due.

An action will lie for interest due on a bond, although the principal is not yet due, and notwithstanding the fact that the mortgage securing the bond provides a special remedy for the collection of principal and interest by writ of scire facias.

Error to the Common Pleas of Montgomery County.

Appeal from the judgment of a justice of the peace in favor of Charles W. Francis and A. H. Carn, executors of Robert Francis, deceased, against the Montgomery County Agricultural Society.

On the trial, before Ross, P. J., the following facts appeared: The society defendant was incorporated in 1870, and by the Act of March 27, 1873, was empowered to issue bonds and to secure "the payment of them with interest" by a trust mortgage on all its real estate and corporate franchises. The bonds were accordingly issued, and bore interest at the rate of seven per cent. per annum, payable semi-annually. The mortgage provided that whenever any person or persons holding $2000 or more of said bonds should not have been paid their interest, then on notice given to the trustees, the trustees should notify the company, and then the whole sum of said bonds, principal and interest, should be taken to have been due one year preceding said notice, and the trustees should then issue a sci. fa. and sell the real estate, and make distribution

The society defended on the ground that inasmuch as the mortgage provided a remedy for the collection of the bonds and interest, the plaintiffs were bound to follow it.

The Court instructed the jury to find a verdict for the plaintiffs for $175. Verdict accordingly and judgment thereon. Defendant thereupon took this writ, assigning for error, *inter alia*, the above instruction of the Court.

C. Hunsicker, for plaintiff in error.

When a contract provides a remedy it must be followed.

Harris *v.* Ligget, 1 W. & S. 305.
Lauman *v.* Young, 7 Casey, 310.

George W. Rogers, for defendant in error.

One holding a note on which interest is payable annually or semi-annually, may sue for each instalment of interest as it becomes payable, although the note is not yet due.

2 Parsons on Contracts, 635.
Greenleaf *v.* Kellogg, 2 Mass. 568.
Cooley *v.* Rose, 3 Mass. 220.

May 14, 1883. THE COURT. In addition to the specific sum agreed to be paid at the expiration of five years from the date of the obligation, there was the additional agreement to pay the interest thereon semi-annually on the first days of July and January in each year. It is true the mortgage does stipulate under what facts a scire facias may issue thereon to collect the principal or interest, yet it does not make such proceeding the only remedy. Although the principal be not now due and payable, yet an action lies for the interest which is due. (Greenleaf *v.* Kellogg, 2 Mass. 568; Cooley *v.* Rose, 3 Id. 220; 2 Parsons on Contracts, 635.) When suit is brought for all that is due, it is not arbitrarily splitting up the claim, and the holder is entitled to recover his judgment.

Judgment affirmed.

PER CURIAM. T. R.

Oct. & Nov. '83, 199. October 5, 1883.

Appeal of Charles T. Neale, Guardian.

Wills—Sole and separate use—Act of June 4, 1879.

In creating a sole and separate use by will, the will speaks from the date of its execution; if the devisee is

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Appeal of Charles T. Neale, guardian of James E. Brown, Jr., from a decree of the Common Pleas of Clarion County, dismissing his exceptions to and confirming the report of an Auditor appointed to distribute the fund produced by a sale, under proceedings in partition of the real estate of Thomas McConnel and J. E. Brown.

Before the Auditor appointed to report distribution of the fund (J. T. Maffett, Esq.) the following facts appeared: J. E. Brown died November 27, 1880, seised, together with Thomas McConnel, of sundry tracts of land in Clarion County, leaving to survive him, *inter alia*, J. E. Brown, Jr., a son by his second wife, and P. R. E. Elwina Linton, a grandchild, the daughter of Jane B. Finley, a daughter by his first wife. On March 30, 1871, after his second marriage, and before the birth of his son, J. E. Brown, Jr., he executed his will, the seventh paragraph of which was as follows:—

"All the rest and residue of my estate—real, personal, and mixed—I devise and bequeath to my daughter, Mrs. Jane B. Finley, and my grandchild, P. R. E. Elwina Finley, share and share alike, for their sole and separate use, and which shall not be controlled, incumbered, or charged by, or liable, or subject, in any way, to debts, contracts, or engagements of the present or future husband of my said daughter, or of any future husband of my said granddaughter. If my granddaughter die without issue, and my daughter survive her, then my daughter shall be entitled to and inherit this devise and bequest to my granddaughter. At the death of my daughter, and my granddaughter survive her, she shall be entitled to and inherit this devise and bequest to my daughter, and if my granddaughter survive my daughter, and afterwards die without issue, then whatever may remain of this devise and bequest shall descend and go to my legal heirs."

At the date of the execution of the said will P. R. E. Elwina, the granddaughter, was only nine years of age, not married nor in contemplation of marriage; but on December 10, 1878, she married A. F. Linton, whose wife she was at the time of the death of J. E. Brown, her grandfather.

Mrs. Jane B. Finley was a feme covert at the date of the execution of the will; she died, however, four years before her father.

In 1881 Thomas McConnel commenced an action of partition, which resulted in a sale of the tracts of land above mentioned for the sum of $9550. It was contended before the Auditor, by Charles T. Neale, guardian of J. E. Brown, Jr., that such portion of said fund as was due P. R. E. Elwina Linton should be paid to a trustee, and the income alone thereof paid to her during her coverture or life.

The Auditor reported that her share should be paid to her absolutely. Exceptions were filed to this report, but were overruled by the Court, the following decree being entered:—

"And now, August 18, 1883, it is ordered and decreed that the exceptions to the Auditor's report be overruled, and the same confirmed, distribution to be made as per schedule annexed."

Neale, guardian, thereupon took this appeal, assigning for error the decree of the Court.

Joseph Buffington (*Buffington* and *E. C. Mitchell* with him), for appellant.

The nature of a testamentary act presupposes that so far as facts and circumstances are susceptible of anticipation by the testator, he will have used the language of his will with reference to the period of his decease.

Redfield on Wills, § 380, pl. 4.
Clarke's Estate, 1 Norris, 536.

The number and status of legatees may be settled by reference to the death of the testator, and entirely different persons declared entitled to take from those answering the description at the date of the will.

Wood's Appeal, 6 Harris, 478.

In this case it is only sought to refer to the death of the testator to qualify enjoyment, and not for the purpose of designation.

The language of the Court in the two following cases would seem to warrant plaintiff's position.

Dubs *v.* Dubs, 7 Casey, 151.
Yarnall's Appeal, 20 Smith, 337.

That the will is not referable to date of execution is apparent from the fact that the testator, in speaking of his granddaughter, used the words "future husband."

If it were a description of property it would be settled by the Act of 1879, sec. 1 (P. L. 88), but on general principles, and independent of the statute the will speaks from, and the trust was created at, the testator's death.

Geo. W. Guthrie and *Jas. P. Colter* (*Hill Burgwin* with them), for appellee.

To arrive at the intention of the testator a will may be read as though executed immediately before death; but even for that purpose the rule is not of universal application, except when extended by statute.

Redfield on Wills, vol. i. 382.
Jarman on Wills, vol. i. 303.
Garratt *v.* Niblock, 1 Russ. & Myl. 629.
Bryan's Trust, 2 Sim. (N. S.), 103.

The question in this case, however, is not one of intention, nor is it one of construction; but it is simply one of power. Sole and separate use trusts, in this State, are restraining in their operation. The law permits their creation where the object is to protect a woman from some definite person, either her husband or some particular person whom she expects to marry. Beyond this the policy of the law and the spirit of the age prohibit their extension. No man can create them through a general distrust of mankind.

McBride *v.* Smyth, 4 Smith, 245.
Wells *v.* McCall, 14 Id. 207.
Snyder's Appeal, 11 Norris, 504.

Mr. Brown did not have any particular person

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in view, at the date of his will, against whom he wished to protect his granddaughter; it was simply an expression of a desire to create a trust for any marriage, and this cannot be done in this State. Mrs. Linton takes only one-half of her present interest in the estate as an original share. One-half accrued to her by the death of her mother. In no view of the case can it be claimed that the will creates a separate use, binding the share which has thus accrued to her. Accrued shares are not subject to the restrictions imposed on the original shares, unless expressly so directed.

Georges *v.* Georges, Hayes' Inquiry, 52 (cited 2 Jar. on Wills, *627).
Gibbons *v.* Langdon, 6 Sim. 260.
Masden's Estate, 4 Wharton, 428.
Seminary *v.* Wall, 8 Wright, 353.

The Act of June 4, 1879, was evidently intended to change the rules laid down by the Court in Massey's Appeal (7 Norris, 470), and Stephenson *v.* Richardson (Id. 40). To give the first section the full effect contended for by the appellant would deprive J. E. Brown, Jr., of any share in his father's estate.

January 7, 1884. THE COURT. The main question argued in this case is whether paragraph seven of the will of James E. Brown created a valid trust in Elwina Finley, now Linton. The devise was to her for her sole and separate use, not to be controlled, incumbered, or charged by, or liable or subject in any way to, debts, contracts or engagements of any future husband of said Elwina. The will was executed on the 30th of March, 1871; Elwina was then under ten years of age. She did not marry until almost eight years thereafter. It is not pretended that when the attempt was made to create this trust, it was in immediate contemplation of marriage, or of marriage with any particular person.

The law is well settled by numerous authorities that a separate use for a married woman cannot be created, unless she is covert, or unless in immediate contemplation of marriage. (Husbands on Married Women and Trusts, 314; M'Bride *v.* Smyth, 4 P. F. Smith, 245; Wells *v.* M'Call, 14, Id. 207; Snyder's Appeal, 11 Norris, 504; Philadelphia Trust, Safe Deposit, and Insurance Company's Appeal, 12 Id. 209.) In Hamersley *v.* Smith (4 Whar. 126), it is said the immediate contemplation of marriage must be with a particular person. This indicates the strictness with which the rule is held in Pennsylvania.

It is, however, contended by the appellant, that conceding the will did not at the time of its execution create a trust in Elwina; yet by her marriage during the life of the testator the trust thereby came valid. The Act of 4th June, 1879, does declare "that every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." "With reference to the real and personal estate comprised in it," it must be construed to speak and take effect at the time stated. For many purposes a will speaks as of the death of the testator. For all purposes it then takes effect. The question here is not what property was devised or intended to be devised by the testator, but what estate did the language used create? At the time this will was executed there was no power in the testator to create the trust in question. It was not the intention of the Act to create a disposing power in the testator just before his death, which he did not possess when he executed his will. If he was clearly incompetent to make a will when he executed one, the fact that just before his death he became entirely competent to execute one, but did not, it will not be claimed that the will which was of no force or effect thereby became valid and of full force. It certainly was not the intention of the Act to strike down the estate which any beneficiary would otherwise have taken. Their title is not thereby destroyed. If the will was to speak as at the death of the testator, then Elwina thereafter had no "future husband."

She married before the death of her grandfather. We do not rest the case on that fact, but on the broad ground that the Act of 1879 does not give vitality to a previous abortive attempt to tie up an estate in a manner wholly beyond the power of the testator to do.

Decree affirmed and appeal dismissed at the cost of the appellant.

Opinion by MERCUR, C. J.

PAXSON and CLARK, JJ., absent.

G. R. L.

July, '82, 84. November 27, 1882.

Nicolls v. McDonald.

Equitable ejectment—Parol evidence to convert absolute deed into a mortgage—Standard of proof required—Province of Court and jury in such case.

The grantor in a deed absolute on its face (made prior to the Act of June 8, 1881, P. L. 84) may, in an action of ejectment, show by parol evidence an agreement substantially contemporaneous with the deed whereby such deed is in equity a mortgage. Such parol evidence must, however, be clear, explicit, and unequivocal, and in all respects such as would move a Chancellor to decree a reconveyance.

If, upon the trial of such an equitable ejectment, the Judge be of opinion that the parol evidence does not come up to the standard above stated, it is his duty to direct a verdict for the defendant.

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The parol evidence in this case held not to meet the above stated requirements; hence the Court below should have instructed the jury that the plaintiff was not entitled to recover.

Error to the Common Pleas of Crawford County.

Ejectment, by John McDonald, against Seneca Nicolls, for seventy-four acres of land in Beaver Township.

On the trial, before CHURCH, P. J., the following facts appeared: In 1879, John McDonald, the plaintiff, was the owner of seventy-four acres of land in Beaver Township. In that year plaintiff was in jail undergoing imprisonment for a misdemeanor. While there, he sent for defendant, who, at plaintiff's solicitation, agreed to go bail for him, get him out of jail, pay the costs accrued, and also to settle and have satisfied of record, certain judgments against him. In return for so doing, plaintiff consented to execute, and did execute and deliver a deed to defendant for the premises in question. This deed was absolute on its face. The consideration was admittedly inadequate. Subsequently, plaintiff claimed that the conveyance made was intended simply to secure defendant for the acts done and sums paid, was in fact a mortgage and not a deed; and brought ejectment for possession. The parol evidence adduced on behalf of the plaintiff is reviewed in the opinion of the Court, *infra*.

Defendant requested the Court to charge, "That under all the evidence in this case, plaintiff cannot recover." Refused. (First assignment of error.)

Verdict and judgment for plaintiff, whereupon defendant took this writ, assigning for error, *inter alia*, the refusal of the Court to affirm the point submitted.

H. L. Richmond & Sons, for plaintiff in error.

In this class of cases, the Judge is bound to view and weigh the facts for himself; and if found insufficient to make out a case for specific relief, to take the case from the jury.

Todd *v.* Campbell, 8 Casey, 252.

To convert an absolute deed into a mortgage, proof of the agreement necessary to change its character must be clear, explicit, and unequivocal.

Plumer *v.* Guthrie, 26 Smith, 441.
De France *v.* Id., 10 Casey, 393.

If there is material misdirection in the charge of the Court, the judgment will be reversed, even though no instructions were asked.

Garrett *v.* Gonter, 6 Wright, 146.
Insurance Co. *v.* Rosenberger, 3 WEEKLY NOTES, 18.
Burke *v.* Maxwell, Id. 48.
P. R. R. *v.* Berry, 18 Smith, 279.

J. B. Brawley, for defendant in error.

Oral testimony may be introduced to show a conveyance absolute on its face to be but a mortgage.

Kerr *v.* Gilmore, 6 Watts, 407.
Sweetzer's Ap., 21 Smith, 273.
Haines *v.* Thomson, 20 Id. 439.

The criteria by which to distinguish whether an instrument is a deed or mortgage, vary according to the particulars of each case.

Kerr *v.* Gilmore, *supra*.
Houser *v.* Lamont, 5 Smith, 312.
Harper's Ap., 14 Id. 315.
Danzeisen's Ap., 23 Id. 65.

December 30, 1882. THE COURT. This is an attempt by the plaintiff below to recover land against a deed made by himself, absolute on its face. He alleges no fraud or mistake in its execution, but claims although it is apparently indefeasible, yet it was executed under an agreement which in law makes it a mortgage. There is no attempt to prove the alleged defeasance by any instrument in writing, but wholly by parol evidence. The rule is well settled in Pennsylvania, prior to the Act of 1881, that a grantor may prove by parol that his deed which purports to be a conveyance is in reality only security for a debt or liability. When the attempt is made, he claims as a mortgagor seeking to redeem. Although the action may be ejectment in form, yet in substance it is a bill in equity to compel a reconveyance of the land from the mortgagee in possession. Each form of procedure is subject to the same equitable principles. If the parol evidence be insufficient to move a Chancellor to decree a reconveyance, it is insufficient to justify a recovery in ejectment. In each case the Judge administers equitable powers. It is in the discretion of a Chancellor whether he will send an issue to the jury. When sent, their province is to aid him in ascertaining the facts; but their verdict is advisory only. It is not conclusive on him. He is still Judge both of the equity and of the facts. So, on the trial of an action of ejectment founded on an equitable title, it is the duty of the Judge to consider and to weigh the facts for himself. They must be proved to his satisfaction as well as to the satisfaction of the jury. If he be of opinion that the evidence does not make out a case which would induce a Chancellor to decree a conveyance, it is his duty to give the jury binding instructions to that effect. (Brawdy *v.* Brawdy, 7 Barr, 157; Todd *v.* Campbell *et al.*, 8 Casey, 250.) When a party sets up title against a deed absolute in its terms and seeks to convert it into a mortgage, the proof of the alleged agreement necessary to change its character must be clear, explicit, and unequivocal. He should not rest on the subsequent admissions and declarations of the alleged mortgagee only, but must establish an agreement substantially contemporaneous with the execution and delivery of the deed. Less than this will defeat the wise provisions of the Statute of Frauds. (Plumer *v.*

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Guthrie, 26 P. F. S. 441.) It is not sufficient that the jury may be convinced on the evidence given, but the question is, ought they to have been convinced?

It appears McDonald had been convicted of selling liquor contrary to law, and a fine imposed on him, which was unpaid. He was again arrested, charged with a like offence, and desired Nicolls to pay the fine, and become bail for his appearance on the latter charge. He was otherwise indebted, and owned two pieces of land. Some agreement was entered into whereby Nicolls was to make some payments and assume liabilities, and take a conveyance of the land. The main contention is whether the conveyance was intended as an absolute sale and purchase of the lands, or as a mortgage only.

McDonald testified that Nicolls asked for a deed; but he refused and said he would give a mortgage; and when the deed was executed a few days thereafter he was told by Mr. Richmond, who drew it, that it would be for security only, and when the debt was paid the property should be reconveyed to him.

George Dean, a tenant of McDonald and living on the lands, was present and heard the agreement. Both he and Nicolls positively and unequivocally contradict McDonald and swear the sale was to be absolute. Each swears that Nicolls absolutely refused to assume any obligation and accept the lands as security. He declared if he took the land, he must take it just as he would buy from any other person, and would not give McDonald any chance to redeem it. The latter then asked how much he would give Nicolls replied sixteen hundred dollars and not a dollar more. He concluded to accept it. The execution of the deed was postponed until the records should be searched. Nicolls was to assume certain obligations and give his note for the residue, amounting to $350. The writings were prepared by Mr. Richmond, a reputable member of the bar, a few days thereafter, and were executed in his presence on May 23d, 1879. They were three in number, to wit: the deed from McDonald to Nicolls and an agreement and note of the latter to the former. The agreement, after reciting whereas Nicolls had purchased two several farms of McDonald, proceeded to say: "now in consideration and full satisfaction of said purchase" said Nicolls agreed to pay the fine and costs in the case of the Commonwealth *v.* McDonald; the fees and charges of Richmond & Sons; six lien judgments specified; to receipt McDonald's indebtedness to him, and to give him his note for $350 payable in two years, "with the understanding that any liability said Nicolls may incur by becoming bail for McDonald's appearance at the next court shall be a payment on said note." The note of $350 given by Nicolls at the same time recited the same "understanding." Mr. Richmond testified: "I read to him (McDonald) the papers and explained them to him; and these are the papers, and he understood them; I not only read them, but explained them and their purport." Thus not only is the evidence of Richmond in conflict with that of McDonald as to what occurred at the execution of the papers; but Nicolls also swears that there was no agreement in any way or form, at the making of the deed that the land should be reconveyed to McDonald. The note and agreement were left in the custody of Mr. Richmond when the writings were executed.

The defendant in error seeks to assail by his own evidence, not only the absolute character of the deed, but to contradict the written contract and note executed by Nicolls "in consideration and full satisfaction of said purchase." The vendor is the only witness who testifies, that either before, or at the time of the execution of the deed, there was any agreement whereby it was to be given or accepted as a mortgage. The vendee and another witness present at the alleged parol agreement, and the vendee and conveyancer, present at the execution of the writings, each not only expressly and positively denies any such understanding; but swears to an agreement in entire harmony with all the written instruments. Thus the material facts averred by the vendor are not denied by the vendee alone; but also by another witness present at the agreement and at the execution of the deed. The evidence of what occurred contemporaneously with the making of the agreement and the execution of the deed is overwhelmingly against the version now given by the vendor. It is very clear, upon all the evidence referred to that no Chancellor should re-form the deed or change its absolute character.

It is, however, contended by the defendant in error that there is other evidence tending to sustain his view. There is some. In fact the value of the property appears to have been much more than $1600, and there is some evidence of subsequent admissions of the vendee indicating that he held it as security. Yet all these are overthrown by the declarations and acts of the vendor. Some of them may be stated. A few days after the execution of the deed the vendor and the vendee went together to the farm on which Dean was residing, and stated to him that Nicolls had purchased it, and Dean was thereafter to be his tenant, and that McDonald was to have nothing more to do with the farm, that Dean must look to, and transact his business with Nicolls. The vendor further saying to Dean that he had sold the property to Nicolls as they had talked on the occasion when he was present. Thenceforth for a year Dean did continue in possession as the tenant of Nicolls

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without any interference or molestation on the part of McDonald.

Mr. Richmond testifies that some time after the execution of the deed, McDonald said to him, he would like to "buy back" one piece of the land called the homestead, and asked if he thought Nicolls would sell it to him? At that time he made no allegation or claim of any right to redeem the land.

On the 20th September following, the parties made a written agreement whereby Nicolls agreed to sell and McDonald to buy, the homestead lot. On that day they appear to have settled all purchase-money due from Nicolls on his note and contract of 23d May. McDonald gave a written order on Richmond requesting him to "deliver to S. Nicolls one note, in favor of John McDonald, for three hundred and fifty dollars against S. Nicolls. Also one other paper with statement for purchase, and payments on farms for which I have received satisfaction this day, and also my books and receipts."

There is evidence of some other admissions by each party. On the one side, indicating the original transaction was considered an absolute purchase, and on the other side that the transfer was merely as security, but they are wholly insufficient to destroy the force and effect of the testimony to which we have referred. The unsatisfactory and strongly contradicted evidence of the vendor, as to alleged facts contemporaneous with the making of the deed, is still further weakened by his subsequent acts.

The operation of the Statute of Frauds cannot be suspended nor a title to real estate by deed absolute on its face, be destroyed by such evidence. The learned Judge should have given binding instructions to that effect, and affirmed the point covered by the first specification of error. It is therefore unnecessary to consider the remaining specifications.

Judgment reversed.

Opinion by MERCUR, J. H. J. S.

Jan. '83, 213. March 21, 1883.

Middleton's Appeal.

Decedents' estates—Wills—Legacies.

A direction in a will to pay the interest of ten thousand dollars to a legatee during her natural life, and after her death "to divide the said principal sum of ten thousand dollars" equally among her then surviving children, is not a direction to invest that sum for the benefit of such children, so as to entitle them to receive the increase in value of the securities purchased by the trustees with the fund awarded them by the Orphans' Court to secure said annuity; such increase goes to the residuary estate.

Appeal of Charles D. Middleton from a decree of the Orphans' Court of Philadelphia County, dismissing his exceptions to the adjudication of the account of F. C. Brewster and James Otterson, trustees of the estate of Martha C. Ware, under the will of Edward Penn Middleton, deceased.

The facts of the case as they appeared on the audit, before ASHMAN, J., are fully set out in the report of the proceedings in the Court below dismissing the exceptions to the adjudication. (See Ware's Estate, 12 WEEKLY NOTES, 571.)

Charles D. Middleton, the residuary legatee under the will of Edward Penn Middleton, took this appeal, assigning for error the decree of the Court.

A. Sydney Biddle (with whom was *Geo. W. Biddle*), for the appellant.

John White (with whom was *Herbert A. Drake*), for appellees.

October 1, 1883. THE COURT. It has been ruled that a gift of income, during the time for which it is given, is equivalent to a gift of the principal. (France's Appeal, 25 P. F. Smith, 220.) It is, however, the intention of the testator expressed in his will, which furnishes the best guide in its construction. Regard must be had to the whole scheme of the will, and its general intent, if it be lawful, must be adopted. (Middleswarth *v.* Blackmore, 24 Id. 414; Schott's Appeal, 28 Id. 40; Reck's Appeal, Id. 432.) Technical rules of construction must not be so applied as to defeat the plain intent of the testator. (Still *v* Spear, 9 Wr. 168.)

The appellant is the residuary devisee of Edward P. Middleton, under whose will this controversy arises. In addition to several specific legacies the testator bequeathed to each of his sisters, Hannah Norcross and Martha C. Ware, and to his brother, John C. Middleton, the interest of ten thousand dollars to be paid to each during the term of their respective lives. The will provided that on the death of either sister the said principal sum of $10,000 be equally divided among such of the children of said sister as may survive her; and after his brother's death the said interest be paid to his said brother's wife during her life, and after the death of both the interest to be paid to their daughter, Susan, during her natural life. He appointed the executors of his will trustees of the estate.

Mrs. Ware having died, the contention now is, What sum are her surviving children entitled to receive? They are not satisfied to accept the $10,000, but claim a larger sum. They base that claim mostly on facts which occurred after the death of the testator. It appears that when the executors filed their account, there was awarded to them as trustees the sum of $31,000 "to secure annuities." It is now claimed that this sum was designed as a fund to produce the interest to be paid to the legatees named (al-

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though technically not annuities), and an annuity of $100 per annum given to an uncle of the testator. If such was the intent, the sum in excess of $30,000 was not sufficient to produce the $100 annuity.

The whole sum thus transferred to the trustees was undoubtedly to be used by them in execution of the trust imposed by the will. It was invested by them in city sixes, which have since increased in value. The children of Mrs. Ware are the appellees here. They contend their right is not restricted to the sum of $10,000, but that they are entitled to the present value of the bonds purchased with the $10,000. This presents the question in the case. They claim that the gift of the interest on $10,000 implied a direction to invest that sum, and the trustees having invested in the securities named, they represented and took the place of the original fund for all purposes, and therefore the appellees are entitled to take the same, or their enhanced value, although it exceeds $10,000. Conceding it became the duty of the trustees to pay the interest due to the legatees out of the interest realized on the city bonds; yet it by no means follows that the sum bequeathed to the appellees was thereby increased.

Referring to the language of the will the intent of the testator appears very clearly. Mrs. Ware was given the interest on $10,000 only. On her death "the said principal sum of ten thousand dollars" was to be divided among her surviving children. The mother was to receive the interest on that sum only. Her children were to receive that principal sum only. So far as she and her children were concerned neither had any rights in any other portion of his estate. The testator distinctly marked the line beyond which they could not go. He did not ear-mark any certain money whereby it could be distinguished from any other like sum. He did not direct that the sum should be invested separately by his trustees. After the payment of specific legacies not postponed the residue of his estate was to remain in their hands for the benefit of all his beneficiaries. The specific sum thereafter to be paid to any of them was not to be enlarged to the injury of the residuary legatee. The children of her sister and the child of her brother occupied as high ground as the children of Mrs. Ware. Whenever the grandchildren became entitled to the enjoyment of the bounty of the testator, the precise sum was fixed by the will, more than the sum named by the testator. The investment of $10,000 in the city bonds did not make the appellees the absolute owners of those bonds. They were merely held to secure either in whole or in part the sum which was to become due to them on the death of their mother.

We think the intention of the testator is too clearly expressed to sustain the appellees' claim for more than the $10,000, and that the learned Judge erred in decreeing otherwise. The appellees are entitled to that sum, less the collateral inheritance tax, and the appellant is entitled to the residue of the fund produced by sale of the securities.

Decree reversed at the costs of the appellees and a procedendo awarded, with instructions to decree distribution in accordance with this opinion.

Opinion by MERCUR, C. J.

PAXSON and CLARK, JJ., absent.

W. M. S., JR.

Common Pleas—Law.

C. P. of Montgomery County. January, 1884.

Bowman et al. v. Van Baum et al.

Lunatic—Deed of, void—Effect of inquisition finding lunacy—How far retroactive—Evidence.

The deed of a lunatic is void, without reference to the adequacy of the price paid, or the grantee's knowledge of the lunacy of the grantor.

The degree of lunacy or insanity which will make a grantor's deed void, requires that there shall be a genuine want of soundness of judgment.

The law does not measure the size or the quality of a grantor's mind so long as it is *sound*, and the test of soundness is the capacity to remember what property he has, and to understand the nature of the act to be done, and the consequences likely to follow from doing it.

An inquisition finding lunacy for a preceding period of five years without lucid intervals, is *prima facie* evidence even agninst a grantee four years prior to the finding. It is, however, only *prima facie*, and may be rebutted.

The members of the inquest are competent witnesses as

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inquisition of lunacy found that Mrs. Wainwright was a lunatic, without lucid intervals, and had been so for five years prior to the time of inquest. Mrs. Wainwright having died, this ejectment was brought by the plaintiffs as her heirs at law, on the ground that her deed to defendants was void on account of her insanity.

BOYER, P. J., having been of counsel, a special court was held by MITCHELL, J., of Philadelphia.

MITCHELL, J., January 26, 1884, charged the jury as follows (*inter alia*):—

It is not necessary for me to trouble you with any technicalities on the subject of the action of ejectment, because the only question that is raised in this case is a single question of fact, whether or not Mrs. Wainwright was of sound mind in the month of August, 1872, when she made the conveyance which is the foundation of the defendants' title.

It is, perhaps, hardly necessary, and yet it may be well to recall to you exactly how this case arises. The plaintiffs opened the case by showing that Sarah Wainwright, originally Sarah Bowman, had inherited, in company with her sisters, a certain tract of land in Lower Merion, in this county. By partition made between herself and her sisters she acquired the title to this land which is in dispute, among some other, as a part of a larger tract. Subsequently she married John Wainwright, and afterwards she died without children, her husband having died before her, and without leaving a will. The present plaintiffs are her heirs at law, and they present their case in that form in the first instance, which would show that this property, being admitted to have been the property and in the possession of Mrs. Wainwright, at her death without a will and without surviving children, would go to them as the next of kin and the heirs at law. That was the beginning of the plaintiffs' case.

To meet that the defendants put in evidence before you a deed, made by Mrs. Wainwright and her husband, on the 9th of August, 1872, to Miss Catharine B. Van Baum. The making of that deed is admitted. There is no doubt that it was made by Mr. and Mrs. Wainwright, and upon that the defendants base their title. Now, if that was a good deed, then the defendants have a good title, and cannot be disturbed in their possession of this land.

Whether that deed was good or not depended, as I have already said to you, upon the question of whether Mrs. Wainwright was of sound mind, or whether she was a lunatic, or in the legal phrase, *non compos mentis*, at the time she made the deed. Now, there is not very much law in this case, but there are some things which, perhaps, it is well for me to say to you. This particular action, which you are now trying, is for an acre and a half of land, covered by the deed made in August, 1872, upon which has been built since the conveyance a house costing between $11,000 and $12,000. With this land, if it is recovered by the plaintiffs, the house goes as a matter of course. That which is put permanently in the way of an addition to land becomes a part of it. Where a man has put a building upon land which is not his own, and the true owner recovers it back again, partly from the necessity of the case, he recovers not only the land but the building and other permanent structures which have been put upon it. . . . .

Now, one more proposition as to the law, and then I think I am through with that part of the case, and that is, that the deed of a lunatic or a person, as I have already used the legal phrase, *non compos mentis*, is void entirely, without reference to the price paid, and without reference to any knowledge on the part of the purchaser. This may seem to you hard law. Perhaps if it was not carefully administered it would be very hard law, but rightly understood and applied, it is perhaps as good a rule as any general rule which the law can frame; and I need hardly say to you that all ordinarily that can be done by way of law is to give a general rule to satisfactorily work the ends of justice in the majority of cases, and to leave it to be applied practically in each instance by the intelligence of juries under the evidence of the facts proved before them. Now, this law was made a long time ago. It is, at least, as old as the time of Lord COKE, who was Chief Justice of England more than two hundred years ago. No man in that day was called a lunatic or madman unless he was so completely and violently so that he would be what we now call a maniac. In the progress of knowledge insanity has come to be better understood, not as a visitation of the devil, to be regarded with superstition, but as a disease to be taken care of, to be investigated, and to be cured if it is possible. It is a disease of very various degrees of intensity, affecting parts of the mind or the whole of it in different cases, with very different possibilities as to curability, with earlier stages which in the study of the cases are recognized with great difficulty, and in the opinion and common language of medical men, and perhaps popularly, many men are now called insane who would not have been so called at the time this rule of law was made.

But what we have to do with is not the medical definition but the legal understanding, and that remains in substance the same as it was in the days of Coke, though the terms in which it is expressed may be different. While, therefore, for some purposes, a man may be insane in the language even of the law, so that for his own good he may be subjected to confinement and to treatment with a view to his cure, yet that insanity or want of the full and complete mind,

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which is necessary in the sense of the law to make his contracts void, requires now as it did in the days of COKE, that there should be a genuine want of soundness of judgment sufficient to prevent the man from knowing what he was doing. Human minds are constituted with infinite differences in various ways. Their powers and capacities and their defects vary very much in different individuals, and they are very often strangely blended even in the same person. The law, hence, does not undertake to measure the size of men's minds.

Some men are dull, some men are very sharp, some are slow of apprehension, some are very quick; some are very stupid in one way and very bright in others. So, on the other hand, as to the quality of mind. Some people are capricious, changeable in their views and opinions, they are odd, or queer, or eccentric, and so on through all the various gradations down to what may be called positive and undeniable insanity.

So long as a man's mind is *sound*, therefore, the law does not undertake to make void his contracts. He is entitled to live his life in his own way, and deal as he pleases with his own.

What is soundness of mind for this purpose in contemplation of law, is not capable of very exact definition, but in general it means the possession of sufficient judgment to understand any ordinary act of business which the party is intending to transact, to know the probable and natural results that will flow from it, and to be of free will to do it or not to do it in accordance with his own judgment. This is as near as I can give you a definition of what is meant by the law in speaking of sound mind, and the want of it in speaking of a man "*non compos mentis*," which means not of complete and perfect mind. Now, taking that definition, which of course is only a very general one, it is for you to apply in your judgment and common sense that rule to the evidence that is presented to you in the case, and then to say in your judgment whether upon the whole evidence you believe that Mrs. Wainwright, at the time she made the deed, knew what she was doing, and what would be the consequences of her act, or whether she did not.

Now in a general way I propose to run over the evidence, not going into detail, but recalling to your minds, as the case has occupied several days, the order of the evidence and to what points it tended. The evidence for the plaintiffs in the first place is the inquisition of lunacy. You will recollect that in the year 1876 Mr. Joshua Bowman, the surviving brother of Mrs. Wainwright, filed a petition in this Court, under which six very reputable gentlemen were appointed, who investigated the subject and returned to this Court that they found her to be of unsound mind, sufficiently so not to be able to take care of herself, requiring the appointment of a committee to take charge of her and her estate, and that she had been so for the space of five years preceding that time. Now this presents what lawyers call a *prima facie* case of insanity. That is, if it stood alone it would settle the matter. It is sufficient to prove the plaintiffs' case, and it is now sufficient to put upon the defendants the burden of proof to show you that the finding was wrong. It is, however, only evidence, and it is entitled for that purpose to just as much weight as in your judgment, after having heard the whole case, you think fit to give it. This case is now trying, and you are to determine it upon the evidence which you have heard yourselves. It is probably presented on other and different evidence, it may be more and it may be different, from the evidence which that other jury heard. It might be that even that jury of six gentlemen, if they had heard the evidence which has been presented to you, might have come to a different conclusion, and whether they would have done so or not you are to use your own judgment and decide the case upon the evidence you have heard in this trial, giving to this finding of the other jury who have preceded you on this subject such weight only as you think under all the circumstances it ought to be entitled to. . . . (Here the Judge reviewed the evidence.) . . . The next witness called was Mr. Warner Roberts, who testified that he had known her a great number of years (I have not made a memorandum of the exact number), and that during all that time he never saw anything in her to indicate that her mind was not in a perfectly good condition until after her husband's death in the spring or early summer of 1874. He considered her perfectly competent to transact business, to make a deed, or do anything of that kind. To the same effect was the testimony of the gentlemen whom I have put by themselves in one class, all of whom testified to having known her for various periods, ranging from twelve or fifteen to forty years, and they all testified that they had never seen anything to induce them to suppose she was not perfectly competent to attend to business until after John Wainwright's death in June, 1874.

Now these five gentlemen were five of the six who were upon the inquest that in 1876 found her to have been insane, and the plaintiffs invite your attention to the fact that there is this apparent difference between what they now say and what they then found over their signatures. How that arose we are not permitted to inquire in this case, but you have heard the witnesses before you, and it is for you to judge how far that may have been a mistake or change of mind, and in what way that is to be accounted for. . . .

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Now, gentlemen, take the rule of law as I have already given it to you, that mere oddity or eccentricity, the saying and doing of strange things, are not enough to deprive a man of his control over his own property. We are not all alike. We do not all think alike upon any subject. Every man is entitled to his own mode of view and to his own mode of action within reasonable limits. The law does not undertake to measure the size or the peculiar quality of mind, or to affect any man's rights by virtue of such matters, so long as his mind is what the law calls *sound;* and the test of a sound mind in regard to the matters in this case, is the capacity to remember what properties he has, to understand rightly the nature of the act that is to be done and the consequences that are likely to flow from it.

It is for you to take all of the evidence into consideration, and use your own judgment and experience to determine whether or not Mrs. Wainwright knew what she was doing, in the sense I have explained it, when she made this deed in August, 1872. If she did not know it, her deed is void, and you will find a verdict for the plaintiffs. If, however, notwithstanding her eccentricities, or her queer sayings or doings, and her general condition afterward in 1876, if notwithstanding all of those, she knew what she was doing, what property she owned, what she was going to do with it, and what the consequences of the sale would be, then her deed was good, and it is your duty to find a verdict for the defendants.

[The jury found for the defendants.]

[See next case.]

C. P. No. 2. January, 1884.

Commonwealth v. Meredith.

Inquisition of lunacy—Traverse—Delusion—Question for determination by the jury.

Upon the trial of a traverse of an inquisition in lunacy, the issue is whether the traverser's mind is so deranged as to render him unable to conduct himself with safety to himself and others, and to manage his own affairs.

The Act of 13 June, 1836, is precautionary, and embraces in its design cases of lunacy in which acts of madness have not been committed, but where there is reasonable ground to apprehend that the lunatic will do violence to himself or others, or squander his property.

A fixed belief in things which are contrary to universal experience and known natural laws, is a delusion, and as such, evidence of insanity.

Where the tendency of a delusion is shown to be dangerous, the question for a jury is, whether there is such an imminent danger as to require, for his own good or the good of others, the control of the lunatic.

Charge to the jury by FELL, J., January 29th, 1884.

Gentlemen: The issue in this case is raised by the traverse of an inquisition in lunacy. The proceeding was commenced at the instance of James C. Biddle, Gertrude G. Biddle, and Catharine K. Meredith, to determine whether William Meredith is a lunatic.

Whatever meaning the word lunatic has in its popular or legal use, as descriptive of a particular phase of mental derangement or incapacity, it is defined by the Act of Assembly under which these proceedings arise, "to mean and include every person of unsound mind, whether he may have been so from nativity or may have become such from any cause whatever." The Act is precautionary in its design. Its humane purpose is to guard the person and preserve the property of the lunatic, to throw its shield around one whose unfortunate condition of mind requires its protecting care in regard to his person and his estate. It seeks to place upon his person no other restraint than that which his well-being and the good of society require, and to exercise no control over his property, except that necessary to preserve it from his unwise acts and secure it for his benefit and the benefit of those depending upon him. The law does not interfere as long as he has the power of proper control, nor does it wait until overt acts of folly and madness are committed. Affecting common law rights, its operation is not to be extended beyond its well-defined intention. The enjoyment of personal liberty and private property are primary rights of every individual. Constitutions and laws are made to preserve and protect them, and they are never to be interfered with unless the good of society or of the individual imperatively requires it.

The issue directed by the decisions and raised by the pleadings in this case is, whether the defendant's mind is so deranged as to render him unable to conduct himself with safety to himself and others and to manage his own affairs.

This question, under the obligation of the duty resting upon you, and in the light of the testimony produced, you are to decide.

Many facts brought out by the testimony on either side, intended to throw light upon the case, are conceded or so clearly proved as to be beyond all question, and the real dispute is within narrow limits. These established facts are the known factors in the problem before you, the substantial data upon which you must, to a great extent, rely in deciding upon the credibility and weight of evidence and the inferences to be properly drawn from it, and in forming a judgment upon the whole case. Mr. Meredith is possessed of great intellectual ability, and has been carefully educated; his life has been that of a close

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student, and his attainments are those of a ripe scholar. He has an accurate and retentive memory; his mind is capable of close and logical thought, of clear and forcible expression. The powers of memory, of reasoning, of expression, he enjoys to-day to their fullest extent, unimpaired in any way. His life has been honorable and without reproach, and in his relation to others he has been uniformly kind, considerate, and gentle, commanding the respect and winning the affection of all who have known him.

Connected with this case, painful in all its aspects, there is no sadder thought than that his unfortunate infirmity of speech has shut him off from the profession in which for so many years his father was conspicuously great, and where a field of usefulness and honor awaited him.

It is clearly established that since 1877 Mr. Meredith has believed that he is the object of a secret and mysterious persecution; that he, at times, hears voices of persons who are not near him, but who are planning danger to him, that he has invisible foes who, through some scientific agency, make their voices audible to him. He does not claim to understand this, or attempt to account for it, except to attribute it to some secret invention in electricity and acoustics, by means of which unknown persons, of evil intent, are persecuting him. He believes this to be a fact; accepts it as such. He does not regard the voices as imaginary or spiritual, but as the real voices of real people, who communicate with him through some unknown means. The means of communication he does not ascribe to a supernatural agency, but to natural causes.

About these matters there is no dispute, and they bring us to the first inquiry in the case—Is this insanity?

Whether the sensation of sound may not be produced in his mind by agencies not common to others has been naturally suggested. Concerning matters outside of our experience, and not susceptible of proof, we may well hesitate to venture any positive assertion, but we cannot enter the realms of fancy and speculation. You are here to decide upon facts, and with facts only can you deal.

What is contrary to universal experience and known natural laws we cannot regard as true. That these voices should be real, or anything but the creation of his imagination, is so contrary to all that we experience, and all that we know, that we must conclude that his belief in relation to them is a delusion. Insanity is always marked by delusions; false belief is its essence. Delusions indicate an abnormal condition of mind; the absence of them is the characteristic of the sane mind. A mere hallucination is not, of itself, evidence of insanity; the inability to correct it may be. The presence of the power of consecutive and logical thought does not disprove the existence of insanity, nor do marked eccentricities and peculiarities prove its existence. Permanent delusion, the belief in facts which no rational person would believe, is evidence of insanity, generally regarded as conclusive evidence. It is not necessary that we should enter into any inquiry involving nice metaphysical distinctions concerning this subject. The question before you does not require it.

The issue here is whether Mr. Meredith's mind is so impaired as to render him unable to govern his body and his estate, not to make the wisest and best management of either, but to take such care of himself as is consistent with his own safety, and the safety of others, and of his estate as to preserve it for his own benefit.

This brings you to the consideration of the evidence, of which I shall attempt no detailed examination. Upon the affirmative of the issue you have the testimony of Francis W. Ralston, James C. Biddle, Cadwalader Biddle, Dr. Wilson, and of his sisters, Mrs. Biddle and Miss Meredith. Mr. Ralston accompanied him to England in 1875, and went for him in the autumn of 1877. Mr. Biddle met him upon his return, was with him much of the time until he was sent to Dr. Given's, and kept an oversight over him until he was taken, some months since, to the Pennsylvania Hospital for the Insane. Mr. Cadwalader Biddle was his intimate friend, his attorney, and had charge of his business affairs until a committee was appointed. Dr. Wilson had been the physician of the family. They are all decided in the opinion that Mr. Meredith is laboring under a delusion which unfits him for the control of his person, and which is likely to imperil his property if left in his charge, and they have stated to you the facts upon which their conclusions are based. As witnesses of high character and great intelligence, whose relations with him have been especially intimate, to whom he has expressed himself freely and without reserve, their opinions cannot be without weight in your minds, and their statement of facts is scarcely open to question.

Drs. S. Weir Mitchell, Charles K. Mills, William Hunt, Robert A. Given, and S. Preston Jones have been called as experts. Some of them also have testified in regard to their observation of him extending over a considerable length of time. Dr. Mitchell, Dr. Mills, and Dr. Hunt personally examined Mr. Meredith, and he was under Dr. Given's care for several years, and has been under the care of Dr. Jones for some months. They agree substantially in saying that he is under the influence of a delusion, and is of unsound mind; that his mental condition is such as to require control and treatment in a hospital. Control, because there is

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danger of his becoming at any time, under the force of his delusion, violent and dangerous to himself and to those around him. Not a possible danger merely, but a probable danger.

The purpose of the expert testimony is to enable you better to form a judgment upon a subject outside of your ordinary experiences, and abstruse and involved. These are gentlemen of great learning in their profession, of high personal character and of wide experience. As far as such testimony can aid you, and it is not to be lightly valued, it is fortunate that we can believe that they speak with all the authority which science has yet brought to bear upon the subject.

On behalf of Mr. Meredith many witnesses have testified to his entire sanity, and many to the belief that his delusion is entirely harmless. His life has, very naturally, been a secluded one, as his infirmity of speech has cut him off from communication with others. When at Dr. Given's institution, and at Mr. Wells's hotel, he formed the acquaintance of a number of persons who have been called in his behalf. Messrs. Porter, Holstein, Gessner, McDonald, Worrall, Burton, Passmore, McKissie, Samuel A. Hill, Francis J. Hill, and Mrs. Rose Hill, have testified. They met him at intervals extending over a period of six years. Some saw him only occasionally, others quite frequently, and others almost constantly for months. They did business with him, conversed with him, some of them lived in the same house with him. They agree in their testimony that they saw no evidence of insanity and no suggestion of it in his conduct; that it had never occurred to them that his mind was affected. These people were impressed by his superior intelligence and his refined manners. They enjoyed his society, and cherished grateful memories of his kindness and courtesy. To those connected with Mr. Hill's family he spoke of his hearing voices, and they probably all knew of his residence at an institution devoted to the treatment of nervous and mental diseases, yet with the suggestions which would naturally arise from these things no thought of his mental derangement occurred to them. Charles A. Harris, who was his attendant at Dr. Given's, testifies that he never knew him to act other than in an entirely sane manner, and that he is fully able to care for himself. Mr. Coleman and Mr. Ingham have been called as to their business relations with him. Mr. George W. Biddle has spoken from a knowledge of Mr. Meredith extending from his childhood up to within a period of two years. He has been his friend and counsel. He speaks from the vantage ground of a knowledge of the subject of insanity obtained by years of observation and experience as counsel of the Pennsylvania Hospital for the Insane, in expressing his decided conviction of Mr. Meredith's ability to manage himself and his affairs.

This is an outline of the testimony. There is nothing in this testimony which darkens with the suspicion of selfish interest the conduct of those who instituted these proceedings, or in any way impugns their motives. Nor do I see anything which would justify you in looking with doubt upon the sincerity of a single witness called in the case. They have seen Mr. Meredith at different times, under different circumstances, in different lights, and are influenced by different views of a subject as to which there can be no absolute certainty, which, from its nature, must remain speculative. Each has formed his judgment from what he saw—a complete picture in itself, but after all but the passing phase of the complicated mystery of a human life. To his family and intimate friends he has expressed himself freely; to his acquaintances with reserve; to strangers he has not spoken of the subject. The fact of the delusion remains, and we cannot but regard it as the result of a derangement of his mind. From the weight of the evidence and your own observation, aided by your good sense, you must decide whether it is a harmless delusion, or one requiring, for his good and the good of others, that he should be under control.

The case is a very peculiar one, and no view of the testimony relieves it entirely from doubt. The conditions are anomalous; a temperament nervous and highly sensitive; an abnormal condition of the organs of speech, intimately connected with those of hearing; a mind of unusual activity and power, without the ordinary means of expression, shut out from the world and turned upon itself, incased and introverted. Whether these conditions furnish any explanation of what has been, or are of value in predicting what may be, can at best be but a mere conjecture. Dealing with the established facts, these peculiar features of the case are presented by the testimony. Mr. Meredith has never attributed the voices which he hears to any other than a natural agency. He has throughout regarded them, as stated by Dr. Mitchell, as "real voices, made by real persons." His belief in them, and that they are a means of persecution, is unshaken at all times, as distinct and strong when he does not hear them as when he is under their distressing influence. He has never spoken of them to strangers, rarely to an acquaintance, but frequently to members of his family, and without reserve to the physicians who have examined him. Men have associated with him for months who never heard him speak of the voices except when the subject was introduced by them. He has not become excited by the mention or

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discussion of them, or betrayed any desire except to ascertain why they annoy him, and how he can be relieved.

Aside from this delusion, there has been no impairment of any of the faculties of his mind; it is as clear, as logical, as vigorous to-day, as it ever was. Six and a half years have produced no perceptible change in his condition. He has treated a mental derangement, not recognized as such by him, in a matter-of-fact way, as others would treat a physical defect or infirmity. These things indicate an almost unimpaired power of control. His affliction, and the irritation and annoyance resulting from it, would naturally lead to the selection of some one as his persecutor, and to an attack upon him. Such has not been the case, and there have been no indications of it, except in one or two instances. He has never harmed or attempted to harm a living creature, and no one who has been with him has feared for his personal safety.

In controlling his outward conduct reason has thus far lost but little of her sway. Is there danger, a present, imminent danger, that she will be dethroned?

The case narrows down to this question. His delusion has been proved to belong to a dangerous class or type. During most of the time since 1877, when not in actual confinement, he has been under a moral restraint. Has this restraint had a salutary influence on his mind, helping him against himself, and will different results follow its removal? The experts say it has; and that the struggle is constantly going on between the inevitable impulses of an insane delusion and the controlling and restraining influence of reason, and that sooner or later the former will triumph. This is the pith of the expert testimony. These gentlemen speak from a knowledge and experience which we do not have. You are not bound by their opinions more than you are by the opinions of others. You should use them as you use other evidence in forming your judgment. But you will not be justified in subordinating established facts, or the inferences fairly following from them, to any speculative conclusions.

Upon the facts of this case, as you find them to be, is Mr. Meredith capable of taking care of his person and his property? Such care as is consistent with his own good and the good of others? We are only concerned with the want of power as the result of the impairment of reason. The law does not interfere with the unwise where there is reasonable ground of apprehension as to either; a present, imminent danger.

With this statement of the law, and reference to the facts, I submit the case to you. The truth upon this painful subject is what we all seek.

I am sure none would more rejoice to feel that Mr. Meredith needs no restraint than the learned gentlemen who have conducted this proceeding against him, and none would more regret that he should unwisely be exposed to danger than those who so ably represent him.

I leave the case with you in the fullest confidence that the close attention you have given it from the beginning will continue to the end, and that your verdict will express the deliberate judgment at which you have arrived, by a careful, an intelligent, and a conscientious consideration of the evidence.

[In this case the jury found for the defendant.]

Daniel Dougherty and *Richard P. White*, for Mr. Meredith.

George Tucker Bispham and *Richard C. McMurtrie*, for the trustees.

[See preceding case.]

C. P. No. 4. January 5, 1884.

Teller Bros. v. Anathan.

Husband and wife—Where a husband acts as agent for his wife (not a feme sole trader) in purchasing goods to carry on a trade conducted by her, he will be held responsible for the same.

Sur rule for judgment for want of sufficient affidavit of defence.

Assumpsit, by Teller Brothers against Nathan Anathan, now or late trading as Anathan & Company, upon seven promissory notes, drawn to the order of Teller Brothers, and signed by the defendant as follows, viz.: "Anathan & Co. per N. Anathan, attorney."

Defendant filed an affidavit of defence as follows:—

"The firm of Anathan & Company consists solely of the wife of this deponent, Eva Anathan, for whom this deponent acts as attorney in fact, under a power of attorney from his said wife, to him executed in May, 1861. These facts were well known to the plaintiffs who sold the merchandise for which the notes were given, and loaned the money for which the checks were given, upon the sole and exclusive credit of said Eva Anathan."

Oscar B. Teller, for the rule.

Where a wife carries on a business with the

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Where the goods or profits of a business carried on by a married woman belong to her husband, he is liable for her purchases.

Mackinley *v.* M'Gregor, *supra.*
Hallowell *v.* Horter, *supra.*

Furth and *Singer*, contra.

The reason for which a husband is held liable on such contracts of his wife, is that he is presumed to have consented to her carrying on business for his benefit; but no such presumption will arise when he denies such arrangement, and the parties know before selling the goods that the business is carried on by the wife for herself.

Mackinley *v.* M'Gregor, 3 Wharton, 368.
Thompson *v.* Hibberd, 37 Leg. Int. 125.

THE COURT. Rule absolute.

W. M. S., Jr.

Orphans' Court.

December 18, 1883.

German's Estate.

Decedent's estate—Claim against, for medical services—Evidence—A printed diary with figures and symbols marked down in the blanks cannot be received in evidence as a book of original entries.

Sur exceptions to adjudication.

At the audit of the account of the executor of Clarence I. German, the testator, a claim was presented by decedent's physician for professional services rendered, who offered in evidence an ordinary diary, with visits noted down therein, which offer was refused for the reasons given in the opinion of the Court. To this ruling exceptions were duly filed in his behalf.

Charles Henry Hart, for exceptant.
William W. Wiltbank, contra.

December 29, 1883. THE COURT. The rule of evidence which introduces a tradesman's books of original entries to prove his sales, is permitted to override the principle that a party may not manufacture evidence for himself, on the ground of convenience. It cannot be said to have been dictated by necessity, because in England, where these books serve only as memoranda from which the party producing them may refresh his memory, it has been found, according to Mr. Best (Best's Evidence, 853), that all the advantage, without any of the danger incident to this character of proof, is obtainable. For the reasons which justify its use in the case of a merchant, it has been so far extended as to embrace, perhaps, the books of any person whose business is not in money, and is of such a nature that its transactions can be itemized with the precision with which a sale may be recorded. It is perfectly consistent with this broad statement that a doubt should have been expressed in Hale's Executors *v.* Ard (12 Wr. 24), whether the books of an attorney containing charges for advice are evidence. Such entries, as was there said, must be incapable of certainty in description, because the services themselves are indefinite in their nature, and can neither be gauged by the time they occupy, nor compared with other similar services with which a jury is supposed to be acquainted. But this objection can scarcely be said to apply to the record kept by a physician. It may cover a daily entry of each visit, with the name of each patient, a list of the medicines furnished, and the price which custom has fixed for the particular service. Such a record will comprise all the incidents of certainty of time, person, labor, and value, and each entry will be complete in itself. No more than this is required in the books of an artisan, and the measure of necessity is at least as great in the one instance as the other. If the proposition has been correctly stated, it affords an easy test of the validity of the proof submitted by the claimant. His diary or visiting list, as a physician, contained on each page a list of names of patients, with tally marks opposite, in columns which were headed separately with the day of the week; the name of the month appearing at the top of the page, and the date of the year on the cover. One column at the end of the space for each week was headed "amount." Preceding these lists, as a sort of preface to the book, was a "Table of Signs." This table embodied a series of hieroglyphics and figures, which were intended to denote visits made and to be made, and visits repeated or to be repeated; consultations proposed or made; services at the office; visits at night; medicines furnished, etc. It is quite clear that entries, patterned after this fashion, could serve, as best, only as memoranda from which to make more formal charges. As original entries, even if decipherable, they were incomplete, because their form admitted only of a weekly charge in money, and in point of fact, no charge at all appeared to have been made. Allowing the utmost latitude to the plea of convenience and necessity, the law cannot tolerate as self-proving an entry of services which can be translated only by means of a glossary. Such a writing would be as unintelligible to an ordinary jury as a Hebrew Bible to a deputy sheriff. The Auditing Judge, therefore, properly threw it out of the case. The sum which he finally awarded the claimant, we think, was all that was shown by the oral testimony to be due.

The exceptions are dismissed, and the adjudication is confirmed.

Opinion by ASHMAN, J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, MARCH 6, 1884.* [No. 13.

Supreme Court.

July, '83, 20 & 24. January 15, 1884.

Bunn's Appeal.
Lane's Appeal.

Corporations—Stockholders—Equity—Attachment execution—Act of April 29, 1874.

Upon the insolvency of a corporation its uncalled and unpaid capital stock constitutes a trust fund for the benefit of all its creditors, and will be administered as such.

Where a corporation incorporated under the provisions of the Act of April 29, 1874 (P. L. 73), becomes insolvent, a bill in equity will lie at the instance of judgment creditors of said corporation to collect such part of the unpaid and uncalled subscriptions to the capital stock as is necessary for the satisfaction of their debts.

The personal liability to creditors for work or labor done or materials furnished, imposed by section 14 of the Act of April 29, 1874 (P. L. 73), upon the stockholders of corporations chartered under the provisions of said Act, is not the sole liability which such creditors may enforce for the satisfaction of their debts. They may also, by appropriate process, enforce for their benefit the liability existing on the part of the stockholders to the corporation to pay uncalled and unpaid subscriptions to capital stock.

The provisions of section 7 of the Act of April 29, 1874 (P. L. 73), as to the immunities and liabilities of a transferee of stock are not to be considered as imposing a special liability, but merely as fixing a status. Hence the liability of a transferee of stock to the corporation to pay up to the par value thereof is not to be regarded as a special liability to be enforced for the benefit of creditors in the manner specified in section 15 of the said Act.

The liabilities to be enforced in the mode pointed out in section 15 of the Act of April 29, 1874 (P. L. 73), are only those special personal liabilities to pay particular debts created by the other sections of the Act.

In case of the insolvency of a corporation unpaid and uncalled amounts due upon the capital stock cannot be attached by a judgment creditor of the corporation by means of an attachment execution; upon insolvency the uncalled and unpaid subscriptions constitute a trust fund, which will be administered for the benefit of all the creditors.

In re Glen Iron Works, 13 WEEKLY NOTES, 387, disapproved.

A corporation incorporated under the Act of April 29, 1874 (P. L. 73), became insolvent, and made an assignment for the benefit of its creditors; certain creditors of the company, one of whom was a judgment creditor upon whose judgment a fi. fa. had been issued and returned "nulla bona," thereupon filed a bill in equity against the corporation, its assignee and its stockholders, some of whom were original subscribers, and others assignees of the stock.

The bill set out the foregoing facts, and also alleged that there were no corporate assets to satisfy their debts, and that forty per cent. remained uncalled and unpaid on the capital stock of the corporation. The bill prayed for an account; an assessment upon the stockholders of such part of the sums remaining due upon their capital stock as would pay complainant's claims in full; a decree that such sums be paid; and the appointment of a receiver:

Held, that the bill in equity was properly framed and used, and that complainants were entitled to the relief sought.

Appeals of William M. Bunn and David H. Lane, from a decree of the Common Pleas No. 4, of Philadelphia County, fixing the liability of the appellants as stockholders in the Philadelphia and Susquehanna Blue Stone Company, and decreeing that they pay certain sums found to be due and unpaid by them upon their subscriptions to the capital stock of said company.

Bill in equity, wherein John Maxwell, Hiram Dunn, and others were complainants, and The Philadelphia and Susquehanna Blue Stone Company, William F. Johnson, assignee thereof for the benefit of creditors, William M. Bunn, David H. Lane *et al.*, were defendants.

The bill averred that the corporation defendant was duly incorporated on December 14, 1874, in accordance with the provisions of the Act of April 29, 1874 (P. L. 73). That the capital stock consisted of 240 shares of the par value of $100 each. That on April 28, 1876, the defendants Bunn and Lane were stockholders in the said corporation, Lane having been an original subscriber to the stock, and Bunn a transferee of certain shares thereof. That in the interval between December 14, 1874, and April 28, 1876, calls had been made upon the various stockholders to the amount of sixty per cent. of the capital stock, thus leaving forty per cent. uncalled and unpaid.

That on April 28, 1876, the corporation defendant had made an assignment for the benefit of its creditors to defendant Johnson. That the complainants were judgment creditors of the said company, complainant Maxwell having recovered a judgment upon certain acceptances of said company held by him, and the others of the complainants having recovered judgments for work and labor done for said corporation. That a fi. fa. had duly issued upon the judgment of complainant Maxwell, and been returned "nulla bona."

That the corporation defendant was wholly insolvent, and that neither it nor defendant Johnson had in their hands any assets wherewith to satisfy the judgments of the complainants, and further, that no attempt had been made by either of said defendants to enforce the liability of the

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stockholders of the said corporation for the forty per cent. remaining unpaid on the capital stock.

The prayers of the bill were as follows:—

(1) That the rights of the parties be declared in the premises.

(2) That an account be taken of the amounts remaining unpaid upon the capital stock of the corporation defendant; and upon such accounting, that the stockholders defendants may be decreed to pay the amounts respectively due by them, which had been previously assessed and called for by the corporation defendant, or so much thereof as may be necessary to discharge the ascertained debts of the said corporation.

(3) That an assessment be levied in such manner and form as the Court may direct for the balances not previously called for, and remaining unpaid upon the capital stock of the said corporation respectively held by the stockholders defendants hereto, or so much thereof as may be necessary to pay the ascertained debts of the said corporation, and that thereupon the said stockholders defendants may be decreed to pay such balances so as aforesaid assessed.

(4) That a receiver be appointed to collect and receive all and singular the assets, books, papers, and other property of the said corporation, and also all sum or sums due by the said defendants, or any of them, stockholders in the corporation aforesaid, for the unpaid balances on the capital stock of said corporation held by them, or such part or parts thereof as may be necessary and sufficient to liquidate the ascertained indebtedness of the said corporation, together with such other powers and duties as the Court may deem just and equitable.

The several answers of the defendants substantially admitted the facts set out in the bill, but denied that complainants were entitled to the relief sought.

The matter was referred to Hampton L. Carson, Esq., as Examiner and Master, before whom it was contended by the stockholders defendant that the complainants were not entitled to the relief sought because—

(1) The provisions of section 15 of the Act of April 29, 1874, must be strictly pursued, and could alone be invoked by creditors of a corporation in a suit against the stockholders thereof.

(2) Complainants had an adequate remedy at law by attachment execution.

The Master overruled both objections, and reported a decree in accordance with the prayers of the bill. Exceptions were filed by the various stockholders to this report, which were overruled by the Court, and the decree reported by the Master was ordered to stand as the decree of the Court. (See Dunn *v.* Philadelphia and Susquehanna Blue Stone Co. *et al.*, 13 WEEKLY NOTES, 57.)

Subsequently a receiver was appointed who duly qualified and entered upon the performance of his duties. Defendants Bunn and Lane thereupon took the present appeals, assigning for error the decree of the Court, fixing their liability and ordering them to pay the sums remaining unpaid by them on their capital stock.

James H. Shakespeare (*A. A. Grace* and *James H. Heverin* with him), for appellants.

The transferee of stock cannot, without express statutory authority, be made individually liable for an unpaid assessment, called after his acquisition of the stock. The only remedy is by forfeiture of the stock.

Canal Company *v.* Sansom, 1 Binney, 70.
Pittsburgh and Connelsville R. R. *v.* Clarke & Thaw, 5 Casey, 146.
Palmer *v.* Mining Co., 10 Casey, 288.
Franks Oil Company *v.* McCleary, 13 Smith, 317.
Messersmith *v.* Bank, 15 Norris, 440.
Coal Company *v.* Otterson, 4 WEEKLY NOTES, 545.

The seventh section of the general corporation Act of 1874 subjects the transferee of stock of corporations organized under its provisions to all the liabilities of an original subscriber. And the fifteenth section provides a full and adequate mode of procedure to enforce any liability arising under the provisions of this Act, thereby precluding the creditor from enforcing his rights in any other manner.

Patterson *v.* Lane, 11 Casey, 275.
Act of March 21, 1806, P. L. 569.
Suydam *v.* The Insurance Co., 1 Smith, 394.
Hoard *v.* Wilcox, 11 Wright, 57, 58.
Brinharm *v.* The Coal Company, 11 Wright, 43.
Youghiogheny Shaft Co. *v.* Evans, 22 Smith, 334.
Means's Appeal, 4 Norris, 75.

The liability imposed by section fourteen of the Act of 1874 was the only one available to appellants, it could be enforced only in the method specified in section fifteen.

The complainants had a full and complete remedy by attachment execution.

In re Glen Iron Works, Bankrupt, 13 WEEKLY NOTES, 387.

Stock subscriptions are ordinary debts, and may be attached in the same manner as other debts.

Peterson *v.* Sinclair, 2 Norris, 250.
Pittsburgh and Connelsville R. R. Co. *v.* Byers, 8 Casey, 22.
McCully *v.* Pittsburgh and Connelsville R. R., 8 Casey, 31.
Pittsburgh and Connelsville R. R. *v.* Clarke & Thaw, 5 Casey, 151.
Graff *v.* Railroad Co., 7 Casey, 493.
Ogilvie *v.* Insurance Co., 22 Howard, 387.

Lawrence Lewis, Jr., and *Angelo T. Freedley* (*Edward Shippen*, with them), for appellees.

A general equitable jurisdiction exists, on the behalf and at the instance of creditors of an insolvent corporation to enforce the payment of unpaid and uncalled subscriptions to capital stock. For, in equity, insolvency matures the subscriber's liability, even when dependent upon

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a condition precedent, and turns the indebtedness into a trust fund to be administered for the benefit of the creditors, so as to preserve as well the equities of the stockholders, *inter se*, as the relative rights of the creditors.

Bank of Virginia *v.* Adams, 1 Pars. Eq. 534.
Wilbur *v.* Stockholders, 35 Leg. Int. 346.
Stang's Appeal, 10 WEEKLY NOTES, 409.
Aultman's Appeal, 2 Outerbridge, 505.
Miller's Appeal, 39 Leg. Int. 72.
Henry *v.* Vermilion, etc., R. Co., 17 Ohio, 187.
Ogilvie *v.* Knox Ins. Co., 22 Howard, 380.
March *v.* Burroughs, 1 Woods, 463.
Hatch *v.* Dana, 101 United States, 205.
Hawley *v.* Upton, 102 United States, 314.
Thompson, Liability of Stockholders, section 258.
Holmes *v.* Sherwood, 16 Federal Reporter, 725.
Patterson *v.* Lynde, 1 Supreme Court Rep. 432.

In Pennsylvania this jurisdiction has been frequently exercised, and is applicable to corporations chartered under the general corporation Act of 1874.

Bank of Virginia *v.* Adams, 1 Pars. Eq. 534.
Wilbur *v.* Stockholders, 35 Leg. Int. 346.
Stang's Appeal, 10 WEEKLY NOTES, 409.
Aultman's Appeal, 2 Out. 505.
Miller's Appeal, 39 Leg. Intel. 72.

Sections fourteen and fifteen of the general corporation Act should be read together, as imposing on the stockholders an additional personal liability as to laborers, in derogation of the common law, and it exists whether the stock be or be not fully paid up. While the present action is to enforce a liability to the corporation, limited by the amount unpaid upon each share held.

Patterson *v.* Wyomissing, 4 Wright, 117.
Loan Society *v.* Lichtenwalner, 4 Out. 104.
Adler *v.* Milwaukee Co., 13 Wisconsin, 57.
Mann *v.* Pentz, 3 Comstock, 415.

And the ordinary equitable jurisdiction to enforce the payment of unpaid instalments on the capital stock of an insolvent corporation is not thereby ousted.

Peterson *v.* Sinclair, 2 Norris, 250.
Miller's Appeal, 39 Leg. Int. 72.

The suggested remedy by attachment execution is inadequate, in that it settles nothing except the creditor's individual rights against the corporation, and is not such a clear, adequate, and perfect legal remedy as will affect the appropriate equitable jurisdiction.

Wesley Church *v.* Moore, 10 Barr, 273.
Kirkpatrick *v.* McDonald, 1 Jones, 387.
Bank of the United States *v.* Biddle, 2 Pars. Eq. 32.
Skilton *v.* Webster, Bright, 233.
Weir *v.* Mundell, 3 Brewster, 594.

February 25, 1884. THE COURT. In this case a bill in equity was filed by certain creditors of The Philadelphia and Susquehanna Blue Stone Company, suing as well for themselves as for all other creditors who might become parties thereto, against the company and the holders of its capital stock, for the purpose of compelling the payment of the unpaid capital stock by the stockholders, in order that the same might be applied to the payment of the debts due the plaintiffs. The bill alleged, and the Master found, that the defendant company was incorporated under the general corporation law of April 29, 1874, that the capital stock was fixed at $24,000, divided into 240 shares at one hundred dollars each, that a part only of the stock had been paid in, that the defendants were stockholders at the time of the assignment made by the company for the benefit of its creditors, and were indebted to the company in certain sums which are set forth in detail, for their unpaid subscriptions to the capital stock, that the company was wholly insolvent, and all its available assets, except the balances due upon its capital stock, exhausted; that neither the company nor its assignee had made any call or assessment upon the stockholders to pay in the unpaid portion of the capital stock, but, on the contrary, had refused to do so, and that payment of such unpaid balances of the capital stock, or of some part thereof, was necessary for the payment of the debts due the plaintiffs. The bill prayed for an account of the amounts remaining unpaid upon the capital stock, and for a decree that the stockholders pay whatever amounts were due by any of them upon previous assessments, and also that an assessment be levied for so much of the balances due, and not previously called for, as might be necessary to pay the ascertained debts of the corporation, and prayed also for the appointment of a receiver, to whom the moneys collected should be paid, and for general relief. Most of the matters alleged in the bill were admitted in the various answers filed, and such as were material and not admitted, were found by the Master. The debts due the plaintiffs were ascertained to be upwards of $8000, of which the sum of $7036.93 was due to John Maxwell, who had obtained judgment for the same. The amounts of unpaid capital stock were in the neighborhood of $10,000, the whole of which was decreed to be paid to a receiver.

The chief contention before the Master, as in this Court, was upon the liability of the stockholders in this proceeding. It was contended on behalf of the defendants that they could not be called upon by bill in equity, as proposed in this case, for two reasons: First, because the complainants have a complete and adequate remedy at law specifically provided by the Act of April 29, 1874, under which the company was incorporated; and second, that the plaintiff John Maxwell, the principal creditor, had a complete and adequate remedy by attachment execution upon his judgment. We will consider these defences separately and in order.

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The remedy at law, which it is said could be resorted to by the plaintiffs is that which is provided by the fourteenth and fifteenth sections of the Act of 1874. The fourteenth section is, so far as it relates to the present controversy, in the following words, viz: "The stockholders in each of said corporations shall be liable in their individual capacity to the amount of stock held by each of them, for all work or labor done or materials furnished, to carry on the operations of each of said corporations." The fifteenth section provides the method of proceeding to enforce the liabilities created by the fourteenth.

It will be perceived at once that the liability established by the fourteenth section is of a special and extremely limited character. The stockholder is made directly liable for work and labor done, and for materials furnished to carry on the operations of the corporations. But two kinds of indebtedness only are imposed upon the stockholder: indebtedness for labor and indebtedness for materials furnished. No other form or species of debt of the corporation can be collected from the stockholder under this section. Moreover, the liability created by this section is a direct liability from the stockholder to the creditor, and it exists to the amount of the stock held by the stockholder, without any reference to the question, whether it has been paid for or not. Hence, the stockholder, although he has paid in full to the corporation for his stock, is nevertheless still liable to the extent of the whole value of his stock, to the two classes of creditors named.

This liability is, of course, of a purely statutory character, having no existence outside of the legislation, and whenever it is invoked it must be enforced in the very manner prescribed by the other portions of the Act. If that kind of remedy is not literally pursued when that particular liability is proposed to be enforced, there can be no recovery. Such were the decisions of this Court in many cases, notably in Patterson *v.* Lane (11 Cas. 275); Hoard *v.* Wilcox (11 Wr. 51); Brinham *v.* The Wellersburg Coal Co. (Id. 43); Youghiogheny Shaft Co. *v.* Evans (22 P. F. S. 331); Means's Appeal (4 Norr. 75). These were decisions under those Acts, principally the manufacturing law of 1849, but the controlling idea of the whole of them was that the liability stock was paid in, and a certificate by the officers to that effect was made and recorded. It was alleged that a false certificate had been made as to the amount of stock paid in, and that the whole had not been paid; and a bill in equity was filed against certain stockholders to enforce their individual liability. But we held that such a bill would not lie, because by the twenty-third section a special mode of proceeding for that purpose was provided, and it must be strictly pursued. This was the whole of that decision. Precisely the same doctrine was held and applied in Hoard *v.* Wilcox, though the source of individual liability was different, and the defect in the proceeding was different, to wit, the corporation was not joined as required by the statute. THOMPSON, J., said, on p. 58: "It is very evident that the remedy of the statute was not followed in these proceedings, and it is also quite apparent on the face of the narr. that it is under the statute that they seek to make the defendants answerable." He said, also, "the remedy for the collection of demands against such institutions is, therefore, statutory and special, and must be followed. This we have lately held in Brinham *et al.* *v.* The Wellersburg Coal Co. *et al.* (*ante*, p. 43), in obedience to the rule of the Act of 1806, requiring the remedy prescribed by a statute to be pursued." The other cases referred to above were mere repetitions of the same doctrine applied to the facts involved in them.

In no one of these or any other cases cited in the paper-book of the appellants, did any question arise as to the right of a creditor to enforce the equitable obligation of every stockholder in a moneyed corporation to pay the whole amount, if necessary, of his unpaid capital stock, in discharge of *all* the indebtedness of the corporation. That is a species of obligation which is founded in no statute, but exists by force of the consideration that the capital stock of a corporation is a trust fund for the payment of its debts, and upon the happening of the insolvency of the corporation, and the exhaustion of its assets, its unpaid capital stock may be appropriated for the benefit, not of any one creditor, but of the whole body of creditors. In none of the manufacturing laws of this Commonwealth is there any substitution of any form of equivalent

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tutionary for nothing. They may be resorted to or they may not. If they are it must be in the precise methods, and within the special limits imposed by the legislation which authorizes them. But if they are not, upon what principle of law or morals shall it be said that these two meritorious classes of creditors shall be literally ousted of other rights and remedies available to all creditors simply because of the relation of creditor to the common debtor?

It is true that in the bill in this case the complainants other than Maxwell allege that the debts due them are for work and labor done, and materials furnished, and, as to Maxwell, proof was offered, and refused, to show that the consideration of his judgment was for materials furnished. But of what consequence is this? The learned counsel for the appellants argue with much ingenuity and earnestness, that because a statutory and peculiar remedy is given to creditors of this character, that one remedy alone must be pursued, and if it is not, all their other remedies against the same parties are taken from them. In other words, laborers and material men can make the stockholders pay them because they are stockholders and by the statute are bound to pay such claims in addition to paying for the whole of their stock, and because they have this right it is their sole, only right of redress against such persons. It is conceded that all other creditors can require the stockholders to pay in their unpaid capital stock in satisfaction of their claims, but it is contended that laborers and material men cannot do so because they have a right peculiar to themselves to resort to an additional remedy which enables them to call upon the stockholders, although they may have paid up the whole price of their stock. The answer to this is very simple. The laborers and material men are creditors of the corporation in as large and broad a sense as all other creditors, and of course in that capacity they have all the remedies which are common to the whole mass. In addition to that they have a special remedy which the others do not possess. This might be availed of if the other failed, but in no possible view of the case can we hold that its existence deprives them of other remedies common to all creditors alike.

The doctrine that the capital stock of a moneyed corporation is a trust fund available to creditors in the event of insolvency is admitted by the appellants, and is established by very numerous decisions. A few of them are the following: Sawyer *v.* Hoag (17 Wall. 610); Sanger *v.* Upton (1 Otto 56); Hatch *v.* Dara (11 Otto, 205); Wood *v.* Dummer (3 Mas. 308); Webster *v.* Upton (1 Otto, 65); Wilbur *v.* The Stockholders (35 Leg. Int. 346); Story's Equity (§ 1252); Vose *v.* Grant (15 Mass. 505); Spear *v.* Grant (16 Mass. 9); Stang's Appeal (10 WEEKLY NOTES, 409); Messersmith *v.* Bank (15 Norr. 440). In Upton *v.* Tribilcock (1 Otto, on p. 47), the doctrine is thus fully and forcibly expressed: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one and cannot be disregarded." In Sanger *v.* Upton (1 Otto, 60), it is said: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. . . . The creditors have a lien on it in equity. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it."

It is also entirely clear that the creditors of an insolvent corporation may compel, by bill in equity, the payment of the unpaid capital stock in discharge of their debts. Thus in Myer's Assignee *v.* Seeley (10 Nat. Bankruptcy Reg. Rep. 412), it was said: "Bills by creditors who have judgments against a corporation have been sustained against the corporation and its stockholders. Said bills being framed in the name of the judgment creditors, and of all others who may choose to come in and be made parties thereto. In such cases the decree has been for an account to be taken of the debts and assets of the corporation, for the appointment of a receiver to whom the stockholders and officers are ordered to pay and account respectively for so much of the assets and capital stock as are necessary to pay the debts due to the creditors; the assets thus collected and received to be applied by the receiver in discharge of the debts." There are other numerous authorities to the same effect, but it is unnecessary to repeat them, as the right to such a remedy is not at all disputed by the appellants, if any right of recovery exists.

A special defence was made as to W. M. Bunn, one of the appellants, that he was an assignee of stock in the corporation defendant, and not an original subscriber. It was admitted, however, that by the seventh section of the Act of 1874, an assignee of stock is subject to the same liabilities as an original subscriber. But it is argued that as the fifteenth section provides a special remedy for any liability under the provisions of the Act, the liability of an assignee can only be enforced by pursuing that remedy. The argument is not sound, however, because the seventh section simply places assignees in the same position as original subscribers. It does not create any special liability. When it subjects assignees to all the liabilities of subscribers

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and gives them all their privileges and immunities it simply confers a status. To determine what are the liabilities of assignees since this Act, we have simply to inquire what are the liabilities of subscribers. When we determine the latter we thereby determine the former. We have already shown that among the liabilities of the subscribers is the obligation to pay the unpaid portion of the capital stock. This liability exists outside of the Act of 1874, and of all legislation, and of course attaches to assignees because their position is the same as that of subscribers. The fifteenth section relates only to the special personal liabilities to pay particular debts created by the other sections of the Act. Mr. Bunn is therefore liable specially for debts due to laborers and material-men under the Act, and he is liable as a subscriber for the unpaid capital stock.

The second defence alleged relates to the plaintiff, John Maxwell, who was the holder of about seven-eighths of all the indebtedness of the corporation. Mr. Maxwell had obtained a judgment for his debt, and it was argued he had a complete and adequate remedy at law by process of attachment in execution.

This writ is simply a species of execution, the purpose of which is to obtain satisfaction of the judgment upon which it is founded. It is not an original proceeding instituted to enforce a real or supposed legal or equitable liability by the procurement of a judicial decree as its result. In other words, it is not a remedial process, and can scarcely be spoken of as a remedy in the sense in which that term is used in considering the subject of an adequate legal remedy which excludes a bill in equity. But leaving that thought aside, we cannot concede the correctness of the appellant's contention in this regard.

In considering this subject, it is necessary to observe some distinctions which must be borne in mind. There is no doubt that a contract of subscription to the stock of a moneyed corporation imposes upon the subscriber an obligation to pay to the corporation the amount of the subscription, according to the terms of the contract. If he fails to pay, the corporation may sue him at law upon his contract and recover whatever may be due. But recovery in this mode must be in accordance with the terms of the contract. If by those terms payment is to be made in any particular manner, or only of a certain portion of the par value with an agreement that no more is to be paid, such contract is valid and binding upon the corporation. But if the corporation becomes insolvent, and all its other assets are exhausted, and it is requisite for the payment of its debts that its unpaid capital should be paid up, then the law changes, and it is perfectly well settled by many decided cases, that all stipulations, conditions, and devices agreed upon between the stockholders and the corporation, releasing the former from their obligation to pay in cash the full par value of their stock become nugatory and void. Notwithstanding such terms of subscription the stockholders, in such circumstances, can be compelled to pay in full for their stock. This doctrine results from the character of the capital stock of corporations. It is a trust fund. It exists for the benefit of the creditors whenever their rights and interests require it. Its payment can be enforced in modes which are not available to the corporation and without using its name. Thus, creditors' bills in the names of individual creditors, whether by judgment or otherwise, proceedings by assignees in bankruptcy, either directly by bill, or by petition to the court in bankruptcy, and proceedings by insolvent assignees or receivers under direction of the proper courts, are the ordinary modes in which the rights of the creditors are enforced in the circumstances we are now considering. In all of them, however, it is absolutely essential that in some mode there should be an ascertainment in some form, of the fact of insolvency, of the exhaustion of all other assets, of the amount of the debts due by the corporation, of the amount of capital stock required for the discharge of the debts, and a call or assessment upon the stockholders for the payment of the amount necessary to be paid by each. If the contract of subscription is absolute and without conditions or terms relieving the stockholders from the payment of the full par value of the stock, the call or assessment may be made by the directors of the corporation, and if the corporation is *sui juris*, and has not passed into the hands of assignees or receivers, the proceeding to recover the money may be prosecuted by the corporation in its own name. If, however, the corporation refuses to act, or is disabled, either by the terms of its contract, or by its legal incapacity by reason of insolvency, or bankruptcy, the assessment must be made by some court having jurisdiction of the matter and the parties in some suitable proceeding by way of bill or petition. Upon such proceeding, and the establishment of the requisite facts above stated, the Court will either order an assessment to be made upon each stockholder of the amount to be paid by him, and upon such assessment an action can be founded and tried in the common law courts, or a decree can be made directly against each stockholder who has been made a party and served with process for the payment of the money due by him, and such decree can be enforced by immediate execution process.

These principles are announced and illustrated in many cases: Wood *v.* Dummer (3 Mason, 308, 314); Sagory *v.* Dubois (3 Sandf. Ch. Rep.

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467); Ward *v.* Griswoldville Manuf. Co. (16 Conn. 593); Ogilvie *v.* Knox Ins. Co. (22 How. 380); Mann *v.* Pentz (3 Comst. 415, 423); Adler *v.* The Milwaukee Patent Brick Manufacturing Co. (13 Wisc. 63); Meyers *v.* Seeley (10 Nat. Bank. Reg. Rep. 411); Upton *v.* Tribilcock (1 Otto, 45, 47); Sanger *v.* Upton (Id. 56, 60); Webster *v.* Upton (Id. 65); Wilbur *v.* Stockholders (35 Leg. Int. 346); Scovill *v.* Thayer (15 Otto, 143); Patterson *v.* Lynde (16 Otto, 519); Sawyer *v.* Hoag (17 Wall. 610).

The question whether an attachment in execution will lie at the suit of a single creditor to secure payment of his own debt to the exclusion of all other creditors, is one whose solution depends upon the application of some of the principles above stated. If the corporation is solvent and the subscription is in the ordinary form of an absolute engagement to pay the price of the stock, there is no doubt that an attachment in execution is an effective remedy for a judgment-creditor of the corporation. The reason is that in such circumstances the amount due by the subscriber to the stock is an ordinary debt due directly by the stockholder to the corporation, the payment of which may be enforced in an action on the contract of subscription. Being a debt due, there is a right of action for its recovery by the company, and therefore it is strictly and properly subject to seizure by attachment. Hence it was held in Peterson *v.* Sinclair (2 Norr. 250), that a balance due on a subscription to stock of a corporation is attachable as other debts are. No question of the solvency or insolvency of the corporation was raised or considered in that case.

In Hays *v.* Lycoming Fire Ins. Co. (2 Out. 184) an attachment was sustained against money due upon an assessment on the premium notes of the company for the purpose of paying losses, but it was expressly said by our brother GORDON in the opinion, that it was admitted the company was solvent and the case was not complicated by the question of insolvency. It was held that as the company was solvent and the premium notes were assessable for the payment of the very debt in suit, and the assessment was lawfully made and the money partially paid into the hands of one of the garnishees, it was to be treated as any ordinary debt and subject to attachment as other debts. In another case between the same parties, reported in 3 Out. 621, the facts were that a member had sustained a loss by fire for which he had brought an action and obtained judgment before the insolvency of the company. An attachment in execution was issued also before insolvency and served upon a member who had given a premium note for his insurance. He became indebted upon his note, before insolvency, for the proportionate part necessary to pay the plaintiff's loss and nothing remained to be done except to ascertain the amount of that proportion. Upon these distinct grounds the attachment was sustained. Mr. Justice TRUNKEY, in delivering the opinion, said, on page 625: "The garnishee gave his notes to the defendant, to be paid in such portions and at such times as the directors may, agreeably to the Act of incorporation, require. The losses by fire occurred, and this judgment for one of said losses was obtained prior to the proceedings for dissolution of the company. Before its dissolution, the garnishee became indebted on his premium notes for the proportionate sum necessary for payment of said losses, and nothing remained to be done except to ascertain the proper amount of his indebtedness prior to his liability to an action to enforce payment. The writ of attachment was issued and served before the dissolution of the company, and the debt owing to the defendant by the garnishee became bound by it. After the receiver was appointed by order of the Court, he ascertained the measure or amount of the debt which had been levied upon by the attachment of the plaintiff."

The foregoing are the only cases of attachment-execution in the Pennsylvania Courts to which we are referred, and, with the exception of the case *In re* Glen Iron Works, Bankrupt (13 WEEKLY NOTES, 387), to be hereafter considered, are all we have found in the books of reports relating to this subject. But there are many cases which as it seems to us settle the principles which ought to control the decision of the question.

In order to sustain an attachment in execution there must be a debt due from the garnishee to the defendant in the judgment which may be payable at the time of the service of the writ, or may become payable subsequently. This debt must be at least a cause of action. If it be not, so that it cannot be enforced by the defendant against the garnishee, it certainly cannot be converted into a cause of action by the mere consideration that an attachment has issued instead of a summons in a common law action. If there is an inherent defect in the cause of action itself which prevents any recovery by the defendant or his representative *because of the nature of the defect*, it is not possible that such defect can be regarded as removed simply because another proceeding is adopted.

Now it is manifest upon the plainest principles that in the case of an insolvent corporation all of whose assets are exhausted except its unpaid capital stock, there can be no recovery against a delinquent stockholder until a call or assessment has been made upon him fixing the amount he is required to pay. Prior to insolvency this might be done by the corporation if it is not disabled by the special terms of the subscription

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contract. But when insolvency and exhaustion of assets exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund which does not belong to the corporation but to the whole body of its creditors.

Hence whether the proceeding originate in the name of one, or of several, or of all the creditors, the result is the same in each. The capital when recovered enures to the benefit of all, and must be distributed among all ratably. Before any recovery can be had in such proceedings, no matter of what particular form, there must be an assessment made by a competent authority. The necessity for an assessment arises from the consideration that only so much of the unpaid capital can be called in as is required for the payment of the unsatisfied debts. If the whole unpaid capital is not required the whole cannot be called. In order to ascertain how much is required there must be an account of debts, assets, and unpaid capital taken, and then a decree for an assessment of the amount due by each stockholder. Thus in Mann *v.* Pentz (3 Comst. on p. 423), the Court said: "This liability (for unpaid capital) is only incurred when the capital paid in is not sufficient to satisfy the debts against the corporation, and then only to an amount sufficient to satisfy such debts. It is therefore necessary that an account of the assets and of the debts should be taken, of the amount of capital remaining unpaid upon the shares, and the amount unpaid by each stockholder, in order that they may be made equally liable."

In Myers *v.* Seeley (10 Nat. Bank. Reg. Rep. 411), the Court, after stating the rule, says: "The reason of that rule is, that the unpaid subscriptions are assets applicable to the payment of corporate debts which the corporate authorities may call in for corporate purposes. If there are adequate assets other than said calls, then the creditor has no legal or equitable right to insist upon such calls. Primarily the amount due on subscriptions is a debt due to the corporation which it alone can enforce, and unless the corporation is without other assets to meet its obligations, and fails to make the needed calls, creditors cannot interpose. When the facts justify their interposition, an account of assets and debts should be taken, in order that it may be known what, if any, calls should be made. No further call should be made than what is sufficient, together with the other assets, to meet all debts; for the bill by creditors cannot reach beyond the satisfaction of their demands. They have no other equity."

In Wilbur *v.* The Stockholders (35 Leg. Int. 346) CADWALADER, J., said: "Where the corporation is solvent, the unpaid capital is not due and payable by the stockholders until payment in part or in whole is called for by the corporate authorities, unless a postponement of the payment would be inconsistent with some provision of the act of incorporation, or with a conventional engagement with the stockholders. Ordinarily there is no such inconsistency of either kind, and thus in the case of a solvent corporation, a call or levy by the corporate authorities assessing the amount or amounts payable, must ordinarily precede any ascertained obligation of the respective stockholders to pay. But in the contrary case of an *insolvent* corporation, the recourse of its creditors does not depend upon such condition precedent, and cannot be thus postponed. Every stockholder is, with relation to creditors, under an obligation to pay so much of the amount represented by his share or shares of the capital as may be required for the payment of its debts. . . . Upon the insolvency of the corporation, the obligations of the stockholders thus at once become assets for the payment of its debts to such an extent as other assets are deficient. To this extent the obligation of every stockholder, in its just proportion, then becomes in equity a debt payable for the benefit of the creditors. No act of the corporation before or after its insolvency can derogate in this respect from the rights of creditors." In Webster *v.* Upton (1 Otto, on p. 71), STRONG, J., says: "All the cases agree that creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company. This results from the fact that the whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent."

The foregoing principles, which are expressed in many cases, indicate the fundamental conditions which underlie the whole subject of the liability of the stockholders as to their unpaid capital stock. Such stock in cases of insolvency is due as an entirety; it is due to the aggregate of the creditors; only so much is due as is requisite to discharge the indebtedness of the corporation after all other assets have been thereto applied; as a necessary consequent there must be an account of debts, assets, and unpaid capital taken; when such account has been taken and the amount required from each stockholder has been ascertained, an assessment ordering the payment of such proportionate amount by each may be made by a court of competent jurisdiction in a proceeding in which the corporation and the stockholders should be made defendants.

I consider it as the clear result of the authorities that, except in cases where the corporate authorities have themselves made calls which are authorized by the subscription contracts, there

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is absolutely no liability of any kind whatever, on the part of the stockholder to pay any part of his unpaid capital, except under and by force of an assessment made as above stated. If this be true, there is nothing upon which an attachment can fasten at any time prior to the assessment. I apprehend this conclusion is sustained by specific authority, which I now proceed to indicate.

The case of Chandler, Receiver, *v.* Siddle, a stockholder (10 Nat. Bank. Reg. Rep. 236) was an action at law by a receiver of an insolvent insurance company against a single stockholder, to collect eighty per cent. unpaid of the defendant's subscription to the capital stock of the company. The subscription contract provided for the payment in instalments, of twenty per cent. of the stock and that the balance should be "subject to the call of the directors as they may be instructed by majority of the stockholders represented at any regular meeting."

There was no call by the directors and the receiver brought an action at law on the contract to recover the eighty per cent. against one stockholder defendant. The Circuit Court of the United States for the Southern District of Illinois, MILLER, J., in disposing of the case said on p. 238: "In this action *at law*, in which neither the corporation nor its stockholders other than the defendant are before the Court, and in which the suit is on the contract of subscription for the entire eighty per cent. alleged to be due, I am of opinion, considering the terms of that contract and that no call or assessment is alleged, either by the company before the insolvency, or by the Court since, that the petition does not state *a cause of action.* In other words, in this action at law on the contract, there must be a call or assessment, or something standing in the place thereof and equivalent thereto, either by the company, or by a proper court in order to make the defendant liable."

If there was not a cause of action, nothing to make the defendant liable without an assessment, surely there could be nothing to serve as the foundation of an attachment. For the writ of attachment cannot *create* a liability. It can at best appropriate a liability already existing. But if it already existed it could be enforced in the proceeding on the contract. The attachment is also on the contract alone where there has been no assessment, and must fall with the action at law built upon the same foundation.

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p. 70, DIXON, C. J., speaking of the question whether one creditor might acquire a preference over others, said: "Whether in those cases where the stockholders are not individually liable by law for the debts of the corporation, one creditor can, by superior diligence, acquire a preference over the other creditors beyond that which might result from his judgment becoming a lien on specific property, or his having otherwise obtained a higher security at law, does not distinctly appear. But the conclusion from the cases and the general doctrine of courts of equity, is, I think, that he cannot, and that when he is obliged to seek the aid of those courts for the enforcement of his demand, he must do so for the benefit of all other creditors who may desire to unite with him; and that all must share alike in proportion to the amount of their respective claims, in the funds which may be realized by the proceeding. The maxim of the law in like cases is, that equality is equity, and certainly no case more appropriate for its application could be imagined. I conclude, therefore, and the authorities clearly tend to show, that such is the practice."

In the case of Wilbur, Assignee, *v.* Wilson *et al.*, in the Circuit Court of the United States for the Eastern District of Pennsylvania, 21 October Session, 1875, not reported, common law actions were brought against the stockholders by the assignee in bankruptcy, upon promissory notes given by each stockholder for the payment at a definite time of the full amount of each subscription. There was a condition annexed that only fifty per cent. of the amount of each note was subject to assessments, and that the remainder should be paid only in dividends of profits earned.

Affidavits of claim were filed by the plaintiff, setting out the notes and conditions in full, but alleging that the conditions were void, because the corporation had become insolvent and bankrupt, that its assets were all exhausted, that eighty per cent. of the capital had never been paid, and that the whole of it was required for the payment of the debts. Defence was taken by affidavits which admitted the foregoing facts, but alleged that no assessment had ever been made upon the notes except one of thirty per cent., which was shortly after rescinded, and, therefore, there was no liability to pay any part of the eighty per cent. The Justices of the Circuit Court, MCKENNAN and CADWALADER, adopted

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No written opinion was filed. A petition for an assessment was then presented in the District Court, and the assessment was subsequently made. Although the plaintiff in the actions at law was the assignee who represented all the creditors, and who sought recovery for all, and all the stockholders were sued, and although the condition annexed to the notes was void against creditors, as was subsequently held, still it was decided that the absence of an assessment was fatal to the cause of action.

We are very clear, that if there was no liability at all sufficient to support an action, there was none upon which to found an attachment.

The case of Scovill *v.* Thayer (15 Otto, 143) puts the whole subject at rest. There a corporation was adjudicated a bankrupt. The assignees presented a petition for an assessment upon the unpaid capital stock for payment of debts. The subscribers to the stock had made an agreement with the company that no more than twenty per cent. of the par of the stock should be paid. The petition of the assignees asked for an assessment of seventy-six per cent. for payment of debts. The defendant, Thayer, having failed to pay his assessment, the assignees brought an action at law against him upon the assessment, and, to the declaration filed, the defendant filed two pleas, the first of which was a general denial of the allegations in the narr., and the second set up the limitation of two years prescribed by section 2 of the Act of March 2, 1867, c. 176, the general bankrupt law of the United States. The Court below sustained the plea of the statute of limitations, and gave judgment for the defendant. The assignees took a writ of error from the Supreme Court, and the whole case was there considered, and the judgment of the lower Court reversed. The question was, when did the cause of action arise? If it arose upon the subscription contract the bar of the statute applied, but if it did not arise until the assessment was made, then it did not apply, and the assignees were entitled to recover. On page 153 the Court say: "The precise question with which we have to deal is: When would this action at law, brought by the assignees of the bankrupt company against a stockholder, to recover a part of the balance due on his stock, be barred by the statute? This will depend on the answer to the question: When did the cause of action accrue to the assignees? In other words, when could they have commenced this action against this defendant to recover the amount due on his stock? . . . The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company, that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter. . . . No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the company.

"In fact it has been held in recent English cases that not only is the company, but its creditors, also, are bound by such a contract. . . . But the doctrine of this Court is that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene, and their claims are to be satisfied, the stockholders can be required to pay their stock in full. . . . The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors. . . . The question for solution is, therefore, when, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it became his duty to pay according to the terms of his contract or according to law.

"It is well settled that when the stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The Court will do what it is the duty of the company to do. . . . But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the statute of limitations does not begin to run in his favor until such order or demand. . . . In this case there was no obligation resting on the stockholder to pay at all, until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing, save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete. But not only was it necessary that

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the amount required to satisfy creditors should be ascertained, but that the agreement between the company and the stockholder to the effect that the latter should not be required to make any further payments on his stock should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceeding for an assessment in the bankruptcy court was, in effect, a proceeding to accomplish two purposes; first, to set aside the contract between the company and the stockholder; and, second, to fix the amount which he should be required to pay. Until these things were done, the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock."

In Patterson *v.* Lynde (16 Otto, 519), a judgment creditor of the corporation brought an action against one stockholder to enforce the payment of his unpaid capital stock in satisfaction of his judgment. It was held this could not be done. WAITE, C. J., says, on p. 520: "Since this case was decided below the Supreme Court of Oregon has passed on the same question, and in Ladd *v.* Cartwright (7 Oreg. 329) determined that the individual liability of stockholders for the indebtedness of the corporation is limited to the amount of their stock subscribed and unpaid, and that the remedy of the creditor to enforce this liability is in equity, where the rights of the corporation, the stockholder, and all the creditors can be adjusted in one suit. Of the correctness of this decision we have no doubt. . . . No one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself."

Against all these doctrines and express decisions we are referred by the learned counsel for the appellant to one case in which a contrary decision was made. It is the case *In re* Glen Iron Works Bankrupt (13 WEEKLY NOTES, 387). A careful examination of that case compels us to say that we cannot agree with the learned Judge of the District Court who decided it. The case of Scovil *v.* Thayer does not appear to have been called to his attention. Had it been, it seems to us his conclusion must have been different. The reasoning of that case is in clear hostility with any theory of the least degree of obligation on the part of the stockholders in the state of facts which existed in the case of the Glen Iron Works, until after the agreement of the stockholders had been declared void, and an assessment had been made. When the attachment in the latter case was issued and served there was no obligation or duty to pay anything on the part of the stockholders, except the subscription contract itself. On that contract there was no right of action whatever in favor of the company and against the stockholder. There was no cause of action. Not a penny could have been recovered if the company had, at the date of the attachment, brought an action on the contract. Even the assignee, as was held in his actions, had no cause of action whatever after his appointment, and after his much larger right of action in behalf of creditors had accrued. Two things were required to be done first before the slightest cause of action arose. One was an assessment and the other a decree setting aside the fraudulent condition of the subscription contract. Neither of these had been done. The learned Judge thought the attachment might be used as equity process to take all the steps and enforce all the rights. We cannot think so. The machinery of an attachment would not admit of it, and, if it did, the result would be not an application of the proceeds to the payment of the attaching creditor alone, but an equitable distribution to all. An attachment in execution is a strictly statutory remedy for the sole benefit of the attaching creditor. We cannot regard it as equity process in any point of view. It has no machinery by which other creditors can be introduced as plaintiffs, or other stockholders as defendants. Nor do we understand how it would be possible under a mere system of interrogatories to, and answers by the garnishees named in the proceeding, and of jury trial on the truth of the answers, to marshal the entire assets of the corporation, to take an account of all its debts and all its assets, to ascertain the amount of unpaid capital stock due from all the stockholders, whether garnishees or not, to determine the proportionate amount due by each for the payment of so much of the indebtedness as cannot be discharged by other assets, nor to make a final decree for an assessment upon delinquent stockholders, designating the amount payable by each. Only a portion of the stockholders were attached as garnishees in the Glen Iron Co. case. The remainder could not be brought in because the attachment law makes no provision for it, and, if they could, the plaintiff's lien would date only from the time they were brought in, thus making a conflict in the mode of distribution. As all other creditors except the plaintiff would or might get no benefit from the attachment they certainly could not be forced to intervene, and if they wished to come in they could not do so. The attachment law makes no provision for such a purpose, and surely their rights could not be administered without their participation in the proceedings. Upon any consideration of the subject we are persuaded that the writ of attachment in execution is a proceeding of strict law not to be found anywhere in the system of equity law or practice, nor in the common law, existing only by force of special statutes, intended and devised for the sole

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advantage of the creditor who issues it, excluding all others from its benefits and entirely unprovided with any methods for the introduction of strangers and the administration of their rights. Moreover, it is a perfectly familiar rule in the law that the attaching creditor stands in the shoes of the defendant in the judgment, and can assert no other or higher rights than his against the garnishees. (Fessler *v.* Ellis, 4 Wright, 248; Dougherty *v.* Hunter, 4 P. F. S. 380.)

Entertaining these views we are unable to regard the decision in the case *In re* Glen Iron Works as authority in Pennsylvania for the doctrine it announces, and we cannot but regard it as in plain hostility with the decisions of the Supreme Court of the United States and other cases to which we have referred.

So far as the case at bar is concerned it is only necessary to add that the assignment for the benefit of creditors was made in 1876, and the creditor Maxwell did not obtain his judgment until 1879. He was, therefore, in no position to issue an attachment until long after the insolvency was ascertained, and its unpaid capital stock had become vested in the assignees for the benefit of all the creditors, to be administered as a trust fund belonging to them. (Macungie Savings Bank *v.* Bastian, 10 WEEKLY NOTES, 71.) An attachment would be no more available to him then than would be a fi. fa. levied upon goods or lands which had passed by the assignment.

The bill in equity in this case was the true remedy of the plaintiffs, framed and used in the proper form, and founded upon facts which entitle them to the decree made by the Court below in their favor, and, therefore, it receives the sanction of this Court. The assignments of error are all dismissed.

The decree of the Court below is affirmed, and the appeals therefrom are dismissed at the cost of the appellants.

Opinion by GREEN, J.

Oct. & Nov. '83, 210. November 8, 1883.

Gibbons's Appeal.

Partition—Practice—Appointment and removal of Master—Judicial sale—Rules of Court.

The appointment or dismissal of a Master in partition is not of course, and must be made by an order of Court in accordance with the Equity Rules of the Supreme Court. Under section 73 of these rules such order can be made only upon application entered in the Equity Docket with due notice to adverse parties or their solicitors.

A sale of lands in partition by a Master appointed by order of Court granted without notice to adverse parties is voidable and will be set aside.

Appeal of Cora I. Gibbons from a decree of the Common Pleas No. 1, of Allegheny County, confirming a sale in partition.

Bill in equity, between Clarence M. Johns and Leonard M. Johns, complainants, and Mira H. Johns *et al.*, defendants, praying partition of certain tracts of land in the city of Pittsburgh, and a tract of coal and a small portion of surface land in Forward Township, Washington County.

In August, 1872, a decree for partition was made by the Court, and the case referred to Thomas S. Bigelow as Master. The Master reported that he had made partition of the land in Pittsburgh, but that the coal property in Forward Township could not be parted without prejudice to or spoiling the whole; that he had valued said coal property at $25,900 ($250 per acre), and that all the parties had refused to take at the valuation. This report was confirmed by the Court, and on December 17, 1872, an order was made that the Master sell the coal and surface land at public auction.

On June 22, 1878, a petition was filed by Robert Arthurs, setting forth that no sale of said coal property under the decree of the Court had taken place; that petitioner had purchased the interest of Clarence M. Johns, one of the complainants, at United States Marshal's, sale under a judgment against said Clarence M. Johns; that petitioner had endeavored, without effect, to have the sale made under the decree in partition; and praying that the appointment of Thomas S. Bigelow as Master be vacated, and that the Court appoint some other person as Master, to make sale of the property in his stead. This petition was granted, and on June 22, 1878, the Court made an order relieving Thomas S. Bigelow from his appointment, and appointed George I. Whitney in his stead, with direction to make sale of the coal property under said order of Court.

In pursuance of this order the said Master, George I. Whitney, after advertisement in the newspapers, sold this property at public auction to Robert Arthurs for $2500, and made report of the sale to the Court. To this report Cora I. Gibbons *née* Johns, one of the respondents, filed, *inter alia*, the following exceptions: (3) "The price obtained for said property is grossly inadequate, being the sum of $2000, whereas the same was appraised at $250 per acre, or over $24,000. (6) The Master, Thomas S. Bigelow, was allowed to withdraw, and the new Master, George I. Whitney, was appointed at the special instance of Robert Arthurs, the purchaser, without the knowledge or consent of said exceptant, and the sale advertised and carried on to completion, and all without notice to this exceptant."

After argument the Court dismissed these exceptions, and confirmed the report of sale, de-

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creeing that the sale to Robert Arthurs be and remain firm and stable for ever. Whereupon exceptant took this appeal, assigning for error the order of June 22, 1878, dismissing Thomas S. Bigelow, and appointing George I. Whitney Master in his stead; and the confirmation by the Court of the sale made by George I. Whitney.

Levi B. Duff (*Wm. B. Negley* with him), for appellant.

The dismissal and appointment of a Master is not of course, and can only be had on application to the Court. This brings the case within the terms of section 73 of Equity Rules, under which it cannot be done without due notice to adverse parties.

Wm. A. Stone, for appellee.

The pending suit in partition was in itself sufficient notice to appellant of any proceedings in the cause.

Baird *v.* Corwin, 5 Harris, 462.

Section 73 of the Equity Rules does not apply to the mere removal of one Master and the appointment of another to execute a final decree already made.

January 7, 1884. THE COURT. The report of the Master, Thomas S. Bigelow, was confirmed on the 14th of December, 1872, and an order made for the sale of certain coal and surface land. All parties appear to have acquiesced in the non-execution of that order for a period of more than five years, during which time nothing had been done in the cause.

On June 22, 1878, Robert Arthurs presented a petition setting forth that he had recently purchased the interest of Clarence M. Johns; that he had not seen the Master but had seen his clerk who had said the Master did not care to be bothered further with said order for sale, and praying the Court to vacate the appointment of Bigelow and appoint some person as Master to make sale of the property. Thereupon the same day the prayer was granted. Upon such showing by a stranger to the record, after so long lapse of time since anything had been done, without the knowledge of the Master, or of any person interested, save the petitioner, the immediate granting of the prayer was extraordinary. If such order can be demanded and obtained forthwith, under such circumstances, a door is open for taking advantage of parties who have been lulled to unwariness.

If a Master who has conducted all the proceedings in an action for partition previous to the order of sale, upon the motion of a plaintiff in absence of all other parties, may be instantly dismissed and another person appointed to execute that order, it would not be surprising if the plaintiff should succeed in purchasing the property at one-twelfth the appraised value. But in this case, action will not be based on the alleged inadequacy of price for which the property was sold; nor upon the appointment of another person as Master as soon as the sale was confirmed.

Section 73 of the Rules in Equity provides that, "All motions for rules or orders, and other proceedings, which are not grantable of course, or without notice, shall be made on application to the Court or a law Judge at chambers, and entered in the Equity Docket, and shall be heard at such time thereafter as shall be assigned therefor by the Court or Judge at the time of the making of the application; and if the adverse party or his solicitor, after notice thereof, shall not then appear, or shall not show good cause against the same, the motion may be heard by any law Judge of the Court, *ex parte*, and granted, as if not objected to, or refused in his discretion."

The power of the Court to appoint or remove a Master is unquestioned, but the proceeding must be in accord with the Rules in Equity prescribed by the Supreme Court. These rules cannot be suspended by the Court of Common Pleas, nor can that Court adopt others inconsistent therewith. It has not been contended, nor could it well be, that the motion or petition was of course. To lay down a clear rule defining such motions as may be made *ex parte*, and distinguish them from such as require notice, has been said to be impossible. Special applications concerning the proceedings in the cause, not regulated by either the general order, or by any clearly defined rule of practice, must always be made upon notice. (Dan. Ch. Pr. 1670.)

After a cause has been referred to a Master, it cannot be withdrawn from that Master without an order of the Court, and such an order will not be made unless on very special occasions, such as the incapacity of the Master from illness to attend to the business, which, to justify such removal, must be shown to be of a very urgent nature. (3 Id. 1847.)

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sal, may be better advised respecting the making of a new appointment. And where such opportunity was not given, the newly appointed Master may do important acts, such as selling property, without the knowledge of any of the interested parties, save those who were instrumental in procuring the change.

We are of opinion that the order of June 22, 1878, was made in violation of No. 73 of the Rules in Equity. The application should have been entered in the Equity Docket, a time fixed for hearing, and due notice given to other parties. The manifest spirit pervading the rules requires a liberal construction in favor of the right of parties to notice of every application affecting their interests. They are interested in an application for the vacation of the appointment of a Master *pro hac vice*, and the appointment of another, and before action thereon, should be allowed a hearing.

This cause having been argued by counsel, upon consideration, it is now considered and decreed:—

1. That the order made June 22, 1879, relieving Thomas S. Bigelow from his appointment as Master, and appointing George I. Whitney in his stead be reversed.

2. That the decree of May 23, 1879, confirming the sale made by said Whitney, be reversed, and that said be sale set aside.

3. That the appellee, Robert Arthurs, pay the costs accrued since the presentment of his application, and the costs of this appeal.

4. That the record be remitted for further proceeding.

Opinion by TRUNKEY, J.

GREEN, J., absent. T. W. B.

January, '82, 332. March 5, 1883.

Borough of Easton v. Neff.

Errors and appeals—Practice—Compulsory nonsuit—Refusal to enter—Municipality—Liability of for injuries—Gutters and pavements—Necessity for—Discretion of municipality in supplying—Negligence—Contributory negligence.

No writ of error lies to the action of the trial court in refusing to grant a compulsory nonsuit.

In such case the only questions for the jury are whether or not the crossing was constructed in a defective and negligent manner so as to cause the injury in question, and also whether or not plaintiff was guilty of contributory negligence.

Error to the Common Pleas of Northampton County.

Case, by Barbara Neff against the Borough of Easton, to recover damages for personal injuries to plaintiff which were alleged to have been caused by a defect in one of the highways of the defendant.

On the trial, before REEDER, A. L. J., the following facts appeared: Plaintiff, a woman of sixty-eight years of age, and a resident of the borough of Easton, was a member of Zion Lutheran Church on Fifth Street, in said borough, and had been for eight or nine years a regular attendant upon the services of that church. In going to and from her residence and the church, she was accustomed to pass over a crossing on Fifth Street at a private alley leading to the rear of a number of dwelling-houses. This crossing consisted of two parallel lines of flagstones, with a paving of cobblestones between and on either side of them, being in their plan of construction precisely similar to the other crossings in the borough of Easton and other towns and cities. The crossing was laid on a level with the adjacent sidewalk, and at either end of the crossing there was a gutter for the carrying off of the surface water from the lots drained by the private alley. These gutters were shown by the testimony to be seven to eight inches wide, and about six inches deep.

On the night of February 24, 1878, Barbara Neff, while on her way from the evening services of her church, stepped into one of the gutters in the crossing and fell, fracturing her left ankle. She was carried home by some of the bystanders, who were attracted by her cries. There were no actual eye-witnesses of the accident who could describe the manner of its occurrence. The plaintiff herself testified to the way in which she fell, and the extent of the injury received, which consisted of a compound comminuted fracture of the left leg near the ankle-joint, and which required surgical treatment for a period of five or six months. Plaintiff was confined to her house for a period of ten months, and was permanently disabled.

Plaintiff brought this suit against the borough of Easton, averring that the arrangement of gut-

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perly made, and that Mrs. Neff's injury was caused by her own negligence.

At the conclusion of plaintiff's evidence, the defendant moved for a nonsuit, which was refused.

The Court charged the jury, *inter alia*, as follows:—

"Now it becomes a question for you to consider whether there was any necessity for the construction of that crossing at that place, either by the owners of that property for the proper enjoyment thereof, or by the borough for the purposes of drainage. If you should find that it was not necessary for purposes of drainage, then the sidewalk should not have been altered, and if you find that in its present condition it is not as safe as a pavement would ordinarily be, then the defendant would be guilty of negligence." (2d assignment of error.)

"You must determine, not from your conceptions, not from your imagination, but from the evidence whether she was guilty of contributory negligence at the time of the happening of this accident. You will remember all the testimony about that. There is really very little testimony upon that subject in the case. What little there is you will consider." (3d assignment of error.)

Verdict and judgment for the plaintiff. Defendant thereupon took this writ, assigning for error the refusal of the Court to grant a compulsory nonsuit, and the portion of the charge above cited.

Frank Reeder, for plaintiff in error.

The Court below should have granted a compulsory nonsuit because there was no affirmative proof of the plaintiff's case. The doctrine that when there is a scintilla of evidence the question must be submitted to the jury is exploded.

Howard Express Co. *v.* Wile, 14 Smith, 206.
Phila. W. & B. R. R. *v.* Stinger, 28 Smith, 219.
Goshorn *v.* Smith, 11 Norris, 438.
Phila. & R. R. R. *v.* Heil, 5 WEEKLY NOTES, 93.
Penna. R. R. Co. *v.* Fries, 5 WEEKLY NOTES, 545.

The parts of the charge in the second and third assignments of error were calculated to mislead the jury.

B. F. Fackenthall, for defendant in error.

It is error to enter a compulsory nonsuit when there is any question of fact for the jury.

P. & S. R. R. *v.* Gazzam, 8 Casey, 340.
Prutzman *v.* Bushong, 2 Norris, 526.
Dillon, Mun. Corp., p. 919.

The charter of the borough (March 19, 1828) gives the town council power to make rules and regulations necessary to promote peace, etc., and to provide for the regulation of markets, improving, repairing, etc., streets, roads, lanes, alleys, etc. It was, therefore, their duty to keep this crossing in safe condition.

The plaintiff in error could not have been injured by the charge of the Court below in regard to the necessity for the crossing.

October 1, 1883. THE COURT. A refusal to enter a compulsory nonsuit is not assignable for error; that has been the uniform ruling of this Court since the passage of the Act of 11th of March, 1836, relating to the District Courts, and of the general Act of 11th of March, 1875, which has application to all the Courts of Common Pleas throughout the Commonwealth. (Bavington *v.* Pitts. and Steub. R. R. Co., 34 Penna. St. 358; Pownall *v.* Steele, 52 Penna. St. 446; U. S. Tel. Co. *v.* Wenger, 55 Penna. St. 262; Mobley *v.* Bruner, 59 Penna. St. 481; Lehman *v.* Kellerman, 65 Penna. St. 489; Ballentine *v.* White, 77 Penna. St. 20.) There is no provision in either of these Acts for removal of the record into this Court by writ of error for revision or review, except where a judgment of nonsuit is entered, and a motion to set that judgment aside has been refused. The remedy of the defendant was by prayer to the Court for instruction to the jury upon the insufficiency of the plaintiff's evidence; he may always prepare the particular point on which instruction is desired, and the Court is bound to give it. The first assignment of error, therefore, does not properly present the question sought to be raised under it for the consideration of this Court.

We are of the opinion, however, that the second assignment is sustained. We cannot agree with the learned Court that it was a question for the jury to consider whether there was any necessity for the construction of the "crossing" at the place where the injury was received. The question of its necessity was for the municipality of the borough of Easton. Her corporate officers had the undoubted right, under the law, to ordain and establish such sewers, pavements, gutters, etc., as they should deem necessary. They had the right to regulate these pavements, gutters, etc., and to fix their heights, grades, widths, slopes, and the forms thereof. They had all needful jurisdiction over this subject matter. It was not a question, therefore, properly referable to the jury, whether the crossing or the gutter therein were necessary, either to the owners of the lots of ground fronting thereon, for the enjoyment thereof, or to the borough in general, for the purpose of drainage or otherwise; the question of their necessity having been adjudicated in their construction by the corporation. If a person by mere accident, and without fault of any one, were killed in a public street, it would be a most unwise and unjust rule of law which could hold the municipality responsible for the injury, because, in the judgment of the jury trying the case, the street was not necessary for public travel, and should never have been opened for public use.

The mere suggestion of the results necessarily arising from such a rule is a sufficient argument

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against its existence. But, under our system, whenever a power is conferred, a corresponding duty is enjoined, and therefore, whilst the law invests the municipality of Easton Borough with the power to establish and construct pavements and gutters, the law, at the same time, requires that they shall be constructed in a reasonably safe and secure manner. It is not pretended that the gutter was out of repair, but that it was improperly constructed. The question for the jury, then, was not as to the necessity for having such a crossing with the gutters, but, assuming their necessity, were they constructed in such a defective and negligent manner as to have occasioned the injury? Was there in the circumstances of the injury any proof of negligence on the part of the borough of Easton in the construction of this crossing? There can be no inference of negligence from the mere fact of the injury. Municipalities are not insurers; they are simply responsible for injuries arising from the negligence of the corporate officers, and the burden of proving that negligence is upon those who allege it. An injury may occur from purely accidental causes, in which no fault can be imputed to any one; we are all liable to the ordinary accidents of life. Was this such an accident, or was it the result of the defendant's negligence? Was this gutter constructed in the usual and ordinary way, and after the plan generally adopted in the borough of Easton and elsewhere? Was it reasonably safe and secure? In passing upon the question of its safety, it was proper for the jury to consider not only the method of its construction, but the length of time it, with others of the same character, had been in use, the number of people who had safely passed over it, whether or not any injuries had ever been similarly received, etc. etc. Was the injury such as the corporate officers might and ought to have seen was likely to result from such a construction. These were matters proper for the consideration of the jury; but the necessity of the crossing was a matter which had previously been settled by another and a competent tribunal. We cannot say that this instruction did no harm to the plaintiff in error.

There was evidence in the cause, some of it inferential in its character, tending to show contributory negligence; this was for the jury. In the use of a public highway, in general, ordinary care is undoubtedly the rule. (Erie *v.* Schwingle, 10 Harris, 384; Lower Macungie Township *v.* Merkhoffer, 21 P. F. Smith, 276; Pittston *v.* Hart, 8 Norris, 389.) Negligence is defined, however, as the absence of care, according to the circumstances. In this case the plaintiff was quite familiar with the crossing; she had passed over it often on her way to and from church; she says she knew it to be a place of danger; she was old and could not see well; the injury was received after night, and the night was dark. Did she exercise a proper measure of care? She was bound to use such care as a prudent person would have used under such circumstances. The measure of duty in the case of a municipal corporation in reference to its streets is but ordinary, and the care of those who use them is the same, whilst the standard of the degree of care is to be measured according to the circumstances. For this reason the question of contributory negligence was peculiarly for the clear and free exercise of the judgment of the jury, under proper instruction from the Court. The language of the Court, that there was really very little testimony upon this subject, was perhaps misleading; but for this alone we might not reverse. All the facts and circumstances attending the injury were to be fully considered on this point.

Judgment reversed, and a venire facias de novo awarded.

Opinion by CLARK, J. S. G. F.

Election Return Board.

February 25, 1884.

In re claim of Frank F. Brightly for a certificate of election as member of Common Council for the Twenty-ninth Ward.

Election to fill a vacancy, where no proclamation is made by sheriff—Judges will merely compute the votes and certify the number received by the highest candidate, but will not issue a certificate of election which might be construed as deciding that there was a vacancy to be filled.

Before HARE, BIDDLE, and ARNOLD, JJ. sitting as Return Judges, to compute and certify the returns of election.

It appeared by the returns that at the municipal election in the city of Philadelphia held on Tuesday February 19, 1884, there were 3734 votes cast for "Frank F. Brightly for the unexpired term of John Hunter, removed" as common councilman from the Twenty-ninth Ward. There was no proclamation by the sheriff that a vacancy existed, and was to be filled at that election. The highest vote received by any successful candidate for the regular terms, voted for at that election, was 4152.

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Amos Briggs, for Mr. Brightly, contended that Mr. Brightly was entitled to a certificate of election, so that he could present his claim to the Common Council. If he should be seated, Mr. Hunter could sue out a writ of *quo warranto*, and if Mr. Brightly were refused admission, he could sue out the writ. But without the certificate, he would not be entitled to a writ of *quo warranto*, not having any evidence of title to the seat, or any interest different from that of other citizens of the ward.

Comm. *v.* Cluley, 6 P. F. Smith, 270.
Comm. *v.* Wisler, 11 WEEKLY NOTES, 513.

The fact that the sheriff's proclamation omitted to state that this vacancy was to be filled, is not sufficient to deprive the voters of that ward of their full representation in the councils. The Acts requiring the proclamation are directory merely.

In re Councilman for the Nineteenth Ward, 11 WEEKLY NOTES, 268.

David W. Sellers, for the sheriff, stated that the sheriff declined to issue a proclamation for this office, because there was no vacancy. The sheriff had received a dispatch from Mr. Hunter stating that he had not removed, and would be present at the next meeting of councils. He read a protest from Mr. Hunter against issuing a certificate of election to his place; and an affidavit made by him at Minneapolis, Minnesota, dated February 21, 1884, stating that he was at that place temporarily; that he was looking about for a place to locate himself, but had made no choice, and intended to return; that his family still remained at his place of residence in the Twenty-ninth Ward, and that he and they have not removed therefrom. Mr. Sellers argued that a certificate of election in the usual form ought not to be issued, and if it was signed that it should be impounded, until the question of vacancy or no vacancy should be determined. He further argued that there should have been a proclamation by the sheriff, to sustain the claim of Mr. Brightly, or, at least, a previous ascertainment of the fact that there was a vacancy to be filled, so that the voters might have notice in fact.

In The Com'th *v.* Meeser (8 Wright, 341) the defendant claimed a seat in the Common Council of the city of Philadelphia, by virtue of a certificate of an election at which he received five votes, being all that were cast for that office. There was no previous proclamation by the sheriff, and the defendant claimed that his ward, which had one member, was entitled to an additional representative by reason of an increased number of taxables residing therein. The Court held that an official list of taxables showing the requisite number, and a proclamation by the sheriff was necessary; and if either was wanting, the election was irregular and defendant's title at least doubtful. The defendant was ousted because there were not enough taxables to entitle his ward to an additional member, and not for want of a proclamation by the sheriff.

Upon a suggestion by Judge BIDDLE, the counsel acquiesced in a certificate of the computation of the vote, without stating anything which might be construed as deciding that there was such a vacancy to be filled at the last election.

THE BOARD. We have concluded to issue a certificate in these words:—

"At an election held February 19, 1884, 3734 votes, being all the votes cast, were cast for 'Frank F. Brightly for the unexpired term of John Hunter, removed,' as member of Common Council from the Twenty-ninth Ward; but whether such vacancy exists, in law or in fact, we have no official knowledge."

In re claim of Henry H. Dambly for a certificate of election as school director of the Thirty-first Ward.

At the same election, there were 99 votes cast for "Henry H. Dambly for unexpired term" of school director of the Thirty-first Ward.

There was no proclamation by the sheriff in this case; and it appeared that it was not generally known to the voters that there was a vacancy to be filled. The highest vote received by any successful candidate for a regular term was 3707.

Joseph M. Pile requested the Judges to withhold the certificate because there was no proclamation.

Foster *v.* Scarff, 15 Ohio State Rep. 532.

Even if a proclamation was not necessary, the voters should have notice of the fact that there was a vacancy to be filled. If the knowledge was possessed by only a few, and kept from the great body of the voters, then there was not a due election.

E. Coppée Mitchell, for Mr. Dambly, stated that there was a vacancy caused by the removal from the ward of Henry S. McBride, a school director, on Friday February 15, 1884, and that Mr. McBride was present in Court, and would admit that he had removed and caused the vacancy. He said that the case of Foster *v.* Scarff, was the only case decided that way, and that the question had been frequently ruled the other way, in cases cited in—

Cooley's Constitutional Limitations, *603, note.

In The People *v.* Cowles, 13 N. Y. 350, a vacancy occurred between the day when the Secretary of State was required to proclaim the offices to be voted for, and the day of the elec-

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tion, and an election to that vacancy was sustained.

Pile in reply. If a vacancy occurs within four days of the election, the board of directors have the power to fill it until the next annual election for directors, when such vacancy shall be filled by electing a person from the district in which the vacancy occurs. Act of May 8, 1854, § 7. In this case the board have not had time to fill the vacancy, and until they do fill it, the electors cannot vote to fill it.

THE COURT. We will issue a certificate of computation of the votes as in Mr. Brightly's case, with a similar addition to it, that we have no official knowledge whether a vacancy exists in law or in fact.

[NOTE.—In Foster *v.* Scarff (cited *supra*), which was a case in which the election of a Probate Judge was in question, the vacancy was caused by the death of the incumbent on October 11, 1861, which was less than thirty days prior to the day of election, and the fact that there was a vacancy was not generally known. It appeared that less than one-fourth of the voters cast their ballots for a single candidate. The election was held to be irregular and invalid. In The People *v.* Cowles (*supra*) a vacancy in the office of Supreme Judge was caused by the death of the incumbent fourteen days prior to the election. There was no proclamation of an election to fill the vacancy, but the several political parties had knowledge of the fact, and made nominations to fill the vacancy, and a full vote was polled. The election was held to be valid. By the Constitution of this State, vacancies happening in any court of record shall be filled by appointment by the Governor to continue till the first Monday of January next succeeding the first general election which shall occur three or more months after the happening of the vacancy.—Const. Art. v. sec. 25.]

Common Pleas—Law.

C. P. No. 1. Dec. 8, 1883.

Allison v. McFadden.

In this case the transcript of a magistrate's judgment was filed in Court, and at the expiration of a year, no declaration having been filed in the mean time, judgment of non pros. was entered under the rule of Court.

Dolman, for the rule, cited.

Simons *v.* Kutz, 1 WEEKLY NOTES, 553.

Cantrell, contra.

The plaintiff should give notice of her intention to treat the transcript as a declaration within a year from filing it.

Gamble *v.* Greaves, 7 Phila. 433.
Ellis *v.* Penington, 2 WEEKLY NOTES, 29.
Seidel *v.* Brecker, 6 Id. 135.

Dec. 15, 1883. THE COURT. Rule absolute.

J. H. W.

C. P. No. 1. Jan. 19, 1884.

Fleming v. Maguire.

Practice—A ca. sa. will not lie upon a judgment in an action of assumpsit upon a warranty, although fraud be averred in the narr.

Rule to quash ca. sa.

This was an action upon a contract, with warranty, for the sale of a mare. The narr. was in assumpsit with a special count, alleging fraud in the warranty, and the plaintiff, after verdict and judgment in his favor, issued a ca. sa. against the defendant.

W. J. Budd, for the rule, cited—

Act of 12 July, 1842, 1 Purdon Dig. 49, pl. 51.

De F. Ballou, contra.

This action was properly begun by capias, as it is in reality an action of deceit, and we have the right to issue a ca. sa. at this stage of it, for the Court has a right to consider the affidavit to hold to bail, which sets out the defendant's knowledge of the fraud committed.

Howard *v.* McKee, 1 Nor. 409.

C. A. V.

February 2, 1884. THE COURT. This action was brought on a warranty. The narr. was in assumpsit; it alleges, however, that there was fraud in the warranty. Under these pleadings and circumstances, we think that a ca. sa. will not lie.

Rule absolute.

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C. P. No. 2. February 9, 1884.

Parmer v. Robert B. Allen, defendant, and the Centennial National Bank, Garnishees.

Garnishee—Interrogatories as to what money defendant may have in garnishee's hands in his wife's name should be answered—The garnishee is a mere stakeholder, and should make full disclosure.

This was a rule on the garnishees to show cause why judgment should not be entered against them for want of sufficient answers.

The facts of the case were these: Judgment confessed on a single bill by Robert B. Allen; fi. fa., and this att. sur judgment issued thereon; the writ of attachment directed the sheriff, "That you attach Robert B. Allen, either in his own name, or in the name of Annie E. Allen;" the first interrogatory was, "Do you know the defendant named in the above stated action or his wife Annie E. Allen, or either, and which of them?" The rest of the interrogatories were double likewise, inquiring as to the business relations of garnishees with defendant and with his wife.

The garnishees answered briefly "No" to all the interrogatories, as far as they related to the defendant, and submitted themselves to the order of the Court, as to whether they should be required to answer further.

J. Alexander Simpson, for the rule, was not called on by the Court.

Harold Goodwin, contra, argued that Annie E. Allen was not a party to the record, and that Robert B. Allen had alone confessed the judgment and was the only defendant, and that, therefore, the bank should be compelled to answer only as to its business with him.

THE COURT. The garnishee is merely a stakeholder, and is bound to make full disclosure in his answers. If he takes upon himself to keep back anything he mixes himself in the fight and must take the consequences.

Leave given the garnishees to file further answers within one week. H. G.

[*Cf.* Corbyn *v.* Bollman, 4 W. & S. 342; Rhine *v.* R. R., 10 Phila. 336; Struber *v.* Klein, 41 Leg. Int. 14.]

C. P. No. 3. February 9, 1884.

Bergdoll v. Toth.

Affidavit of defence law—Notice of filing of copy under Rule III., new rules of Court, p. 7.

Sur rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note. An appearance for defendant was entered immediately after service of the summons, which was returnable January 7, 1884. The copy of note was filed January 21; and on January 25 an affidavit of defendant's attorney was filed setting forth, *inter alia*, "that no notice of the filing of said copy as required by rule of Court was served on deponent nor the defendant; neither was any notice received either by deponent or defendant of the filing of the same until deponent . . . discovered, on the 25th day of January, 1884, that a copy of the note had been filed on the 21st day of January as aforesaid."

Otto Wolff, for the rule.

I contend that I can come into Court any Saturday, on forty-eight hours' notice, and ask for judgment.

Joseph A. Abrams, contra.

THE COURT. Not having given the notice required by the rule of Court, the rule must be discharged.

Per LUDLOW, P. J.

YERKES, J., absent. A. M. B.

C. P. No. 4. November 24, 1883.

Williams v. Dreshler.

Crimes—Act of March 31, 1860—Private offences—Compromise of—When consideration not illegal—The offence of fraud in misappropriating money as broker is but a misdemeanor under the Criminal Procedure Act; it can be settled, and an action had for the amount misappropriated—Further, a judgment may be confessed for it, and the security will be bound with the principal.

Sur rule to open judgment.

The following facts appeared from the depositions, and are stated in the opinion of the Court:—

"The plaintiff, Williams, was indebted to William W. Weigley, to whose use the above judgment is marked, in a large sum. In order to secure a part of the debt Williams procured from the defendant, who is his brother-in-law, the bond and warrant in this case, which he transferred to Weigley. Defendant now seeks to open the judgment entered thereon upon the ground that it was obtained from Williams under a threat made by Weigley, that he would be prosecuted criminally for fraud in misappropriating money as his broker.

"The testimony of the defendant on this point is substantially that he gave the bond to assist Williams; that he knew nothing of any threat of arrest or prosecution, but simply that Williams and Weigley were engaged in stock speculations, and that Williams was in difficulties.

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"The testimony of Williams was substantially that Weigley had made threats of arresting him for fraud in misappropriating money and using stocks for his own benefit deposited by Weigley as collateral, and that, unless he made the amounts good that were due to him he would certainly prosecute him. This was on the same day he got the bond from the defendant and gave it to Weigley."

Geo. Junkin, for the rule.

On a preliminary hearing, it is not necessary to prove the commission of crime. The offence charged was larceny as bailee.

Act of 31 March, 1860, §§ 108, 114, Purd. Dig. 345, 548.
Sharp *v.* Warehouse Co.. 38 Leg. Int. 404.

A bond given in compromise of such an offence is without consideration, and against the policy of the law.

Wharton on Contracts, §§ 483, 509, 338.
Smith's Leading Cases, *502.
Frazier *v.* Thompson, 2 W. & S. 236.

When Dreshler gave the bond, he intended a legal use of it, but the settlement was forced out of Williams by threats. A broker deals with the public, and the offence charged is not of a private nature. Only a *prima facie* case need be made out now.

Com'th *v.* Chatham, 14 Wr. 181.
Riddle *v.* Hall, 3 Out. 116.

Samuel C. Perkins (*John H. Colton* with him), showed cause.

The bond was used for the purpose contemplated; therefore there was no damage, and hence no equity for relief.

Fulton *v.* Hood, 10 Cas. 365.
Steinbaker *v.* Wilson, 1 Leg. Gaz. Rep. 76.

The obligor was not a party to the compromise, and the settlement of the offence was no part of the consideration enuring to him.

Fulton *v.* Hood, 10 Cas. 372.

Embezzlement by a broker is but a misdemeanor, and may be compromised.

Act of 31 March, 1860, § 9, Purd. Dig. 377.
Bredin's Appeal, 11 Nor. 241.

The cases in which the settlement of offences has been held illegal are all of them offences in which the crime was a felony, or a misdemeanor the compounding of which is prohibited by the 10th section of the Act of 1860, and is excepted from the provision of the 9th section of the Criminal Procedure Act.

Moreover, it is not shown by the depositions that any offence was actually committed, nor even that the alleged threats had any influence.

C. A. V.

December 29, 1883. THE COURT (after reciting the facts, *ut supra*). The defendant, therefore, knew for what purpose his bond was about to be used, and it was perfectly fair business, unless forbidden by public policy.

It is well understood that an obligation given for the compounding or settling of a felony or a criminal offence of a public nature is void. Some greater latitude is allowed upon this subject under our law than in some of our sister States, in consequence of the enactment of our criminal code. By the Criminal Procedure Act of March 31, 1860 (Purd. Dig. 377), all cases which are not charged to have been done with intent to commit a felony, or not being an infamous crime, and for which there shall be a remedy by action, may be settled and the defendant discharged.

The offence named in the testimony of Williams is but a misdemeanor under the statute (see Act of March 31, 1860, § 167), and can be settled, and an action had for the amount misappropriated. If an action can be had, a judgment may be confessed and the security bound with the principal.

Under the decisions in Fulton *v.* Hood (10 Cas. 365), Bank *v.* Kirk (9 Nor. 49), Bredin's Appeal (11 Nor. 241), Swope *v.* Ins. Co. (12 Nor. 251) we have no doubt upon the law that this is a bond binding on the defendant. The later case of Riddle *v.* Hall (3 Out. 116) it has been argued, goes further than any of the cases cited, and that the settlement of a misdemeanor, like that of a felony, avoids the bond. A casual reading of the opinion may thus mislead, but upon reading the whole case it will be found that it does not change the law as previously stated, but well affirms it. In that case a mortgage had been given by a married woman in consideration of suppressing a criminal prosecution against her husband and son, for embezzlement of the funds of a savings bank, of which they were respectively president and cashier. The savings bank was not an incorporated institution, and upon this point the case turned.

By the 116th section of the Criminal Code (Act March 31, 1860, Purd. Dig. 348) any officer of a *corporate* bank who shall embezzle, etc., shall be guilty of a misdemeanor. Although no reason is apparent for the distinction, yet, under that section, the officer of an unincorporated institution could not be indicted or prosecuted, but he would be indictable under the 107th section of the same Act, which would make the offence larceny, and thus a felony, and the mortgage there was, for this reason, held to be void.

In the present case no attempt was made to show that a felony or any offence of a public nature had been committed, but simply an offence of a private nature, which the District Attorney, had a bill been found, could have recommended for a *nol. pros.*

The rule to open judgment is therefore discharged.

Opinion by ELCOCK, J. W. H. W.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, MARCH 13, 1884.* [No. 14.

Supreme Court.

Jan. '83, 408. January, 14 1884.

Germantown Passenger Railway Company v. Brophy.

Negligence—Passenger railways—Manner of sitting in a car—Contributory negligence.

Where a person sits in a street car with his arm resting on a window sill wholly within the car, and by a sudden collision his arm is thrown out and broken, his occupying such a position is not contributory negligence in law. In an action by such person against the railroad company to recover damages for his injuries, the question of the plaintiff's contributory negligence is properly submitted to the jury.

Error to the Common Pleas No. 2, of Philadelphia County.

Case, by John Brophy against the Germantown Passenger Railway Company to recover damages for personal injuries suffered through the alleged negligence of the company defendant.

On the trial, before MITCHELL, J., the following facts appeared:—

On September 19, 1881, the plaintiff was riding in a car of the defendant, and was sitting in the rear left-hand corner with his arm resting on the ledge of the window-sill. When the car reached Twenty-fifth and Girard Avenue, where there is a sharp curve, it ran into and collided with another car which was turning the curve at the same time, and in consequence the plaintiff's arm was thrown out of the window and broken. There was some conflict of testimony as to the plaintiff's exact position at the time of the accident. Some of the witnesses testified that he was sitting with his arm out of the window. This was contradicted by others, and the plaintiff himself testified:—

"I was sitting, one leg thrown over my knee and my elbow on the sill against the back of the car. The windows were open and stuck up about two inches, and I had my arm against it, right against top of window sash. I was inside of both windows. . . . I was sitting on the south side of the car in rear end, opposite the second window, when car came to curve; just as car I was in came to curve, the other car struck my car and threw my arm out of the window."

It appeared in evidence that it was a rule of the company that the down car should stop while the other car was rounding the curve.

The defendant submitted, *inter alia*, the following point:—

"(5) If the plaintiff placed his arm on the windowsill and by a jolt of the car it was thrown out of the window, and he was injured, he was guilty of contributory negligence, and he cannot recover." Answer: "I refuse that, gentlemen, as a question of law. I leave it to you. It will be for you to consider as a question of fact whether, if this plaintiff was riding in that way, it was negligence on his part which contributed to the injury."

Verdict for plaintiff for $1000. The defendant thereupon took this writ, assigning for error, *inter alia*, the answer to his point as above.

Samuel Gustine Thompson, for plaintiff in error.

The position of the plaintiff below was an unusual one. He was not sitting as passengers usually sit. If he had been, there could have been no accident. The unusual position in the seat, and the occupation of the window, were the causes that produced the accident.

It is not a case where the accident could have occurred without regard to the position of plaintiff below, but it is one where it could *only* have occurred in *consequence* of the position of plaintiff.

R. R. Co. *v.* McClurg, 6 Smith 297.
Camden and Atlantic R. R. *v.* Hoosey, 3 Outerbridge, 492.
Todd *v.* Old Colony and Fall River R. R., 7 Allen, 207.
Willis *v.* Long Island R. R., 32 Barb. 399.
Hickey *v.* Boston R. R. Co, 14 Allen, 429.

Rudolph M. Shick (*James S. Nickerson* with him), for defendant in error.

The verdict of the jury has established the fact that the arm of the plaintiff below was not out of the window. He was entirely inside the car.

It is submitted that under such a state of facts it was not a case of clear negligence on the part of the plaintiff below to sit as he did, and that it was not the duty of the court to determine it as a question of law.

Pass. R R. Co. *v.* Walling, 1 Out. 61.
Lauderbuck *v.* Pass. R. W. Co., 40 Leg. Intel. 271.
Pass. R. R. Co *v.* White, 7 Norris, 333.

January 28, 1884. THE COURT. The jury found on most ample evidence that the plaintiff in error was guilty of negligence in the act which caused the injury.

The company has two railway tracks, separated by so narrow a space on a curve, that when its cars were passing in different directions they came in collision, whereby the defendant in error, a passenger in one of the cars, was injured. The main contention is whether he was guilty of contributory negligence in producing the injury to

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his arm. The evidence was conflicting as to his position at the time the collision occurred. The company claimed and gave some evidence that his arm projected out of the windows. He testified that while the windows were open, they stuck up about two inches, and he had his arm against the top of the window sash and inside of both windows, and that the collision threw his arm out of the window.

The learned Judge charged if he sat with his arm out of the window when the collision occurred, he was guilty of negligence, and could not recover. Not satisfied with this, the counsel for the company requested the Court to charge if the defendant in error placed his arm on the window sill and by a jolt of the car it was thrown out of the window and he was injured, he was guilty of contributory negligence, and could not recover. The Court refused to so charge, but left it to the jury to find whether if he was so riding it was negligence on his part which contributed to the injury. The company has no just cause of complaint of this answer. It would have been clear error if the Court had instructed the jury that occupying such a position was negligence *in law*. Resting his arm upon the window-sill wholly within the car, created no legal presumption of negligence. If it constituted negligence, it was a fact to be found by the jury, to whom it was submitted, and it was not to be so declared by the Court. In the absence of a collision with an external object his arm was in no danger of injury. He was under no legal obligation to assume or anticipate that the company would run another car against the one in which he was sitting. The window-sill in a railway car is substantially the top of the back of the seat. It cannot be declared negligence in law for a passenger to so rest his arm, and the jury has found it is not negligence in fact. No assignment of error is sustained.

Judgment affirmed.

Opinion by MERCUR, C. J. A. B. W.

Jan. '84, 258. February 7, 1884.

Fairmount Coal and Iron Company's Appeal.

Corporation — Insolvency—Execution—Acts of June 13, 1836, and April 7, 1870.

The proceeds arising from a sale, upon execution, of

Appeal of the Fairmount Coal and Iron Co. *et al.*, from a decree of the Common Pleas of Crawford County, confirming the report of the Auditor appointed to distribute the proceeds of sale of certain property of the Gibbs and Sterrett Manufacturing Company.

The admitted facts of the case were as follows: The Gibbs and Sterrett Manufacturing Company, a corporation incorporated under the laws of Pennsylvania, continued in business until November 4, 1882, when all its personal property was levied on by the sheriff, the proceeds of the sale of part of which is the subject of this controversy.

As early as June, 1882, the company's paper commenced to go to protest. On October 24, 1882, the company executed and delivered to W. B. Roberts, trustee, a mortgage upon its property and franchises, in the sum of $183,-843.24, to secure certain creditors named therein, It had a large amount of property in the Western States which had been attached about this time by Western creditors, and its other available assets had been transferred by its officers and agents as collateral security for its indebtedness.

On November 2, 1882, the company confessed judgment in favor of the Second National Bank of Titusville for $21,102, and in favor of the Hyde National Bank of Titusville for $11,642, on which judgments fi. fas. were issued by virtue of which all the personal property in Crawford County was levied on, as above stated, as was also the personal property in Erie County, by regular process.

On December 11, 1882, the stockholders filed a bill for a receiver, and F. W. Ames was appointed to that office.

On February 12, 1883, a part of the property levied on was sold by the sheriff for $23,532.79, constituting the fund now in question.

The Auditor (H. L. Richmond, Jr.) found the following facts, in addition to the above: That the property sold consisted of the products of the company, and the raw materials used in their manufacture, and was therefore not necessary to the exercise of its franchise; that the corporation, at the time the judgments were obtained, was insolvent. He accordingly reported a decree distributing the fund between the execution creditors, *pro rata*, to the exclusion of the general creditors.

To this report exceptions were filed, by sundry general creditors, which, after argument, were dismissed by the Court below, in an opinion

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As regards a private corporation, insolvency can now be proved otherwise than by a return of *nulla bona*.

Loudenschlager *v.* Benton, 3 Grant, 389.
Hopkins and Johnson's Appeal, 9 Norris, 77.
Bayard's Appeal, 22 Smith, 453.
Hogg's Appeal, 7 Norris, 197.
Reed *v.* Penrose, 12 Casey, 227.
Morawetz on Priv. Corp., pp. 580 *et seq.*

The division of the property of a corporation into two classes, viz., that which is not necessary to the exercise of its franchises, and that which is thus necessary, does not apply to strictly private corporations.

Foster *v.* Fowler, 10 Smith, 30, 32.
Ammant *v.* The President, 13 S. & R. 212.

W. R. Bole (*F. B. Guthrie* with him), for appellees.

Strictly private property of a corporation, other than its franchises, is bound by the lien of executions, and the proceeds thereof must be appropriated to such executions according to their priority.

Youngman *v.* E. & W. R. R , 15 Smith. 278.
Plymouth R. R. Co. *v.* Colwell, 3 Wright, 337.
Reed *v.* Penrose, 12 Casey, 214.
Patterson *v.* Sinclair, 2 Norris, 250.
F. and M. Nat. Bank *v.* Ryan, 14 Smith, 236.

Under the Act of June 13, 1836, §§ 72 *et seq.* it has been universally held, that property held by a corporation, beyond what is actually dedicated to corporate purposes, can be taken and sold on execution.

Plymouth R. R. Co. *v.* Colwell, 3 Wright, 227.
Foster *v.* Fowler, 10 Smith, 30.
Loudenschlager *v.* Benton, 3 Grant, 384.
Canal Co. *v.* Benham, 7 W. & S. 27.

The Act of April 7, 1870, gives the right to sell on execution the property of a corporation dedicated to corporate uses; but under the Act of 1836, the proceeds of private property still go to the first execution creditor. The cases cited by the appellants are consistent with this view.

Bayard's Appeal, 22 Smith, 453.
Hopkins and Johnson's Appeal, 9 Norris, 77.
Foster *v.* Fowler, 10 Smith, 27.

February 18, 1884. THE COURT. In deciding the case before us, it is unnecessary to rule on many of the questions argued. It is found as a fact, that the property of the corporation which produced this fund, was not necessary to the exercise of its franchise. It was the articles which it produced to sell and the material out of which they were manufactured. Whether any of the franchises of the corporation could be sold on execution and the proceeds of the sale be applied on that execution, to the exclusion of the debts due to other creditors, is a question that does not now arise, and we intimate no opinion thereon. We think the proceeds of the property sold may be so applied, and the Court committed no error in thus decreeing.

Decree affirmed and appeal dismissed at the costs of the appellants.

PER CURIAM. E. A. B.

Oct. & Nov. '83, 187. Oct. 18, 1883.

Foster v. Berg & Co.

Trover and conversion—Contract—Construction of writings—Chattel—Notice of title—Letters and telegrams.

The construction of written instruments is always for the Court, except when they cannot be understood without reference to extrinsic facts, and then the jury are to judge of the whole together.

Letters and telegrams are within this rule.

Error to the Common Pleas of Butler County.

Trover and conversion, by J. Y. Foster, against John Berg, Sr., and John Berg, Jr., doing business as John Berg & Co.

Upon the trial, before BREDIN, J., the following facts appeared: A. B. White, an oil speculator, applied to Berg & Co., who were bankers, for a loan of money, $10,000 or $15,000. The first loan was for $10,000. Berg & Co. agreed to loan White this sum, upon his furnishing them 10,000 barrels of oil as collateral security. White applied to J. Y. Foster (the plaintiff), who had oil in the Union Pipe Line Co., for this amount of oil. The matter in controversy appears from the following letter and telegrams, which were given in evidence:—

"April 19, 1875.

To Union Pipe Company, Parker, Pa.—Place to the credit of John Berg & Co. ten thousand barrels pipeage paid oil, to be carried in my tankage, and notify Berg & Co., by wire and letter, that same is to their credit to secure payment of A. B. White's note for ten thousand dollars.

J. Y. FOSTER."

"PARKER, April 19, 1875.

To John Berg & Co., Butler, Pa.—J. Y. Foster has placed to your credit ten thousand barrels oil, pipeage paid, as collateral for payment of a note of ten thousand dollars of A. B. White. Signed,

CHAS. J. EASTWICK."

Mr. Eastwick also wrote to Berg & Co., as follows:—

"PARKER, PA., April 19, 1875.

Messrs. John Berg & Co. Gentlemen:—J. Y. Foster to-day placed to your credit, subject to your orders, ten thousand barrels of oil, pipeage paid, and requested me to notify you by wire and letter of the fact, and that it is collateral for the payment of a $10,000 note of A. B. White. Inclosed press copy of my message to you by W. U. Tel. Co., to-day. Signed,

CHAS. J. EASTWICK."

Berg & Co., upon receipt of this, refused to give White the money until they knew how the credit was, and telegraphed the Union Pipe Co., in whose employ Mr. Eastwick was, as follows:—

"April 19, 1875.

To C. J. Eastwick, Parker, Pa.—Is oil placed to our credit by Foster, as absolutely ours as if we had made purchase of the same?

Signed, JOHN BERG & CO."

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Answer :—

"PARKER, PA., April 19, 1875.

To John Berg & Co., Butler, Pa.—The oil placed to your credit by Foster, is as absolutely subject to your order as if you had purchased it.

Signed, CHAS. J. EASTWICK."

The loan of $10,000 was then made by Berg & Co., upon White's executing his note at ninety days therefor. Subsequently another loan of $5000 was made upon substantially the same terms, Foster transferring 5000 barrels of oil.

The oil was afterwards sold and White's $10,000 note paid out of the proceeds; and the residue paid over by Berg & Co. to White. Foster then brought suit to recover this residue with interest.

The plaintiff submitted, *inter alia*, the following point :—

(4) The telegrams and letter in evidence show that the oil was Foster's, and they are sufficient to visit the defendants with that knowledge.

Answer. We say that is a question for the jury, and not for the Court, and we have submitted it to the jury. Exception.

Verdict and judgment for defendants. Whereupon the plaintiff took this writ, and assigned for error the answer of the Court to plaintiff's fourth point, as above specified.

John M. Thompson (*Chas. McCandless* and *O. D. Thompson* with him), for plaintiff in error.

T. C. Campbell (*J. D. McJunkin* with him), for defendants in error.

November 12, 1883. THE COURT. The construction of a written instrument is exclusively for the Court; except when it cannot be understood without reference to facts not within the writing, and then the jury are to judge of the whole together. If there be a patent ambiguity in the terms of a written contract the Court must solve it; but if ambiguity arises from extrinsic evidence it must be solved by the jury. Not controverting these familiar rules, the defendants contend that under all the testimony the question whether they had notice of Foster's title to the oil at the time it was sold, was for the jury; and, also, that if the Court improperly submitted the construction of the writings to the jury the error was harmless, for the writings fail to give notice of Foster's title.

As the cause was tried the question was submitted upon the writings alone. The plaintiff's fourth point was: "The telegrams and letters in evidence show that the oil was Foster's, and are Upon this point, in the charge, the Court said: "If you are satisfied, under the evidence, that there was notice, that the telegrams and letters were notice, and brought the knowledge to Mr. Berg that the oil was still owned by Foster, and on payment of the notes would revert to him, your verdict should be for the balance or amount the oil sold for in excess of $10,000. On the other hand, if you think these were not notice—did not convey knowledge to Berg that Foster still retained the ownership of the oil, then your verdict should be for the defendants." Thus, the writings were submitted to the jury for construction, and the remaining inquiry is whether such submission injured the plaintiff. If they show that Foster retained ownership of the oil, subject to Berg & Co.'s right as collateral security for White's notes, then the Court should so have instructed the jury, and the plaintiff has cause for complaint.

The telegrams and letter relating to the ten thousand barrels of oil, explicitly state that Foster had placed the oil to the credit of Berg & Co., as collateral for the payment of White's note for ten thousand dollars. They inquired by telegram, "Is oil placed to our credit by Foster ours as absolutely as if we had made purchase of the same?" and received answer: "The oil placed to your credit by Foster is as absolutely subject to your order as if you had purchased it." It is plain that Berg & Co. took the oil as collateral security for the note, subject to their order as if they had purchased it; but upon payment of the note at maturity, the oil would belong to him who gave it as collateral, or upon default of payment and sale of the oil by the holder, the overplus, after satisfaction of the note belonged to the owner of the oil. Foster placed the oil and named the purpose; it had been stored in his own name, and he transferred it to name of Berg & Co.; the direct and natural inference is that it belonged to him. There is nothing to indicate that he sold or gave the oil to White. Had White been the owner, or had the Union Pipe Company held it in his name, Foster could not have transferred it to any body for any purpose. In absence of evidence to the contrary, the man who holds a chattel in his own name and pledges it, is presumed to be the owner, and the pledgee is taken to have knowledge that the pledgor is the owner.

The writings respecting the second lot of oil are not so explicit; but it has not been contended that this lot was received on other terms than the first.

We are of opinion that the plaintiff's fourth

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it should be the duty of the Court to instruct the jury respecting the effect of such extrinsic testimony.

Judgment reversed, and venire facias de novo awarded.

Opinion by TRUNKEY, J.

GREEN, J., absent. J. M. S.

July, '82, 109. April 18, 1883.

Hamilton's Appeal.

Judgment—Partnership—Practice—Index—Notice—Guardian and ward.

A judgment entered and indexed in the name of a firm, without any designation of the individuals composing the firm, will be postponed to the claim of a subsequent lien creditor, without notice, whose judgment is properly indexed.

Such defective entry may be remedied as to subsequent lien creditors, by actual personal notice to them of the judgment.

Where a partner gave a judgment note in the name of his firm for money borrowed by the firm, on which judgment was entered and indexed in the firm name only, and subsequently he confessed judgment in the name of the firm to himself as guardian of several minors, the latter judgment being properly indexed:

Held, that he, as guardian, had such actual notice of the first judgment as would remedy its defective entry, and entitle it to be paid in priority of the judgment confessed to him as guardian.

Appeal of Elizabeth L. Hamilton from a decree of the Common Pleas of Montgomery County, distributing the proceeds of a sheriff's sale of the real estate of Henry E. Newberry and Israel D. Newberry.

The facts of the case, as they appeared before the Auditor, will be found in full in the opinion of the Supreme Court.

The Auditor, John W. Bickel, Esq., filed his report postponing the Hamilton judgment to all the others. All the judgments, except the last two, having been paid, he made the following distribution:—

Balance of fund, less expenses of audit, . .		$714 25
To judgment of Clarissa Eve . .	255 10	
" " Newberry Minors .	459 15	
		$714 25

Exceptions were filed by Elizabeth L. Hamilton on the ground that the Auditor had erred in not distributing the fund to her, and in distributing it to Clarissa Eve and the Newberry Minors. These exceptions were dismissed by the Court, and the Auditor's report confirmed. Elizabeth L. Hamilton thereupon took this appeal, assigning for error the dismissal of her exceptions, and the decree of the Court.

George N. Corson, for appellant.

The judgment was duly filed in the office, entered of record, and indexed against Newberry & Brother, and notice of this fact must be found from the evidence to have been given to all the parties.

If subsequent incumbrancers have actual notice of a judgment so defectively entered (*i. e.*, without setting forth the Christian names of the partners) before their rights attach, it is equivalent to the constructive notice required to be given by the entry on the judgment docket.

York Bank's Appeal, 12 Casey, 458.

The Newberrys were the agents of all the creditors, and through them notice of the Hamilton judgment was given to all.

H. K. Weand (with him *Geo. W. Rogers* and *N. H. Larzelere*), for appellees.

It is not denied by the appellant that her judgment was only indexed as against Newberry & Brother, and not against the members of the firm in their individual names, hence the subsequent lien creditors did not have such constructive notice as affected them.

Ridgway's Appeal, 3 Harris, 181.
York Bank's Appeal, 12 Casey, 458.
Smith's Appeal, 11 Wright, 128.
Hutchinson's Appeal, 11 Norris, 186.

October 1, 1883. THE COURT. The money for distribution in this case is part of the fund arising from the sale on execution of the real estate of Henry E. and Israel D. Newberry, by the sheriff of Montgomery County. The defendants in the execution were brothers, and had been partners for many years in the flour and feed business in Bridgeport, under the firm name of Newberry & Bros. They held the land as tenants in common, having derived their title by inheritance from their deceased father and brother. The sum for distribution is $14,725.

The first judgment appearing of record against the said defendants was that of Elizabeth L. Hamilton, the appellant, which was on the 29th of July, 1878, entered and indexed against "Newberry & Bros." This judgment was entered by the prothonotary upon an obligation under seal, dated July 26, 1878, for $600, payable six months after date; the obligation contained a warrant of attorney to confess judgment in the usual form, and had subscribed thereto the firm name of Newberry & Bros. in the proper handwriting of Henry E. Newberry, one of the partners. The obligation was given for money borrowed for the use of the firm; the co-partner, Israel D. Newberry, was cognizant of the transaction, knew that the money had been received and used by the firm, but it does not clearly appear that he knew of the character of the obligation given as a security for it.

The second lien was a mortgage, executed by Henry E. and Israel D. Newberry to Ann Jane

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Yewdall, conditioned for the payment of $9500, entered January 14, 1879.

Judgments were afterwards entered as follows:—

1. Maria Hagy *v.* Henry E. and Israel D. Newberry, trading as Newberry & Bro. Debt $3000, entered February 11, 1879.

2. Ross Broades *v.* Henry E. Newberry and Israel D. Newberry. Debt $300, entered May 20, 1879.

3. Henry E. Newberry, guardian of Charles E. Adams *v.* Henry E. and Israel D. Newberry. Debt $1388.17, entered May 11, 1880.

4. Clarissa Eve *v.* Henry E. Newberry and Israel D. Newberry. Debt $1100, entered January 27, 1881.

5. Henry E. Newberry, guardian for several minors, *v.* Henry E. Newberry and Israel D. Newberry. Debt $2400, entered January 27, 1881.

Other judgments were entered against the defendants, and appear in the certified lists, but it is deemed unnecessary to state them, as the above are all that are involved in the questions raised in this distribution.

Objection is made to the allowance of the Hamilton judgment; first, upon the ground that it is entered and indexed in the name of Newberry & Brothers, without naming or giving any sufficient designation of the persons constituting that firm, by the addition of the Christian names. This is undoubtedly a valid objection, when made by subsequent lien creditors without notice. (Ridgway, Budd & Co.'s Appeal, 3 Harris, 181; York Bank's Appeal, 12 Casey, 458; Smith's Appeal, 11 Wright, 128; Hutchinson's Appeal, 11 Norris, 186.) It is the duty of the plaintiff to see that his judgment is properly entered and indexed, so that it may give constructive notice to subsequent purchasers and lien creditors, and his recourse for an improper entry is against the prothonotary.

Actual personal notice of the judgment to subsequent purchasers and lien creditors, before their rights attach, will supply such defective entry and index as to them. (Smith's Appeal, 11 Wright, *supra*).

Was there, then, such actual personal notice to the subsequent lien creditors as will admit the Hamilton judgment to participate in this distribution?

Setting apart as much of the money realized by the sheriff as is sufficient to pay the Hamilton judgment we may ascertain how far the remainder of the fund will reach, in the payment of the other liens, as they appear of record, and thus discover with whom Mrs. Hamilton has her controversy. We are not informed of the amount of the debt, interest, and costs of each of the several liens, but the Auditor reports that the sheriff has thus applied the money, and that after paying off and discharging the Yewdall mortgage, and the judgment of Maria Hagy, Ross Broades, and Henry E. Newberry, guardian of Charles E. Adams, there remains $800, which the sheriff has paid into Court for distribution.

There could, in the nature of the case, be no controversy between Elizabeth L. Hamilton and any one, or all of these creditors, thus reached in the distribution; they are entitled to their money, whether they had actual notice or not; even allowing the Hamilton judgment to share in the distribution, they are entitled to their claims. It is, therefore, immaterial and unnecessary to inquire whether there were any facts or circumstances which gave them, or any of them, notice of the Hamilton judgment; the fact of such notice to them might be admitted, and the distribution, as to them, would not be affected thereby. The controversy, therefore, necessarily arises between Elizabeth L. Hamilton, on the one part, and Clarissa Eve, and Henry E. Newberry, "guardian of several minors," whose judgments were entered on the same day, January 27, 1881, on the other part.

It cannot be pretended that there is any proof of actual personal notice to Clarissa Eve; a careful examination of the testimony discloses no fact or circumstance affecting her with notice, actual or constructive. The Auditor finds that, after deducting expenses of the audit, she is entitled to $255.10, being her *pro rata* share of the fund in Court, and we can find nothing in the law or facts in this case which can change this result.

Clarissa Eve, being thus eliminated from the controversy, it only remains for us to pass upon the rights of Mrs. Hamilton, as against the judgment of Henry E. Newberry, "guardian of several minors," for $2400, entered January 27, 1881. This judgment is peculiar in form, the defendant, Henry E. Newberry, being the plaintiff therein, but as the judgment recites, in a general way, and the testimony discloses more specifically the use for which it is held, the judgment is probably sustainable in equity, in relief of the persons interested therein. The plaintiff in this judgment, being the legally appointed guardian of those for whose use the same was taken, is the only person to whom notice could be given touching the rights, interests, and estates of his wards to have any legal force or effect. Notice to the minors themselves would certainly avail nothing, but notice to their guardian is effective according to its purpose.

If, therefore, Henry E. Newberry, "guardian," had actual notice of the Hamilton judgment, the effect of that notice would be communicable to the minors whose interests he represented. He was one of the firm of New-

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berry & Brothers. He knew how that firm was constituted; that he had himself given the obligation to Mrs. Hamilton, and that obligation contained a warrant to confess judgment. He also knew that she had entered it upon record as a lien; he himself states that he asked Mr. Conard, Mrs. Hamilton's grandson, before the Yewdall mortgage was negotiated, to have the lien of that judgment released, in order that the mortgage might be entered as a first lien. He certainly, therefore, knew all about it; more accurate and complete notice could not be established in any case.

The judgment confessed, as between the parties, without indexing, was sufficient to create a lien upon the defendant's lands. (York Bank's Appeal, *supra.*)

The obligation, it is true, was signed only by Henry E. Newberry in the name of the firm; but, as we have stated, it was given for money borrowed for the use of the firm, and Israel D. Newberry has done nothing to impeach the validity of this judgment as to him; if he is satisfied, judgment creditors cannot complain; if one partner confess a judgment against a firm for a partnership debt, another creditor of the firm can interpose no objection to the judgment on that account. It is only the non-assenting partner that can question the validity of the judgment; if he permits it to stand, it binds both. (Grier & Co. *v.* Hood, 1 Cas. 430.)

We are of opinion, therefore, that the amount awarded to the judgment of Henry E. Newberry, "guardian of several minors," should be applied to the judgment of Elizabeth L. Hamilton. Clarissa Eve cannot complain of this, as she receives, upon her judgment, just what she would have received if the Hamilton judgment were entirely excluded from the distribution. Nor can the other junior judgment creditors complain, as the fund can in no case reach them.

The decree is reversed, and it is ordered that the sum of $459.15, awarded to Henry E. Newberry, guardian, etc., be applied to the judgment of Elizabeth L. Hamilton; and it is ordered that the money be paid out accordingly, and that the appellee pay the cost of this appeal.

Opinion by CLARK, J. T. R.

Jan. '82, 461. May 7, 1883.

King et al. v. Commonwealth, at suggestion of Solomon, to use of Sartwell.

Sheriff—Sheriff's official bond—Execution—

money was made. The sheriff made return that after deducting costs he had paid the balance of the sum realized into Court, and an entry in the docket was duly made to that effect. A. thereupon procured an order of Court authorizing him to withdraw the amount, and in pursuance of this order the prothonotary paid him said sum. Subsequently it was discovered that the sheriff had not paid the money into Court. A. thereupon assigned all his rights in the premises to the prothonotary, and a suit was brought by the Commonwealth, at the suggestion of A., to use of the prothonotary, on the sheriff's official bond, the breach assigned being a false return:

Held, that the rights of the use plaintiff, if any, were derived entirely by assignment from A., but that A., having received the amount of his claim in full under order of the Court, and not being bound to refund to the prothonotary the money received by him, had no cause of action against the sheriff, and hence could assign none to the prothonotary:

Held, therefore, that the action could not be maintained.

Error to the Common Pleas of McKean County.

Debt, by the Commonwealth, for the use of Chester K. Sartwell, against Chester S. King, Enoch B. Dolly, and Horace B. King, upon the official bond of the first-named defendant, as sheriff of McKean County. The other two defendants were sureties on said bond.

On the trial, before WILLIAMS, P. J., the following facts appeared: Defendant, Chester S. King, while acting in his office of sheriff, collected by a fi. fa. a sum of money in an action by S. Solomon against D. Whitestone. He indorsed on his writ that the money was paid into Court, and returned the writ into the office of the prothonotary. The return on the writ was duly entered in the execution docket. S. Solomon, the plaintiff in the execution, obtained leave from the Court to take the money, and, on presenting the Court's order, the prothonotary paid it to him. Afterwards, the prothonotary, Chester K. Sartwell, discovered that he had never received the money from the sheriff, and that the sheriff's return was false. This action was then begun against the sheriff at the suggestion of Sartwell: but the record was afterwards amended so as to read "at the suggestion of S. Solomon, for the use of Chester K. Sartwell," etc., Solomon having assigned any rights he had against the sheriff to Sartwell.

Plaintiff requested the Court to charge that if the jury believed that the money had not in fact been paid into Court, or into the hands of Sartwell, the prothonotary, by the sheriff, and that Sartwell had paid the money to the execution plaintiff under a mistake caused by the false re-

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him the right to recover the amount of the same from the sheriff and his sureties in this action. *Affirmed.*

That the payment by Sartwell, if the facts are found as above stated, operated as an equitable assignment to him of the rights of the execution plaintiff, which, when followed by the legal assignment of the execution plaintiff gave Sartwell the same right to recover from the sheriff as the plaintiff would have had if Sartwell had not paid him the money. *Affirmed.*

The defendant requested the Court to charge as follows:—

1. That by the plaintiff's own showing the payment by Sartwell to Solomon was a voluntary payment without fraud or deceit on the part of Solomon, and that, therefore, Sartwell could not recover it back in an action against Solomon. *Refused.*

2. That Solomon having received his money, and standing in a position where it cannot be recovered back from him, he cannot recover in this action. *Refused.*

3. That even if Sartwell paid the money by mistake, not having received the same from King, his remedy would be by action in his own name against King individually, and not on his official bond. *Refused.*

4. That, under the plaintiff's own evidence in the case, no recovery can be had upon the official bond of Sheriff King. *Refused.*

Verdict and judgment for the plaintiff. The defendant thereupon took this writ, assigning for error, *inter alia*, the affirming of plaintiff's points, and the refusal to affirm defendant's points as above.

A. G. Olmsted, and *Sterrett & Rose*, for plaintiff in error.

Sartwell's right to recover depends entirely on the rights of Solomon at the time of the assignment; and at the time of the assignment Solomon had received his money in full. He received it without fraud or deceit, it was a voluntary payment, and it could not be recovered back from him.

Morris *v.* Tarin, 1 Dall. 147.
Keener *v.* Bank of U. S., 2 Barr, 237.
Natcher *v.* Natcher, 11 Wr 496.
R. E. S. I. *v.* Linder, 24 Sm. 371.
Diechman *v.* Northampton Bank, 1 Rawle, 54.
Rogers *v.* Huntingdon Bank, 12 S. & R. 79.

Solomon, therefore, had nothing to assign to Sartwell.

R. Brown, B. D. Hamlin, M. F. Elliott, for defendant in error.

The question is not whether Sartwell could recover back the money he paid to Solomon, by paid. The mistake of the prothonotary cannot possibly discharge the sheriff from liability to account for money which he has collected but not paid. As between Solomon and the sheriff the execution is not satisfied. Solomon, therefore, had a right of action against the sheriff, and he has assigned it to Sartwell.

Lithcap *v.* Wilt, 4 Phila. 64.
Brice's Appeal, 9 WEEKLY NOTES, 230.
Murphy *v.* Flood, 2 Grant, 411.
Bradford *v.* White, 1 Phila. 15.
Tybout *v.* Thompson, 2 Brown, 27.
Miles *v.* Stevens, 3 Barr, 37.
Thomas *v.* Brady, 10 Barr, 164.
Marble Co. *v.* Burke, 5 WEEKLY NOTES, 124.
Dunn *v.* Megarge, 6 Id. 204.

October 1, 1883. THE COURT. The controlling question in this case is, whether, upon the following state of facts, the plaintiff below was entitled to recover. In November, 1878, a writ of fieri facias, at the suit of S. Solomon against D. Whitestone, was issued and placed in the hands of plaintiff in error, King, the sheriff of McKean County. It is conceded the money was made by levy and sale of defendant's personal property, and the writ, showing that fact, was returned into the prothonotary's office two weeks before the return day. The sheriff's return, indorsed on the writ, setting forth that the property levied on was sold for $1102.26, and, after applying a portion thereof to costs, "the balance of the money, $1030.71, paid into Court," was duly entered on the execution docket by one of the prothonotary's deputies; and thus the matter rested until after the return day.

Adverse claimants of the fund having, in the mean time, relinquished their right thereto, the Court, on application of counsel for Solomon, the plaintiff in the execution, authorized him to take out of Court the money appearing by the sheriff's return to be there. Upon presentation of the order to Prothonotary Sartwell, the money was forthwith paid to the plaintiff in the execution, and by him receipted for in full of his judgment and interest. The Court in making the order, the prothonotary in promptly obeying it, and the execution plaintiff in receiving and receipting for the money, all acted upon the assumption and belief that it was in Court as represented by the sheriff's return. Some time afterwards, however, the prothonotary, alleging the money had not been paid into Court, or to him by the sheriff, caused this suit to be brought against the latter and his sureties on his official bond to recover, at the suggestion of Solomon, the amount paid to the latter in pursuance of the

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money made on the writ, nor hath he rendered the same to the said Solomon, the plaintiff therein; wherefore, an action hath accrued to demand and have of the defendants the said sum of money, etc.

The main question of fact presented by the pleadings and evidence, viz., whether the sheriff did, in fact, pay the money into Court, as averred in his return, was submitted to the jury, and they by their verdict found in effect that he did not.

Assuming it, then, to be true that the money made on the writ was not paid into Court or to the prothonotary, the use plaintiff below, the question is, whether, upon the undisputed facts above stated, the suit, at the suggestion of Solomon, in his own right, or to the use of Sartwell, can be maintained. If it can, there is no error in the record that will justify a reversal of the judgment.

The suit is in the name of the Commonwealth, at the suggestion of Solomon, to use of Sartwell, the prothonotary. The only authority the latter appears to have had for using the name of Solomon is contained in the writing executed by the latter three months after he received his money. That paper contains a recital of the facts, as claimed by Sartwell, followed by an assignment of Solomon's interest in the judgment against Whitestone, etc., in the following words: "I do hereby transfer, assign, and set over unto the said Chester K. Sartwell the above judgment, and any right of action I may have against the said Chester S. King, or that may accrue by reason of the above stated facts, without any recourse to me, and it is expressly understood that this assignment gives the assignee no right to sue for or collect the above judgment from D. Whitestone, the defendant, he having paid the judgment, interests, and costs in full to the sheriff."

It must be conceded that Sartwell's right to recover depends entirely upon the rights of Solomon. If the latter, after his claim was fully paid and satisfied, had no right of action, there was nothing upon which the assignment could operate. Solomon was clearly entitled to his money. The record made up under the supervision of the prothonotary showed that it had been collected by legal process and paid into Court; and the Court, acting on the faith of what there appeared, ordered it to be paid to him. That order was recognized and obeyed by the prothonotary, and, so far as appears, it has never been rescinded or modified. Having thus received his money in good faith, and in pursuance of the order of Court, in satisfaction of his return it to the prothonotary, or any one else, nor could he have been compelled to do so. If there be any question as to the correctness of this position, the doubt should be resolved in favor of the suitor, and against the public officer who so keeps his accounts that he may be mistaken as to whether trust funds are in his hands or not. Public policy forbids that those who are free from blame should be subjected to the inconvenience, and sometimes loss, that too frequently results from loose methods of transacting public business. The entry on the execution docket make up under the supervision of the prothonotary was notice to Solomon that his judgment had been collected and paid into Court. The Court authorized him to take it out, and in perfect good faith he received it in satisfaction of his claim. If that part of the sheriff's return which represented the money as having been paid into Court was false, it was the duty of the prothonotary to know it and refuse to perpetuate the error by making a record thereof. For the reasons suggested, we think it is clear that Solomon was under no obligation to refund the money; and, if that be so, he had no right of action, or claim to assign. He was not aggrieved by anything that the sheriff may have done, or omitted to do, and hence he had no right of action against the sheriff and his sureties, which he himself could assert, or authorize any one else to assert in his name.

We are, therefore, of opinion that there was error in affirming the points submitted by the plaintiff below, and in refusing to affirm defendant's points. The remaining assignments do not call for special notice. They are not sustained.

Judgment reversed.

Opinion by STERRETT, J.

CLARK, J., absent. S. G. F.

March 3, 1884.

Ex parte John McGinnis.

Insane criminals—Act of May 14, 1874—Application for appointment of commission to report on mental condition of a convicted prisoner.

Motion for appointment of commission to inquire into and report on the mental condition of John McGinnis, convicted of murder in the first degree, and imprisoned in the Philadelphia County Prison.

This was an application under the provisions of the Act of May 14, 1874 (P. L. 160, Purd. Dig. Supplement, 1893, pl. 3), which provides that upon the certificate of certain officials

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sons to inquire into and report upon the mental condition of the prisoner, and if they report that the prisoner is of unsound mind and unfit for penal discipline, such Court may make an order for the removal of such prisoner to a hospital for the insane.

In support of the application was presented the sworn certificate of the General Agent of the Board of Public Charities (one of the officials named in said Act) to the effect that John McGinnis "is believed to be insane by four physicians [naming them] who have examined him for the purpose of discovering his mental condition; whose affidavits are annexed; and affiant distinctly states that he has never seen the prisoner, and has no personal judgment in the matter to express; that he makes the affidavit at the request of counsel for the prisoner, solely to give the Court jurisdiction under the Act of May 14, 1874." The affiant, therefore, requested that said John McGinnis shall be removed to a hospital for the insane.

The annexed affidavits of Drs. S. Preston Jones, C. K. Mills, T. H. Andrews, and W. P. Moon, set forth that after full and careful examination and inquiry of the mental condition of the prisoner, each affiant believed him to be insane and in an unfit mental condition to undergo capital punishment.

Hampton L. Carson (with him *Jos. De F. Junkin*), for the motion.

This Court has jurisdiction; the Constitution provides that the justices shall be by virtue of their office justices of Oyer and Terminer and general jail delivery in the several counties. Unless your Honors grant this application, the execution, fixed for to-morrow, will take place. We have exhausted every other effort to have the prisoner's insanity legally established without avail.

[MERCUR, C. J. Have you made any application to the Court of Oyer and Terminer in which the prisoner was convicted?]

Yes, we applied to that Court this morning, on this same application and affidavits, and the Court refused the application, PEIRCE, J., intimating that if such relief was grantable at all it would require the judgment of the Supreme Court. It being impracticable, from want of time, to remove the record, on that decision, to this Court in the usual way, by certiorari, or writ of error, writ of error brought the case to this Court, where it was fully argued. We considered all the evidence as well as the law, and affirmed the judgment. We have information of the fact of the commission appointed by the Governor to examine the question of the prisoner's sanity, and the action of the members of that commission. The Governor, after having given careful consideration to the reports of the commissioners, has declined to interfere with the sentence of the Court.

We are now of opinion that it would establish a very bad precedent if we, as a Court of last resort, should, on the eve of the day fixed for execution, interfere with the well considered exercise of discretion by the Governor. While it is eminently proper for the prisoner's counsel to exhaust every effort in his behalf, we do not think the circumstances of the case, or the Act of Assembly cited, warrant such interference on our part, and we are therefore constrained to refuse the application.

Motion dismissed.

Common Pleas—Law.

C. P. Dauphin County. December 6, 1883.

Commonwealth ex rel. Attorney-General v. Sinking Fund Commissioners.

Commissioners of the Sinking Fund—Mandamus—Jurisdiction of the Common Pleas of Dauphin County—Act of May 25, 1881.

Alternative mandamus, commanding Silas M. Baily, State Treasurer, John A. Lemon, Auditor-General, and W. S. Stenger, Secretary of State, as Commissioners of the Sinking Fund, under the Act of April 22, 1858 (Purd. 1333), to direct the fiscal agent of the State to invest the surplus balance of said fund in accordance with the requirements of the Act of June 6, 1883 (P. L. 75), or to show cause why the same should not be done.

W. S. Stenger, Secretary of the Commonwealth, filed a separate return to this writ.

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Lewis C. Cassidy, Attorney-General, and *Robt. Snodgrass*, Deputy Attorney-General, for Commonwealth.

Weiss and *Gilbert*, for the Auditor-General, and State Treasurer.

January 24, 1884. THE COURT. An alternative writ of mandamus was issued on the petition of the Attorney-General, in the above stated case, commanding the respondents, as Commissioners of the Sinking Fund, to authorize and direct the fiscal agent of the State to purchase loans of the Commonwealth or bonds of the United States at market rates with the balance remaining in the sinking fund in excess of the amount necessary to pay the interest on the State debt, or show cause why they should not do so, in accordance with the requirements of the Act of June 6, 1883.

To this writ Wm. S. Stenger, Secretary of the Commonwealth, made a separate return which is not now before the Court.

John A. Lemon, Auditor-General, and Silas M. Baily, State Treasurer, joined in a return which, in addition to the facts therein recited, contained virtually a demurrer to the jurisdiction of the Court. By agreement of counsel, with the consent of the Court, the question of jurisdiction thus raised was separately argued, and is the only question now to be decided. The ground of the demurrer is that the jurisdiction of the Court depends wholly upon the Act of May 25, 1881, which enacts that "the Court of Common Pleas of the county in which the seat of government is or may be located shall have the power, and it shall be required to issue the writ of mandamus to the Governor, Lieutenant-Governor, Secretary of the Commonwealth, Attorney-General, Secretary of Internal Affairs, Superintendent of Public Instruction, State Treasurer, and Auditor-General, and thereupon like proceedings shall be had therein as in any other writ of mandamus issued out of the Courts of Common Pleas in this Commonwealth." And the respondents claim that the Court has not jurisdiction to entertain this action against them because "the writ of alternative mandamus is issued against them in their character and capacity as Commissioners of the Sinking Fund, and that Commissioners of the Sinking Fund are not designated or included among any of the officers, persons, or classes in said Act mentioned against 311), and these cases show clearly that we have no jurisdiction unless by virtue of this Act. Notwithstanding the ingenuity with which it was argued, and the numerous objections which were made to the jurisdiction by the able counsel for the respondents, we consider the question one easy of solution. The Act subjects the Secretary of the Commonwealth, the Auditor-General, and State Treasurer to the jurisdiction of this Court in cases of mandamus. And the Act of April 10, 1849, prescribes that these officers, for the time being, shall be Commissioners of the Sinking Fund. There is, therefore, no separate, independent office of Commissioners of the Sinking Fund, and the statement in the demurrer that "Commissioners of the Sinking Fund are not designated or included among any of the officers, persons, or classes in said Act mentioned," cannot be accepted as an accurate statement of the fact. For it may with strict accuracy be said that whenever the Secretary of the Commonwealth, the Auditor-General, or the State Treasurer is named, a Commissioner of the Sinking Fund is "designated." So when the people elect either of these officers, they elect a Commissioner. And whenever either qualifies and enters upon the duties of his office, he takes upon him the duties of a Commissioner. And the Act of May 9, 1874, section 16, provides "that the neglect or refusal of the State Treasurer or any of the Commissioners of the Sinking Fund to perform the duties in said Act enjoined on them shall be a misdemeanor in office, for which they or either of them may be impeached, and, if found guilty, removed from office." The duties enjoined in said Act are those of the Commissioners of the Sinking Fnnd.

But if we ask in what office would such neglect or refusal be a misdemeanor, or from what office shall they be removed on conviction, there can, in the very nature of the case, be but one answer. The State Treasurer cannot be removed from the office of Commissioner of the Sinking Fund, for so long as he is State Treasurer he is *ipso facto* a Commissioner. But if it would be a misdemeanor in the office of State Treasurer for that officer to neglect or refuse to perform the duties of a Commissioner of the Sinking Fund, it must follow that these are part of his official duties. But the Act was passed and the jurisdiction was conferred for the express purpose of providing a mode by which the performance of

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We have carefully examined the numerous Acts of Assembly cited by the counsel for respondents, some of which give to these officers additional salary as Sinking Fund Commissioners, and others prescribe duties to be done by the State Treasurer with respect to the sinking fund, separate and apart from the Commissioners, and reports to be made by him to these Commissioners. But we are unable to see how any of these Acts can affect the result.

Each of the officers who are, by virtue of their offices, Commissioners of the Sinking Fund, have separate official duties to perform, and the sum of their action as a Board of Commissioners is made up of their individual action as its members. And the Court cannot have jurisdiction of, or act upon, the collective "Board" as a distinct entity; the subjects of the jurisdiction are the several members, and the Board is controlled by controlling the action of these individuals. We are not unmindful that the Act of May 25, 1881, is a remedial act, and ought to be, if necessary, liberally construed to prevent the mischief of a total want of jurisdiction, but we do not consider it needful to invoke the aid of this principle.

We think it abundantly clear that we have jurisdiction of the respondents in this case, and the demurrer is, therefore, overruled.

Opinion by SIMONTON, P. J. P. C.

C. P. of Northampton Co. Feb. 25, 1884.

Gross v. Reinhard.

Mortgage—Not a conveyance of land within the Statute of Frauds—Parol gift of, valid.

Rule for a new trial.

Ejectment, by Peter Gross, administrator of Caroline Jacoby, against Elizabeth Reinhard, for certain land in the borough of Bath.

On the trial, before SCHUYLER, J., the following facts appeared: In 1875 the defendant executed to Caroline Jacoby, her mother, a mortgage for the sum of $800. After its execution, Mrs. Jacoby, in the presence of witnesses, handed the mortgage back to her daughter, saying: "Here, Elizabeth, this is yours; I have done enough for my other children. It is time I do something for you." The defendant had possession of the mortgage from this time until after Mrs. Jacoby's death in 1881, when the administrator obtained possession of it, had it recorded, and brought this suit.

The Court charged the jury that if they believed from the evidence that Mrs. Jacoby intended the mortgage to be a gift to the defendant, they should render a verdict in her favor.

Verdict for defendant.

The plaintiff filed several reasons for a new trial, being mainly that a mortgage is a conveyance of land within the Statute of Frauds, and therefore incapable of gift by parol.

H. J. Steele and *R. E. James* showed cause.

A mortgage, though in form a conveyance of land, is in substance but a security for debt, and a mere chose in action.

McCall *v.* Lennox, 9 S. & R. 304.
Rickert *v.* Madeira, 1 Rawle, 327.
Asay *v.* Hoover, 5 Barr, 21.
Lennig's Estate, 2 P. F. Smith, 138.
4th Kent's Comm., 160.

The forgiving of the mortgage debt, although by parol, will draw the land after it as a consequence.

Rickert *v.* Madeira, 1 Rawle, 325.

A mortgage is not a conveyance of land within the Statute of Frauds.

Martin *v.* Mowlin, 2 Burrows, 978.
Green *v.* Hart, 1 Johnson, 589.
Brown on the Statute of Frauds, § 66.
1 Powell on Morgages, 187.

A mortgage is capable of gift by parol.

Richards *v.* Syms, Barnardiston, Ch. Cases, 90.
Hurst *v.* Beach, 5 Madd. 351.
Duffield *v* Elwes, 1 Bligh, N. S. 497.
Hackney *v.* Vrooman, 62 Barb. 650.
Montgomery *v.* Miller, 3 Redf. (N. Y.) 154.

Henry W. Scott, R. E. Wright, Jr., and *T. F. Gross*, for the rule.

A mortgage is the conveyance of an estate, and the title which passes by it is as absolute as that by deed.

Tryon *v.* Munson, 27 P. F. Smith, 262.
Berryhill *v.* Kirchner, 15 Norris, 489.

A parol mortgage cannot be created in Pennsylvania because of the Statute of Frauds.

Bowers *v.* Oyster, 3 P. & W. 239.
Ins. Co. *v.* Dovey, 14 P. F. Smith, 260.

Interests in land cannot be created or surrendered by parol.

Schitz *v.* Dieffenbach, 3 Barr, 233.

C. A. V.

March 3, 1884. THE COURT. "A mortgage, though in form a conveyance of land, in virtue whereof the mortgagee may maintain ejectment and recover, and hold the possession until paid, is nevertheless in substance only a security for a debt. It is but a chose in action—personal estate. A devise of a man's personal estate carries with it all his mortgages. A mortgage is discharged by payment, and an assignment of the debt transfers the right to the mortgage itself; for whatever will give the money secured by the mortgage, will carry the mortgaged premises along with it." (Moore *v.* Cornell, 18 P. F. Smith, 322; see, also, Tryon *v.* Munson, 27 Id. 262.) If a case still more directly in point be required it will be found in Rickert *v.* Madeira (1 R. 328), where it is held that, "forgiving the debt although by parol, will draw the land after it as a consequence." . . .

Rule discharged.

Opinion by SCHUYLER, J.

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C. P. No. 3. February 9, 1884.

Jane Gross, Executrix of John F. Gross, Deceased, v. H. L. Cloud.

Promissory note—Suit by holder against indorser—Want of consideration—Notice of dishonor—Affidavit of defence law.

Rule for judgment for want of a sufficient affidavit of defence.

Action on a promissory note of which the following is a copy:—

"$250. Philadelphia, October 26, 1877.

Two months after date I promise to pay to the order of H. L. Cloud two hundred and fifty dollars, without defalcation. Value received.

(Signed) ENOCH W. CLOUD.

(Indorsed) H. L. Cloud,
John F. Gross."

The affidavit stated that the note sued on was one of a series given or indorsed by Enoch W. Cloud, and cashed by plaintiff's decedent, John F. Gross; that said Gross had solicited affiant to permit the use of his name on a renewal of one of these notes in order to facilitate its discount, alleging that the indorsement would accommodate him (said Gross), and not obligate the affiant. That affiant had never received any consideration for the use of his name; that Enoch W. Cloud, who had borrowed the money from Gross, had paid him on these notes up to December 29, 1877, usury to the amount of $52.50; that the note sued on had been taken up and paid by said Enoch W. Cloud when it fell due by another note, without affiant's name upon it; that affiant never received notice of the dishonor of this note from said Gross, or from any agent of his, though the said Gross lived only a few squares from affiant; that said Gross never made any demand on affiant for payment of said note, though they had numerous business transactions together subsequent to the year 1877, since which time affiant has collected considerable sums of money from said Gross.

Harold Goodwin, showed cause.

The affidavit discloses a denial of the receipt of consideration by defendant. He is sued by an immediate party, who solicited the indorsement, and it is settled that between parties, want of consideration is a good defence.

Byles on Bills, p. 127.

The averment of want of notice is sufficient.

Simpson, Jr., for rule.

The affiant deposes that he never received notice from Gross or his agent. He should have averred want of notice from any one.

THE COURT. Rule discharged. A. M. B.

C. P. No. 4. Dec. 7, 1882, Dec. 13, 1883.

Fidelity Insurance, etc., Co., Guardian, v. Norris.

Equitable jurisdiction—Trust—Account—Discovery—Infancy—Pleadings—Act of April 18, 1845, § 3—A bill in equity will lie against a trustee of realty limited to the use of his wife for life, and after her death to the use of her surviving children, who has continued to hold and enjoy the profits of the realty after his wife's death on the supposition that he was entitled thereto as tenant by curtesy—A mistaken and honest payment by the trustee of an infant's share to one whom the trustee believed to be the owner thereof is no defence to a claim by the infant.

Hearing on bill and plea, motion for appointment of a Master, and on bill, answer, and proofs.

The bill averred that certain realty was devised to the defendant in trust for his wife for life, and on her decease to the use of her surviving children, of whom the plaintiff's ward's father was one; that the wife died in 1861, and the plaintiff's ward's father in 1865; that after his wife's death the defendant continued in possession of the realty, and did not convey the same to the children until October 31, 1882, when a decree in partition was made and the property was divided. The bill prayed discovery and an account of the income and profits of the realty.

The defendant pleaded that two days after the filing of the bill the infant became of full age and had not been joined with or substituted for her guardian in the suit.

J. Rodman Paul and *A. Sydney Biddle*, for plaintiff.

A guardian is trustee for the ward's lands on the principle derived from the common law relation of guardianship in socage, and may bring an action in his own name for the redress of all injuries connected with the real estate.

2 Kent's Commentaries, p. *288.
Hughes Minors' Appeal, 30 Smith, 503.
Beecher *v.* Crouse, 19 Wendell, 306.

In the last case it was decided that an infant must sue by guardian and not by *prochein ami* to recover the products of a farm. Nor does the ward's coming of age abate the suit, or require the ward's substitution as complainant. The guardian's acquittance for a liability accrued during minority, alone releases the ward's debtor.

Pond *v.* Curtis, 7 Wendell, 45.

John J. Ridgway and *John G. Johnson* (*J. Parker Norris* with them), for defendant.

The suit should have been brought in the name of the infant herself. A guardian has no title to the property, and cannot make a good conveyance of the ward's real estate without order of Court. The powers of a guardian over

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the ward's property are much more limited than those of a trustee, the legal title remaining in the ward and not in the guardian. The bringing of the suit in the guardian's name two days before the ward's attainment of her majority was equivalent to a suit brought after majority, and it should therefore have been brought in the ward's name.

[THAYER, P. J. Do you deny that the guardian can sue at law in his own name for an injury to the ward's property during minority, and that he can continue to prosecute such suit after the attainment of the latter's majority? Is the rule different at law and in equity?]

The rule in equity we believe to be different, although we have not found any cases on the subject.

December 8, 1882. THE COURT. Plea overruled and defendants ordered to answer.

The defendant thereupon filed an answer, admitting the plaintiff's title in a share of the real estate named in the bill, but denying that he had ever occupied any of it or received any of the rents and profits *as her agent, trustee, or otherwise.*

The plaintiff cross-examined the defendant before an examiner when he admitted that he had received the rents and profits of part of the real estate and had occupied the remainder; but he stated that he had done so as the agent of his children (one of whom was the plaintiff's father who had died in 1865), and that he had fully accounted to his children in respect to the rents and profits of the said real estate, and that he had occupied portions of the real estate for a stable and dwelling-houses, as the guardian of two of his minor children, and since they had attained their age, with the consent of his, the defendant's, other children. The plaintiff also offered in evidence leases and conveyances of the various properties executed by the defendant since 1865, and signed by him individually.

The case was then set down for argument on bill, answer, and evidence, and when the argument had proceeded for some time the plaintiff's counsel moved that the case be sent back to the Examiner to enable them to produce further testimony.

as tenant by the curtesy, upon his wife's death in 1861, and not as the agent of any of his children.

J. Rodman Paul and *A. Sydney Biddle*, for the plaintiffs.

The testimony shows conclusively that the defendant was never employed as agent by his son, the infant's father, nor, after the latter's death, by the infant or her guardians; that having been trustee of the property in question up to 1861, he continued in possession of a portion of the real estate and in the reception of the rents of the balance until an adverse decree was rendered against him on October 31, 1882, in a suit in partition instituted by one of his children; that from 1861 on he asserted a right to the exclusive possession of the property as tenant by the curtesy while it is admitted that he had no such right; that in 1874, he settled with the infant's mother as devisee under her husband's will, for her share of the rents and profits belonging to his son's estate, in the mistaken belief that she was entitled to the whole of his son's, her husband's, share. This bill is sustainable under three heads of equity jurisdiction: (1) on the ground that the defendant is *trustee.* (*a*) Because one who has obtained the control of property as trustee and who holds over after the termination of the trust is always regarded in equity as a trustee liable to account on a bill filed for that purpose, and the measure of damages is ascertained on the assumption that he is trustee. (Landis *v.* Scott, *supra;* Perry on Trusts, § 520; Rife *v.* Suyer, 9 Smith, 396; Caton *v.* Coles, L. R. 1 Equity, 581; Earp's App. 27 Sm. 464.) (*b*) Because any stranger who enters upon an infant's land has always been held in equity as the infant's trustee, and a bill will lie for an account, and this is an exception to the general rule that a person suing for *mesne* profits must sue at law. (Lewin on Trusts, note (1) to * p. 752, on pages 597–8; Bloomfield *v.* Eyre, 8 Beavan, 259; Wylie *v.* Edlice, 6 Hare, 505; Hicks *v.* Sallitt, 3 De Gex, M. & Gordon, 782.) (2) On the ground of *account.* The right of an infant to an account of the profits of the land occupied by a stranger is recognized by Story and other writers under the head of account. (Story on Equity Jurisprudence *sub cap.* "Account," 511; Act of April 18, 1845, § 3; Coke on Littleton, § 124; Frisbee's Appeal, 7 Norris, 144.) (3) *Discovery* which is essential, as the defendant has kept the accounts of the amounts received and disbursed by him, and the plaintiffs

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February 16, 1884. THE COURT. This case exhibits now a very different aspect from that which it presented in June last when argued here upon bill, answer, and the testimony of the defendant. The new evidence produced before the Examiner has thrown much additional light upon the questions then in dispute. It is clear by the terms of George Pepper's will, that the trust created by that instrument in favor of his daughter, Mrs. Norris, terminated with her death, and that her children in default of any exercise of her power of appointment then became entitled to their several portions of the estate in possession. But in point of fact things went on after Mrs. Norris's decease just as before. No conveyance or partition was then made. The legal title and the possession remained in the trustee. He continued in the exclusive control and management of the estate just as he had done in the lifetime of his wife. The properties, other than that which he himself occupied, were leased in his own name. The rents were collected and receipted for in his own name and appropriated, so far as appears, without the interference of any other person and without any accounts rendered to anybody. The explanation of this is now very apparent. His letter to his son George, of December 9, 1862, six months after Mrs. Norris's death, as well as his declarations to his daughter-in-law, Mrs. Pepper, and to her counsel, Mr. Robbins, twelve years later, in 1874, show very distinctly that the defendant continued in possession and collected the rents under the impression that he had a life estate in the property as tenant by the curtesy, that he considered the rents as belonging to himself in that capacity and appropriated them under that claim of right. In this he was mistaken, and when convinced of the mistake he settled with Mrs. Pepper for the arrearages upon the supposition that the whole of his son George's one-sixth had passed to her as his widow under his last will. Unfortunately the fact was not known, or if known, was not appreciated, that the plaintiff's ward, Margaretta Price Norris, had been born after the date of her father's will, and that being unprovided for in the will a revocation *pro tanto* had taken place which left her rights under the intestate laws unaffected by the will. The settlement with Mrs. Pepper was a compromise, but Mr. Norris undoubtedly thought that he was settling with her for the entire one-sixth of the rents and income and both Mrs. Pepper and her counsel, Mr. Robbins, were under the same belief and were ignorant of the fact of an outstanding interest in the daughter. Nevertheless nothing can be plainer than that the plaintiff, then a minor and who was neither in her own proper person nor by her guardian, a party to that settlement, is not bound by it, but is entitled to claim her share of the rents and income received by the defendant precisely as if no such settlement had been made. Her rights cannot be taken away by transactions between other parties in which she was not represented and to which she was in no wise a party. Of course we are to deal with such a question only in its legal aspects, and to solve it by the settled rules which determine legal rights. Payment to the wrong person without authority cannot, either at law or in equity, operate as a discharge of a debt, and an erroneous application of trust property by paying to A. what belongs to B. under an erroneous belief that it really belongs to A., can never discharge the trustee's liability to account to B., however natural and excusable the mistake may have been. Lister *v.* Pickford (34 Beav. 583) is a very striking case in point. It is a hard case for the defendant no doubt, but it would be quite as hard a case for the plaintiff if the Court should refuse to award her her legal rights on account of a mistake of fact or of law made by the defendant.

We are therefore of opinion upon the evidence now presented to us that the plaintiff is entitled to an account, and it is equally clear to us that the plaintiff's remedy has been sought in the proper forum. All the authorities agree, and the doctrine is so well settled and the cases upon the subject so numerous that it is unnecessary for me to cite them, that one who enters upon an infant's estate and takes the rents and profits becomes thereby a trustee for the infant, and will be compelled in equity to account for them as such trustee to the infant. The Equity Reports are full of decisions upon this subject, and I have not found one of a contrary character. Nor does this principle appear to be restricted altogether in its application to the case of infants, for where an executor or administrator without authority collects the rents of the real estate he is held to be a trustee for the heirs or devisees. (McCoy *v.* Scott, 2 Rawle, 222; Landis *v.* Scott, 8 Casey, 495.) Even at law a person receiving the rents and profits of the infant's estate would be held liable for them as bailiff and receiver, and accountable for them as such in account render. Thus, where a father in pursuance of his son's request took charge of his estate after his death, and collected the rents, he was held to have received them as bailiff for his son's children and liable for them in account render. (McLean's Exrs. *v.* Wade, 3 Smith, 146.) And wherever account render will lie at law, a bill for an account will lie in equity in this State under the Act of 13 October, 1840. This by the express words of the Act and the decisions under it. (Shriver *v.* Nimick, 5 Wright, 80; Persch *v.* Quiggle, 7 Smith, 247.) The third section of the Act of 18 April, 1845, confers equity jurisdiction in matters of account in all cases where chancery

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entertains jurisdiction, and that whether the liability to account be "actual or constructive," that is as I understand the words, whether it arise by express contract or construction of law.

We see no reason therefore why the plaintiff should be put to an action at law in such a case as this. The plaintiff needs discovery as well as relief. An action would not afford an adequate and complete remedy, to say nothing of the inconvenience and uncertainty of settling an account in such a case as this by a jury in an action of trespass, assumpsit, or account render. There are therefore three heads of equity jurisdiction under either of which this bill may be maintained, viz., trust, account, and discovery. All these grounds of jurisdiction are combined in the present case.

As to the defence that the defendant acted in the collection of the rents as the agent of his children, and that therefore he is not accountable to third parties, it must be obvious upon an examination of the facts that it cannot be successfully maintained. We have failed to find in the Examiner's report any adequate evidence that the defendant in the control which he exercised after his wife's death over that share of the property which passed under the will of George Pepper to his grandson George Pepper Norris, acted under any authority derived from him, or in pursuance of any agency which he had any share in creating. But it would make no difference if he had, for such authority if it existed must have terminated with the death of George Pepper Norris, and any powers as agent given by him to the defendant must necessarily have been revoked by the death of George Pepper Norris. The bill prays only for an account of the rents received since his decease. After that event it is perfectly clear that no authority to collect or dispose of the share of the subsequent rents which belonged to Margaretta Price Norris could be derived from any other person than her guardian, and it is not alleged or pretended that any such authority existed. For these rents the defendant therefore was in contemplation of law a trustee for her, and if in the settlement made with Mrs. Pepper he paid her more than he would have paid her if he had known of the outstanding interest of the daughter, that is no answer to the guardian's demand for the daughter's legal rights. The conclusion therefore is that the bill is well brought and that there must be an account of Margaretta Price Norris's share of the rents and

C. P. No. 4. February 16, 1884.

Glaser v. Lewis et al.

Practice—Bill of particulars—In actions sounding in tort, a bill of particulars is a matter of grace and not of right.

Rule for a more specific bill of particulars.

This was an action on the case brought against the receivers of the Philadelphia and Reading Railroad Company for damages resulting from the destruction of a number of bales of rags set on fire, as alleged, by defendants' locomotive. The bill of particulars set forth the place where, and the time when, the fire occurred.

Thomas Hart, Jr., for the rule.

The only question that can be tried in this case is the condition of a *particular* engine.

Erie Railway Co. *v.* Decker, 28 Sm. 295.

In order, therefore, to meet plaintiff's case defendants are entitled to know, in addition to the time and place of the fire, the direction in which the engine which caused the fire was going, whether it was attached to a train or running light, etc. In short defendants are entitled to information that will enable them to identify the engine amongst the numerous engines that hourly pass the place where the fire occurred.

[THAYER, P. J. This is an action *ex delicto*, and you have a bill of particulars only by grace.]

R. P. White, contra.

The bill of particulars states all and more than defendant is entitled to demand.

Furbush *v.* Phillips, 2 WEEKLY NOTES, 198.

Eo die. THE COURT. Rule discharged.

C. P. No. 4. January 26, 1884.

Commonwealth v. Russel.

Plea of nil debet in an action on a bond—Practice.

Rule to show cause why the plea of *nil debet* should not be striken off as irregular.

Debt on a bond. Defendant pleaded "non est factum," "nil debet," and "payment with leave."

William Gorman, for the rule.

The plea of nil debet is an improper plea to an action of debt on a bond.

Stephens on Pleading, 139.
Chitty, vol. 1, 483 and notes.
Troubat & Haly, vol. 2, sec. 1517.
Moyer *v.* Fisher, 12 Harris, 513.
Brubacker *v.* Taylor, 26 P. F. S. 83.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, MARCH 20, 1884.* [No. 15.

Supreme Court.

Jan. '83, 383. May 16, 1883.

First Methodist Episcopal Church v. Old Columbia Public Ground Company.

Real estate—Conditional fee—Base fee.

Wherever words in a conveyance are relied upon as creating a condition subsequent so as to create a base or determinate fee, they must not only be such as would of themselves create a condition, but must be so connected with the grant as to qualify or restrain it.

A. covenanted with B., C., and D., by an instrument under seal, that he would, when they required, convey to them a certain piece of land in fee simple in trust for the sole use of a company thereafter to be formed for supplying a certain borough with water, said ground to be for a reservoir of a certain size specified. B., C., and D. covenanted that A. should, upon erecting a hydrant at his own expense, have a supply of water from the reservoir for his use. The water company was formed, and B., C., and D. released all their rights under the above agreement to said company, which thereupon constructed a reservoir of the size specified on the premises. Several years after A. constructed a hydrant, and drew water from the reservoir for his own use for a few years. He then discontinued the use of said hydrant, and subsequently died. Fifty years after the date of the original agreement, and twenty-five years after the discontinuance of the use of the hydrant, the water company abandoned the premises, filled up the reservoir, and conveyed the land to a religious corporation for church purposes. In ejectment against the church by purchasers from the heirs of A.:

Held, that the agreement between A. and B., C. and D. did not constitute a base fee determinable on the cessation of the use of the premises for a reservoir, but that it passed a fee simple, and that, therefore, the defendant was entitled to judgment.

The obligation of the vendees, in the above agreement, to furnish a supply of water to A., was a covenant merely which they could not be called on to fulfil unless A. constructed a hydrant. A. and his heirs having failed to construct and maintain a hydrant for a quarter of a century:

Held, that it was contrary to public policy to hold that the unexercised privilege should cast a clog on the title, and that the same must be regarded as having been relinquished.

Under the circumstances of the above case:

Held, that the fact that the grant was not followed by the execution of a deed did not defeat the vested estate, which passed to the grantees.

Error to the Common Pleas of Lancaster County.

Ejectment, by the President and Managers of the Old Columbia Public Ground Co. against The First Methodist Episcopal Church, to recover a certain tract of land in the borough of Columbia.

On the trial, before LIVINGSTON, P. J., the following facts appeared: On April 26, 1823, John L. Wright entered into a certain agreement or covenant under seal with Christian Breneman, Henry Martin, and Jacob Mathiot, the material part of which was as follows:—

"The said John L. Wright for the consideration hereinafter mentioned doth for himself his heirs, executors and administrators, covenant, promise, grant and agree to and with the said Christian Breneman, Henry Martin and Jacob Mathiot and their heirs and assigns by these presents that he the said John L Wright shall and will when thereunto required by the said Christian Breneman, Henry Martin and Jacob Mathiot, their heirs and assigns and at their costs and charges by such deed or deeds of conveyance as they or their counsel learned in the law shall advise well and sufficiently grant, convey and assure unto the said Christian Breneman, Henry Martin and Jacob Mathiot their heirs and assigns in fee simple clear of all incumbrances in trust for the sole use of a Company which may hereafter be formed for the purpose of bringing a supply of water into the Borough of Columbia a certain piece of ground *for a Reservoir* to contain water which shall be sufficiently large for that purpose and not exceeding sixty feet square and shall be in what is commonly called the grave yard field and near or adjoining the turnpike road on the line of land of Bethel's estate as may be found most suitable, and further agrees for himself his heirs and assigns that the said water company when formed shall and may enter into and upon his lands for the purpose of laying pipes or conduits to convey the waters from any spring or stream to the said reservoir in said grave yard field, and may also use any water on his lands for the purpose aforesaid which may be found on the same that is on his lands lying northwest of land late Samuel Bethels, Esq., and further the said Christian Breneman, Henry Martin and Jacob Mathiot their heirs and assigns for and in trust as aforesaid, shall and may forever hereafter, and all times have free ingress and regress to the said lands for the purpose of laying pipes and repairing the same or any other thing that may be found necessary in or to the conveyance of water to the said Reservoir they or their workmen doing as little damage as possible, and repairing any *breaches* by them made therein with the least possible delay and inconvenience to the said John L. Wright his heirs and assigns. In consideration whereof the said Christian Breneman, Henry Martin and Jacob Mathiot for themselves their heirs and assigns and in trust as aforesaid doth covenant promise, grant and agree to and with the said John L. Wright his heirs and assigns by these presents that they the said Christian Breneman, Henry Martin and Jacob Mathiot their heirs or assigns or some of them shall and will give grant and assure unto the said John L. Wright his heirs and assigns when the said Reservoir or basin for containing water shall be erected the privilege of erecting a Hydrant at said Reservoir at his own expense and for his own use and shall have a supply of water therefrom sufficient to water his cattle or stock or for the use of a family at all times when the same is in repair or water sufficient therein."

The Columbia Water Company was subsequently organized, and in 1823 took possession of the premises above mentioned, upon which it constructed a reservoir. In 1826, Breneman,

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Martin, and Mathiot released to said company all their interest in the premises.

The water company continued to hold and use the land in question for a reservoir until 1872, when they purchased other ground upon which they constructed a new reservoir. They gradually filled up the old reservoir, and in 1874 conveyed the land on which it had been situate to the defendant in fee. Defendant thereupon erected a church or chapel on said premises at considerable expense.

Wright, prior to 1840, constructed a trough at which to water his cattle, which was supplied from the reservoir in question. In 1847 the trough ceased to be used, and in 1850 was removed. Wright died in 1856, and in 1877 his heirs conveyed the premises to the plaintiffs.

The Court ordered the jury to find a verdict for the plaintiffs, subject to the following points, which were reserved:—

(1) Whether, under the agreement of April 26, 1823, an *absolute fee simple* was granted, or only a qualified or base fee.

(2) Whether or not, if a qualified or base fee only was granted the grantees having abandoned or ceased to use for the purpose of a reservoir (and sold to defendant) the land so granted in and by said agreement, it reverted to and vested in the grantor, or his heirs, who are now represented by the plaintiffs in this action.

Verdict accordingly for plaintiffs, subject to the opinion of the Court on the points reserved. Subsequently the Court entered judgment for the plaintiffs on the points reserved. Thereupon defendant took this writ, assigning for error, *inter alia*, the entry of judgment for plaintiffs on the points reserved.

H. M. and *E. D. North*, for the plaintiff in error.

The agreement did not create a base fee, but an absolute fee simple. It contains no words which can properly be construed to create a condition subsequent.

Cook *v.* Trimble, 9 Watts, 16.
Perry *v.* Scott, 1 Smith, 124.
Paschall *v.* Passmore, 3 Harris, 307.
Kerlin *v.* Campbell, 3 Harris, 500.
Seebold *v.* Shitler, 10 Casey, 137.
Beck's Appeal, 10 Wright, 527.
Rawson *v.* Inhabitants, etc., 7 Allen, 125.
Packard *v.* Ames, 16 Gray, 327.
Bigelow *v.* Barr, 4 Ohio, 358.
Hunt *v.* Beeson, 18 Ind. 380.

W. Augustus Atlee and *A. G. Kauffman*, for the defendants in error.

The covenant or agreement in question created a base or determinable fee.

Kirk *v.* King, 3 Barr, 436.
Scheetz *v.* Fitzwater, 5 Barr, 126.

Plaintiffs have the legal title, and are, therefore, entitled to a verdict, unless the defendant has an equity which enables him to prevail.

Bear *v.* Whisler, 7 Watts, 144.
Cook *v.* Trimble, 9 Watts, 15.
Kenrick *v.* Smick, 7 W. & S.41.
Kirk *v.* King, 3 Barr, 436.
Hawk *v.* Greensweig, 2 Barr, 295.

No court of equity would decree a conveyance in this case, for there is an entire absence of consideration; without consideration no court of equity decrees performance.

Kennedy *v.* Ware, 1 Barr, 445.

October 1, 1883. THE COURT. This contention relates to the effect to be given to a writing under seal executed by John L. Wright, on the 26th April, 1823. For the consideration therein mentioned, he covenanted and agreed for himself, his heirs, executors, and administrators, with Breneman, Martin, and Mathiot, their heirs, and assigns, that he would when thereunto required by them, their heirs or assigns, by such deed or deeds of conveyance as they or their counsel learned in the law should advise, well and sufficiently grant, convey and assure unto them, their heirs and assigns, in fee simple, clear of all incumbrances, in trust for the sole use of a company which might thereafter be formed for the purpose of bringing a supply of water into the Borough of Columbia, a certain piece of ground for a reservoir, to contain water sufficiently large for that purpose, and not exceeding sixty feet square, describing the field in which it should be located. In consideration whereof the grantees therein named for themselves, their heirs and assigns, covenanted and agreed to give, grant and assure unto Wright, his heirs and assigns, when the said reservoir should be erected, the privilege of erecting a hydrant at said reservoir at his own expense, and for his own use, and should have a supply of water therefrom sufficient to water his cattle or stock, or for the use of a family at all times when the same should be in repair, or water sufficient be therein.

The Columbia Water Company was organized soon after, and in 1823 took possession of the premises in dispute under arrangement with the vendees named, and in 1826 obtained a deed from them for the same. The Water Company made a reservoir sixty feet square thereon, inclosed it with a fence and continued to use it as such until 1872. Then it purchased other lands for a reservoir, some thirty rods therefrom, and ceased to use the former for that purpose. The Water Company retained possession of the land, and gradually filled up the reservoir, and in September, 1874, sold and conveyed the land to the plaintiff in error. The latter took possession thereof and erected a chapel thereon at a cost of nearly $2000.

Wright died in 1856, and in 1877 his heirs conveyed the premises to the defendants in error. Prior to 1840, the precise time does not appear,

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a water trough was placed at the turnpike near the reservoir, from which the trough was supplied, and the latter was used for the watering of stock. It continued to be so used until 1847, or thereabouts. In 1850 the trough appears to have been removed, and none afterwards maintained there.

The learned Judge held that under the agreement of 26th April, 1823, the grantees took a base or qualified fee only, and when they and their vendees ceased to use the land for a reservoir, it reverted to Wright, or his heirs, and directed a verdict in favor of the defendants in error who purchased from those heirs. On the point reserved the Court entered judgment in favor of the plaintiffs below on the verdict. This presents the main cause of complaint.

Did the writing create a conditional estate? It contained none of the technical words usually employed for that purpose; neither *sub conditione*, *proviso* nor *itaquod*. It is true no one of these is essentially necessary to constitute a condition. Other words clearly equivalent thereto are sufficient. Hence an estate conveyed for an "English school-house, and no other purpose," was held in Kirk *v.* King (3 Barr, 436), to revert to the grantors after the school therein had been discontinued for seven years, so long as to create a presumption of permanent abandonment. So in Scheetz *v.* Fitzwater (5 Id. 126), a conveyance of a mill dam or pond of water and mill race, and a perch of land on each side thereof, for the use and service of a certain mill with the land thereunto belonging, "and for no other use whatsoever," the title was held to be a base fee, determinable on disuser as a pond. When, however, subsequent conditions are relied on to work a forfeiture they must be created by express terms or clear implication, and are construed strictly. (1 Washb. on Real Property, 447.) The policy of the law is to render the alienation and transfer of land as free as possible, and conditions are not favored in law. Therefore, whenever words can be construed either as a condition, reservation, or a covenant, the tendency of the Courts is to construe them as one of the latter, rather than as the former. (Hoyt *v.* Kimball, 49 N. H. 326; Wheeler *v.* Dascomb, 3 Cush, 285; Paschall *v.* Passmore, 3 Harris, 295; McKnight *v.* Kreutz, 1 P. F. Smith, 232.)

A mere recital in the deed that it is made upon a certain consideration will not raise a condition. Where a deed set forth that the estate thereby conveyed was given to the commissioners of a county in consideration of a county seat having been located on the premises, it was held that no condition was thereby created that the county seat should be kept there. (Harris *v.* Shaw, 13 Ill. 456.) In Cook *v.* Trimble (9 Watts, 15), it was held that the words "in consideration of $160, and a comfortable living to be given to the said grantor, his wife, and his daughter during their natural lives, by the vendee," might create a covenant, but not a condition. In Kerlin *v.* Campbell (3 Harris, 500), a conveyance of land for a valuable consideration, in trust, for the use of the inhabitants of the county of Delaware to accommodate the public service of said county, was held not to be defeated on a sale and conveyance by the vendees, whereby the use for the public service ceased. Seebold *v.* Shitler (10 Casey, 133), was the case of a conveyance to the commissioners of a county and their successors in office in fee simple for the purpose of erecting thereon a court-house, jail, and county offices. The county was subsequently divided; the seat of justice moved therefrom, the land sold and used for other purposes, and the proceeds thereof divided between the two counties. It was held the title did not revert to the heirs of the original owners. In Union Canal Company *v.* Young (1 Whar. 410), Young entered into a contract with the Delaware and Schuylkill Canal Company whereby he agreed to sell it so much of his land as was requisite for the canal, amounting to 135 perches. The same year the canal was dug through this land, but the contemplated communication with a river on each side was never completed. The object of the contract was therefore not realized. Many years thereafter the land was sold by the assignee of the vendee, and occupied for building lots. It was held that the abandonment of the canal and the dissolution of the old canal company did not divest the fee created by the agreement, nor authorize Young to treat the contract as rescinded. In the case of Perry *v.* Scott (1 P. F. Smith, 119), the deed recited that it was made in consideration of natural love and affection, and that the grantee, the grantor's son, had promised to remain with the grantor, and to assist him in working the land, and to support his widow after the death of the grantor. The consideration recited was held not to constitute a condition although there were other facts in the case which might prevent a title vesting in the son.

Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. (Laberee *v.* Carleton, 53 Me. 211.) It was said by Mr. Chief Justice BIGELOW in Packard *et al.* *v.* Ames *et al.* (16 Gray, 327), "we know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money or the doing of

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some act by the grantee, on which the grant is clearly made to depend." To make the estate conditional, the words must clearly show such intent. (Cook *v.* Trimble, 9 Watts, 15.)

Turning to the writing executed by Wright we see that he absolutely and unconditionally covenanted to convey the premises in fee simple clear of all incumbrances to the vendees, their heirs or assigns, whenever requested by them. No restraint was imposed on an alienation of the land. No construction of a reservoir, nor any work on the ground was required to precede the right to demand a deed. No clause provided for a forfeiture or termination of the estate in case the land ceased to be used as a reservoir. No right of re-entry was reserved by the grantor, on any contingency. No technical word to create a condition was used. No other words were used equivalent thereto or proper to create a condition. The authorities show that the recital of the consideration and a statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate. The obligation which the vendees assumed to furnish water to the vendor, was at the most a covenant only. Whether they could ever be called on to fulfil it, depended on whether the vendor should avail himself of the privilege of erecting a hydrant. It was purely optional with him whether or not to exercise that right. If he failed to do so within a reasonable time, it would be against public policy to hold that this unexercised privilege should cast a clog on the title for an indefinite time.

The evidence shows that Wright was tardy in first claiming to exercise his privilege. It also shows that he ceased to claim or exercise it about nine years before he died; and, although the reservoir was continued for some sixteen years after his death, it is not shown that his heirs ever replaced the trough or sought to exercise that privilege. The fact that the grant was not followed by the execution of a deed does not defeat the vested estate. The grantor and his heirs had no rights which they attempted to enforce. After using the privilege for a time, there was an unmistakable relinquishment of all use under it. In Union Canal Co. *v.* Young (*supra*), the grant was by virtue of an agreement, and no deed had been executed; yet it was held the estate created was not thereby conditional. The learned Judge, therefore, erred in entering judgment in favor of the defendant in error.

Judgment reversed, and now judgment is entered in favor of the plaintiff in error *non obstante veredicto*.

Opinion by MERCUR, C. J. L. L. JT.

Jan. '84, 213. February 5, 1884.

City of Erie v. First Universalist Church.

Taxation—Exemption—Municipal lien—Churches—Act of May 15, 1874.

A lot whereon is erected a church occupied and used as a place of regular, stated religious worship is by the provisions of the Act of May 14, 1874 (P. L. 158), exempt from local assessments for the construction of sewers.

Such an assessment is a "tax" within the meaning of the said Act.

Olive Cemetery Co. *v.* City of Philadelphia, 12 Norris, 129, approved and followed.

Error to the Common Pleas of Erie County.

Scire facias sur municipal claim filed July 20, 1882, by the city of Erie against a piece of land fronting on Ninth Street, in the city of Erie, and the trustees of the First Universalist Church, owners or reputed owners.

The facts of the case were as follows:—

In the spring of 1882 the city of Erie had caused a sewer to be built in Ninth Street from Peach Street to Sassafras Street. The First Universalist Church of Erie owned a lot eighty-two and one-half feet in width, fronting on Ninth Street between the points aforesaid, on which is erected a church; the lot and church being used exclusively for religious purposes. The city of Erie caused this property to be assessed with its proportion of the cost of the sewer, and the assessment being unpaid, filed a claim therefor in accordance with law. A scire facias issued thereon, when the trustees of the church filed an affidavit of defence, setting forth that the property was used exclusively for religious purposes, and that no income or revenue was derived therefrom, and that the property was exempt from charges for sewers. A rule on defendants was entered, to show cause why judgment should not be entered against them for want of a sufficient affidavit of defence, and after argument the rule was discharged, the Court holding that the 1st section of the Act of May 14, 1874 (P. L. 158), relating to exemption from taxation, also includes assessments for special improvements. The city of Erie thereupon took this writ, assigning for error the action of the Court in discharging the above rule.

Theo. A. Lamb, for plaintiff in error.

The exemption created by the Act of 1874 must be construed to mean only such taxes as are of a public nature and for public purposes, and not assessments made for improvements of special benefit to the party charged.

Northern Liberties *v.* St. John's Church, 1 Harris, 104.

That case seems to have been based largely on

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that of Mayor of New York (11 John. 77), and Bleecker *v.* Ballou (3 Wendell, 263). But since then the ruling has been repeatedly and almost universally affirmed.

Cooley on Taxation, pages 146 and 147.
Chegary *v.* Jenkins, 3 Sandf. 409.
People *v.* Roper, 35 N. Y. 629.
Buffalo Cemetery *v.* Buffalo, 46 N. Y. 506.
Universalist Society *v.* Providence, 6 R. I. 235.
Matter of College, 8 R. I. 474.
Patterson *v.* Society, 24 N. J. 385.
Broadway Church *v.* McAtee, 8 Bush (Ky.), 508.
Baltimore *v.* Cemetery Co., 7 Md. 517.
Lefevre *v.* Detroit, 2 Mich. 586.
Kendrick *v.* Farquhar, 8 Ohio, 189, 197.
Cincinnati College *v.* State, 19 Ohio, 110.
Brewster *v.* Hough, 10 N. H. 138.
Bridgeport *v.* R. R., 36 Conn. 255.
First Presbyterian Church *v.* Ft. Wayne, 36 Ind. 338.
Bank *v.* Hamilton, 21 Ill. 53.

The case of Olive Cemetery Co. *v.* Philadelphia (12 Norris, 129), is the only authority that controverts the rule contended for. And, in view of the great mass of authorities to the contrary, it is respectfully submitted whether the rule in that case can stand.

A. J. Foster (*Frank Gunnison* with him), for defendant in error.

That an assessment for the cost of a sewer is a tax, and that when imposed and collected by the authority of a city, it is a city tax, was settled beyond controversy in the case of—

Olive Cemetery Co. *v.* The City of Philadelphia, 12 Norris, 129.

The numerous authorities cited from Judge COOLEY's work on Taxation, doubtless declare the law in the respective States. Perhaps the statutes upon which these cases arose were entirely different from the one now in controversy.

February 18, 1884. THE COURT. This is the case of a scire facias on a lien filed by the city of Erie for the cost of a sewer built by the municipality in Ninth Street, of said city, in front of the lot owned by the defendants, on which is erected a building occupied and used as a place of regular stated religious worship by the congregation of the First Universalist Church of Erie. On the part of the defendants, it is claimed that the property so used and occupied, is, by the first section of the Act of May 14, 1874 (P. L. 158), exempted from the assessment which forms the basis of the lien above stated. This claim is certainly well founded if municipal assessments of this kind are to be regarded as a species of taxation, for the Act speaks in no doubtful terms concerning the exemption of this kind of property from every variety of city tax. The statute reads as follows: "All churches, meeting-houses, or other regular places of stated worship with the grounds thereunto annexed necessary for the occupancy and enjoyment of the same; . . . . and all school-houses belonging to any county, borough, or school district, with the grounds thereunto annexed and necessary for the occupancy and enjoyment of the same; and all court-houses and jails, with the grounds thereunto annexed, be and the same are hereby exempted from all and every county, city, borough, bounty, road, school, and poor tax."

It will here be observed that churches are put in the same category with court-houses, jails, and school-houses; in other words, with that kind of municipal property which every one must admit is not the subject of any kind of local taxation or assessment. It would seem to me, therefore, that this manner of classification leaves no room for doubt as to the legislative intent; if school-houses, jails, and court-houses are not subjects of municipal assessments, neither are churches; and if this is not the true reading of the Act, I confess my inability to comprehend it.

But again, the property specified in this category is exempted from "all and every county, city, borough, bounty, road, school, and poor tax." If then, the assessment which is the subject of the present contention, is a tax, it is embraced within the letter of the Act, and we must approve the judgment of the Court below. But that such an assessment is a tax is definitely settled in the case of the Olive Cemetery Co. *v.* City of Philadelphia (12 Nor. 129). Mr. Justice STERRETT, who delivered the opinion of the Court in that case, says: "The main contention on the part of the cemetery company is, that the assessment for construction of the sewer on Merion Avenue, is a species of taxation, and clearly within the letter as well as the spirit of the exemption contained in the charter. The exemption is 'from taxation excepting for State purposes.' The obvious meaning of this is that the Commonwealth releases, in favor of the cemetery company, her right to tax its land, when used as a place of sepulchre, in any form or for any purpose of a local nature, as distinguished from general State purposes; reserving to herself the right of taxation for the latter purposes only. The exemption is general, and embraces every species of taxation not specifically excepted; and the rule is well settled, that an exception in a statute excludes all other exceptions. (Miller *v.* Kirkpatrick, 5 Ca. 226.) It is not pretended that municipal assessments for constructing sewers, etc., are within the accepted meaning of taxation for State purposes; on the contrary, it is contended by the city, that they do not come under the head of taxation at all. It is conceded, however, that the authority to make and collect such assessments is delegated by the Commonwealth. If it does not emanate from the inherent powers of the government to

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levy and collect taxes, it is difficult to understand whence it comes. The only warrant for delegating such authority must be either in the right of eminent domain or in the taxing power. It cannot be found in the former, and hence it must be in the latter." Scarcely less emphatic is the declaration of Mr. Justice SHARSWOOD, in Hammett *v.* Philadelphia (15 P. F. S. 146), that this mode of municipal assessment for the cost of local improvements upon the properties benefited, is a species of taxation. So the cases of Washington Avenue (19 P. F. S. 352); Craig *v.* The City (8 Nor. 265), and The City *v.* Rule (12 Nor. 15), are ruled upon the assumption that such assessments are taxes, and in those cases they were held unconstitutional because the frontage rule of taxation, when applied to rural districts, was regarded as unequal and unjust.

We cannot, therefore, but regard the doctrine contended for by the defendants as thoroughly established by authority, and as the language of the Act itself leads to the same conclusion, we must agree with the Court below, that the affidavit of defence is sufficient, and exhibits such a case as must put the plaintiff out of Court.

The order of the Court below discharging the plaintiff's rule for judgment for the want of a sufficient affidavit of defence is affirmed, and the writ of error is dismissed at the costs of the plaintiff.

Opinion by GORDON, J. H. L. N.

July, '83, 19. January 14, 1884.

Burkholder's Appeal.

Decedents' estates—Contract—Consideration—Post-nuptial settlement—Married women.

A post-nuptial settlement between husband and wife may, if unobjectionable, be enforced by the machinery of a court of equity.

A. married B. prior to the passage of the Act of April 11, 1848 (P. L. 536), securing the rights of married women, and reduced to his possession the income of certain real estate of his wife's former husband, wherein she had an interest under the intestate laws. B. had a son C. by her former husband. Disputes took place between husband and wife which terminated in a short separation. Subsequently, by an instrument under seal, wherein A., B., and C. were parties, the said disputes were referred to, and an intention to settle them and prevent their recurrence expressed. By said instrument, A. covenanted that in the event of his outliving B., his executors and administrators would, on his death, pay over one-half of his estate to C. or his representatives. B. covenanted that A. was to be allowed to receive the income accruing from her former husband's estate. A. outlived B. some two years. On the audit of the account of his administrators, half his estate was claimed by the representatives of C. under the above-mentioned instrument, which claim was resisted by A.'s heir-at-law:

Held, that the instrument was not a mere executory agreement sought to be enforced by volunteers, but that, being under seal and given to settle family disputes, presumably partly with reference to property, the same would be supported and under the circumstances enforced.

If a husband's conduct is such that his wife is legally justified in leaving him, she has the right to remain absent, and her agreement to return is a sufficient consideration to support a post-nuptial contract entered into by her with him.

Appeal of Martha Burkholder from a decree of the Orphans' Court of Philadelphia County, dismissing the exceptions to, and confirming the adjudication of the Judge auditing the account of the administratrix of the estate of Richard J. Rutter, deceased.

The facts of the case, as they appeared before the Auditing Judge, were as follows: About 1834, Richard J. Rutter married Mrs. Julia Brisben. By her former marriage, Mrs Rutter had a son, David Brisben. She also had an interest under the intestate laws in the real estate of her former husband, amounting to the interest of $3000. This interest passed to the decedent at his marriage, and during their married life he had received and used it as his own. Down to 1876, when his wife died, he had received from this source in round numbers, $4860. In 1849 the husband and wife quarrelled. A reconciliation took place, and articles of agreement were entered into between Richard J. Rutter, Julia Rutter, and David Brisben, which set forth, *inter alia*, as follows:—

Whereas differences lately happened between the said Richard Rutter and Julia his wife, which caused the said Julia to leave her said husband, and whereas the said Richard Rutter and Julia are desirous that all differences hertofore existing between them shall be settled and compromised, and that they will again live together in union and harmony as becomes man and wife, and in consideration whereof, and for the purpose of avoiding future difficulties and dissensions, they have mutually agreed, and by these presents do agree, that their respective property and estates shall be held and enjoyed as follows: Then follow the mutual stipulations and agreements, among which is the contract that, if the said Julia shall die before the said Richard, then, upon the decease of the said Richard, his administrators or assigns shall pay over, grant, and convey one-half of all his estate, real and personal, unto the said David Brisben, only child of the said Julia by her former husband, if he be then living, and, in case he be not then living, to his child or children then living, and to the issue of any of them then dead per stirpes, and in default of any child or issue of any deceased child, then to the next of kin of the said Julia, their heirs and assigns, according to the intestate laws; the said Julia on her part agreeing that her husband, the said Richard, should take and receive for his own use the annual interest of the sum of $3000, chargeable on the estate of her late husband, Henry Brisben, deceased, so long as the said Richard and Julia shall live together, with the further stipulation, in case of any separation, said Richard should pay to the said Julia the sum of $500, and thereafter permit her to receive the annual interest on the said sum of $3000, payable out of

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the real estate of the said Henry Brisben, deceased; and in case the said Julia should survive her husband, the said Richard, and they shall at the decease of the said Richard be living together, then that the estate of the said Richard shall pass and be distributed agreeably to the intestate laws.

After the execution of this agreement, the said Richard Rutter and his wife Julia continued to live together down to the time of her death. The agreement was executed on the sixth day of August, 1849. David Brisben died in 1852, leaving issue two children, Mrs. Julia A. Bair and Mrs. Maria Wallace. Mrs. Julia Rutter died on the 7th of April, 1876, leaving her husband, the said Richard Rutter, surviving, and he died on the 29th of May, 1881.

On the audit of the final account of the administratrix of the estate of Richard J. Rutter, Mrs. Julia A. Bair and Mrs. Maria Wallace, daughters of David Brisben, claimed, under the above agreement, one-half of the decedent's estate, which amounted to $4968.81. This claim was objected to by the heirs-at-law, on the ground, *inter alia*, that there was no valuable consideration to support the contract made between decedent and his wife and David Brisben. The claim was allowed by the adjudicating Judge. Exceptions thereto were dismissed by the Court and the adjudication sustained, whereupon Martha Burkholder, one of the heirs-at-law, took this appeal, assigning for error the dismissing of the exceptions and the decree of the Court.

Robert H. McGrath (*H. C. Brubaker* with him), for the appellant.

Richard J. Rutter married his wife before the Act of 1848, he therefore had a vested interest in her statutory dower, and the agreement merely recited his right to it. His subsequent promise to pay is void for want of parties and for want of consideration.

Johnston *v.* Johnston, 7 Casey, 450.

The "differences between husband and wife," which caused the separation in this case, were personal and domestic, and had no reference to rights of property, pending suits or disputed claims. The agreement was a post-nuptial contract, which is not sought to be enforced by the wife but by volunteers who have given no consideration.

S. Hepburn and *J. B. Townsend*, for the appellees.

The settlement and compromise of doubtful and disputed rights have always been held to be a sufficient consideration to support a contract whether executed under seal or without seal.

Chamberlain *v.* McClurg, 8 W. & S. 31.
Rice *v.* Bixler, 1 W. & S. 445.
Fellows's Appeal, 12 Nor. 470.
Paxson *v.* Hewson, 8 WEEKLY NOTES, 197.

February 4, 1884. THE COURT. It was not alleged that the agreement between Richard Rutter, Julia Rutter his wife, and David Brisben, had been obtained from the said Richard Rutter by means of fraud or undue influence. It was resisted solely on the ground of want of consideration, and that being executory it could not be enforced. The Court below held that there was sufficient consideration from which ruling this appeal was taken.

The agreement bears date the sixth day of August, A.D. 1849, and recited that "whereas differences lately happened between the said Richard Rutter and Julia his wife, which caused the said Julia to leave her said husband, and whereas the said Richard Rutter and Julia are desirous that all differences heretofore existing between them shall be settled and compromised, and that they will again live together in union and harmony as becomes man and wife, and in consideration whereof, and for the purpose of avoiding future difficulties and discussions, they have mutually agreed and by these presents do agree that their respective property and estates shall be held and enjoyed as follows." Then follow the covenants, which so far as they are material, briefly stated, are: 1st. That in case the said Richard shall survive the said Julia, his executors and administrators shall pay over one-half of all his estate to the said David Brisben, only child of the said Julia by a former husband, if he be then living, and in case he be not then living, then to his child or children if any then living, and to the issue of any then dead, *per stirpes*, their heirs and assigns, etc. 2d. That the said Richard should take for his own use so long as they shall live together the annual interest on the sum of $3000 which was charged upon the real estate of her former husband in favor of the said Julia; and 3d. That in case of a future separation the said Richard shall pay to the said Julia the sum of $500, and permit her to receive the interest on the said sum of $3000.

From the date of this agreement the parties lived together, and, for anything that appears, harmoniously, until the death of Julia in 1876. Richard received the $180 per year due Julia from the estate of her former husband up to 1876, amounting altogether, as stated by the Court below, in round numbers to $4860. The estate of the said Richard, as appears by the adjudication, amounted to $4968.81, which is but a trifle more than he received by his wife. It is also proper to say that at the date of the agreement there had been no children born of the marriage, and evidently none were contemplated; Julia had a son, the said David Brisben, by a former husband. David died in 1852, leaving two children, the present appellees, who claimed under the above recited agreement the one-half of Richard Rutter's estate.

Without referring to the assignments of error in detail, I will consider the case as the learned counsel for the appellants have presented it.

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They say the agreement should not be enforced because, 1st. It is a mere executory contract without consideration; and 2d. It is a post-nuptial contract not making provision for wife or children, which is not sought to be enforced by the wife, but by volunteers who have given no consideration.

I will consider the last objection first. That it was a post-nuptial contract is not material, as such contracts, where otherwise unobjectionable, may be enforced in this State through the medium of equity. (Husband's Law of Married Women, 26.) The objection that the agreement is not being enforced by the wife, but by a volunteer who gave no consideration is plausible, but does not meet the requirements of the case. It must be remembered that the appellants are seeking to invoke the chancery powers of the Orphans' Court, and to strike down a solemn settlement of his property made by Richard Rutter when in the full enjoyment of his faculties and without any suspicion of fraud. That settlement gave to the son of his wife a much less sum of money than Richard Rutter received from the estate of the father of that son. And the appellants, who object to this are the collateral relatives of Richard, and are themselves mere volunteers.

Nor is it accurate to call this a mere executory contract. It is a contract executed so far as the wife is concerned. All that she was to give, her husband received; all that she was to do she has done. It remains but for the representatives of the husband to do what on his part he covenanted they should do after his death. With full performance on the part of the wife, and the death of both parties, rescission of the contract is impossible.

This brings us to the question of consideration. The agreement was under seal, which according to all the authorities imports a consideration. This throws the burden of proof upon those who attack it. No evidence was introduced in the Court below to impeach it, but the appellants relied upon the agreement itself as showing want of consideration. They allege that the interest due Julia Rutter from the estate of her deceased husband was vested in and absolutely belonged to her husband, the said Richard Rutter, and that the family "differences" which caused the separation and led to the agreement were "personal and domestic, and had no reference to rights of property, pending suits or disputed claims."

Henry Brisben, the first husband of the said Julia, died prior to the Act of 1848; the agreement in question was executed in 1849. Richard Rutter had received the annual interest due his wife for several years, and the agreement provided that he should continue to receive it for his own use so long as they lived together. A number of authorities were cited as to the effect of the Act of 1848 upon this interest, or dower as I shall call it for the purpose of convenience. The discussion of these authorities I do not consider necessary to this case, as there are other considerations which will be referred to later on, which fully sustain the agreement aside from this. Whatever may have been the right of the husband to reduce into possession the annual payments of dower as they matured after the passage of the Act of 1848, it seems to me equally clear that he could treat it as the property of his wife, even after conversion, and that in such case equity would preserve her right of survivorship. (Gochenaur's Estate, 11 Harris, 460.) The agreement proves one of two things, either he recognized the dower as belonging to his wife, or it was one of the subjects of the dispute between them which led to the separation. In either case there would be a consideration sufficient to support the agreement.

Upon the ground, however, that this was an agreement to settle family difficulties and disputes, we think it unassailable. The settlement and compromise of doubtful and disputed rights has always been held to be a sufficient consideration to support a contract whether executed under seal or otherwise. (Rice *v.* Bixler, 1 Watts & Serg. 445; Chamberlain *v.* McClurg, 8 Id. 31; Paxson *v.* Hewson, 8 WEEKLY NOTES, 197.) And the law looks with equal favor upon agreements, the object of which is to promote domestic peace and harmony, where they are free from fraud or the suspicion of improper influence. And family compromises, especially if they are made in good faith and with full disclosure are favored in equity, and may be sustained by the Court, albeit perhaps resting upon grounds which would not have been satisfactory if the transaction had occurred between strangers. (Bispham's Equity, 192.) The same principle is distinctly recognized by many of our own cases, among which may be mentioned, Share *v.* Anderson (7 S. & R. 62); Barton *v.* Wells (5 Wharton, 225); Smith *v.* Warden (7 Harris, 430); Worrall's Accounts (5 W. & S. 111); Ackla *v.* Ackla (6 Barr, 232); Fulton *v.* Moore (1 Casey, 476); Walworth *v.* Abel (2 P. F. S. 370). It is said, however, that in the present case the differences were purely domestic, that no property rights were involved, and that it was the duty of the wife to return to her husband. This is assuming the whole case, and it is assuming it against all its probabilities. The "differences" which caused the separation are not specified in the preamble of the agreement, but there is much upon the face of that instrument to show that rights of property were the foundation of the whole trouble. Then the position of the

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parties favors this view. The husband was receiving an income through his wife, which in their circumstances, and for that day, was by no means inconsiderable. He was childless; the wife had a son living by the husband from whose estate that income was derived. It was natural for the wife to desire that some portion of the money her husband was thus receiving should go to her son in case her husband survived her. And this was the very thing that the agreement provided for. The object of that paper was to settle their differences and restore harmony. We have but to turn to the agreement and see what was settled to ascertain what was in dispute. We there find that the parties themselves declare that "for the purpose of avoiding future difficulties and dissensions they have mutually agreed and by these presents do agree, that their respective property and estates shall be enjoyed and held as follows," etc. Here is their own statement that the differences referred to related to their respective property. How then can we say, that the differences between this man and this woman were entirely domestic, and had no relation to questions of property?

Nor does it appear that the wife was in duty bound to return to her husband. This would be so had she left him without sufficient cause. If, however, the husband's conduct had been such that she was legally justified in leaving him, she would have the right to remain absent, and her agreement to return would be a sufficient consideration to support a contract. We have the admission in the agreement in question that it was these differences between them "which caused the said Julia to leave her said husband." This impliedly leaves the blame at his door, and his contract for her return is such an admission of the sufficiency of the cause of her leaving as to throw the burden of proof upon those who assert the contrary.

No question arises upon that clause in the agreement providing for a subsequent separation. If we concede it to be against the policy of the law it does not affect the case. No attempt was ever made to enforce it, and under the facts as they exist no such attempt could have been made.

Richard Rutter never called the validity of this agreement in question. He enjoyed its benefits to the time of his death. The appellants are mere volunteers, and have no equity to set aside a contract which is not only free from fraud or any species of imposition, but which was evidently in the interests of domestic harmony and substantial justice.

The decree is affirmed and the appeal dismissed at the costs of appellants.

Opinion by PAXSON, J. A. B. W.

Common Pleas—Law.

C. P. of Perry Co. February, 1884.

Jacobs v. Woods et al.

Wages—Priority of, on proceeds of execution—Act of April 9, 1872, and its supplement of June 13, 1883—Construction of—Farmers are not such employers, within the purview of said Acts, whose laborers are entitled to priority for wages earned within six months, in the distribution of proceeds of an execution against personalty—The supplement of 1883 does not enlarge the class of employers, from whom wages may become due, prescribed in the Act of 1872—Nor does said supplement change the kinds of business in which the preferred wages may be earned.

Case stated, wherein John C. Jacobs was plaintiff, and Samuel Woods and others were defendants, setting forth substantially the following facts:—

The defendants, judgment creditors of one Amos Watts, a farmer, residing in Penn Township, Perry County, issued executions against said Watts, on the first and third days of January, 1884, by virtue of which the sheriff on January 11, 1884, sold his farm stock, farm products, and farming implements for the gross amount of $1820.06.

The plaintiff in the case stated was a laborer, in the employ of said Watts, and there was due him for wages, on the date of the sale, the sum of $153.97, of which the sum of $112.50 was due for wages earned within six months preceding the sale. On January 9, 1884, two days before the sale, Jacobs gave the sheriff due legal notice of the nature and amount of his claim, and demanded to be preferred in the distribution of the proceeds of sale under said executions as to the said sum of $112.50.

If, in the opinion of the Court, the plaintiff, Jacobs, was entitled to priority in the distribution, judgment to be entered for him, on the case stated, for $112.50; otherwise, judgment to be entered for the defendants.

McIntire & Stewart and *Sponsler & Shull*, for the plaintiff.

W. N. Seybert and *A. R. Sponsler*, for the defendants.

March 4, 1884. THE COURT (after stating the facts). The question to be decided is, whether a farm laborer is entitled to a preference under the Act of April 9, 1872, and its supplements, and to be first paid out of the proceeds of an execution sale of the farmer's personal property.

That he is not so entitled under the Act of

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1872, has been repeatedly decided by Common Pleas Judges, on the ground that farmers are not within the class of employers whose laborers that Act was intended to prefer. In Solm's Estate (1 Chester Co. Reports, 115), Judge Ross said, the object of the Act was to protect the employés of owners and lessees engaged in developing the manufacturing, mining, and mineral resources of the Commonwealth. The mischief to be remedied was, that such employés being numerous and paid at regular intervals, were, like their employers, at the mercy of trade and financial mutations, and ran some risk of obtaining their wages when pay-day came. But farming is not so affected by such mutations, its laborers are few and already protected by statutes made for their benefit, and the Act of 1872 extends to a different class of laborers a preference special to that class. In Taylor *v.* Smith (Id. 106), Judge BUTLER rejected certain claims, because the miners were also laborers on Mr. Smith's farm, and no separate account was kept, nor separate charge made for the time spent in mining. In Shields *v.* Scott (Id. 123), Judge FUTHEY says of a claim for a farm laborer's wages, that such claims are not within the provisions of the Act. In Brindle *v.* Lichtenberger (Id. 485), Judge HERMAN decided against a farm laborer's claim, on the grounds that farming is not a business where clerks, miners, or mechanics are employed. To the same effect is Sackett & Co.'s Assigned Estate. (Id. 136).

The Supreme Court, also, has decided that cooks, clerks, and house servants in a hotel are not preferred by the Act of 1872, because a hotel is not within the descriptive words of the Act, nor included in the general words "or other business." (Sullivan's Appeal, 27 Smith, 107, and Allen's Appeal, 32 Smith, 302.) And in Pardee's Appeal (4 Out. 408), Judge STERRETT, delivering the opinion of the Supreme Court, says: "We are clearly of opinion that the business of cutting saw logs and driving them to the place of manufacture is not such as is contemplated by the Act of 1872;" that the words, "works, mines, manufactory" employed in the Act have a definite signification, well understood in their general and popular acceptation; and that "the other business" is *ejusdem generis* with that more particularly described by the preceding

This statute was enacted for the purpose of amending the first section of the former, "so that wages of servant girls, washerwomen, clerks, and others shall be preferred and first paid out of the proceeds of the sale of the property of insolvent debtors owing wages to such servants or employés." The amendment as made consists *solely* in inserting eight or more lines in which, in addition to "miner, mechanic, laborer, or clerk," mentioned in the Act of 1872, are specially enumerated servant girls or other servants and helpers, including porters, in and about hotels, boarding-houses, restaurants, and private families or houses; hostlers, and all persons employed in and about livery stables; laundrymen, washerwomen, seamsters, and seamstresses employed by merchant tailors, milliners, dressmakers, clothiers and shirt manufacturers; clerks employed in stores; and hands, laborers, mechanics, printers, apprentices, hired for wages or salary, who are particularly included in the class of employés intended to be benefited. But this Act does *not* enlarge the class of employers from whom the moneys might become due, nor change the kinds of business in which the wages may be earned. It is still the moneys due "from any person or persons, or chartered company . . . . . either as owners, lessees, contractors, or under-owners of any works, mines, manufactory, or other business where clerks, miners, or mechanics are employed." And it is still restricted to be "paid out of the proceeds of the sale of such mine, manufactory, business or other property as aforesaid." The same words are again used in this Act which had a "definite signification well understood" before its passage, and had received judicial construction in the Act of 1872. It must follow, therefore, that Mr. Watts is not within the class of employers, and farming not included in the kind of business described and intended in either the Act of 1872 or the amended Act of 1883; and Mr. Jacobs, as his farm laborer, is excluded from the class of employés to which those statutes give a preference.

It was strongly urged upon the argument that the Legislature *meant* to protect the wages of farm laborers and the other employés mentioned, without regard to the kind of business furnishing the employment, or the description of the class

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struction had left without doubtful signification; and "the best rule to arrive at the meaning of the Legislature is to abide by their ordinary meaning and import." (Ihmsen *v.* The Monongahela Navigation Company, 8 Casey, 153.) If it could be *supposed* that the Legislature *intended* more, then we can only say *quod voluit non dixit;* and that it would be very dangerous to put upon the language used a construction which would amount to holding that the Legislature did not mean what it has expressed. (Dwarris on Statutes, p. 215 *et seq.*).

Being of opinion, therefore, that farming is not such business as comes within the provisions of the Acts of 1872 and 1883, and that for *that reason* the wages of the claimant are not entitled to the preference claimed, we must enter judgment on the case stated for the defendants.

Opinion by BARNETT, P. J.

C. P. No. 3. January 5, 1884.

W—— v. D——.

Case for injuries to the person—Statute of Limitations—Assault within the Act of March 27, 1713 (Purdon, vol. 2, p. 930)—Disease produced by such assault—Facts stated in a narr. by way of inducement—Demurrer.

Sur joinder in demurrer to defendant's plea in case.

The summons went out February 24, 1883, and was returned "served." Plaintiff originally declared in trespass, but afterwards, September 29, 1883, by leave of Court, filed an amended narr. in case, in which she alleged that the defendant on the 27th of November, 1877, being infected with the venereal disease commonly known as "syphilis," and being "a person of wicked mind, and intending to communicate said disease to said plaintiff, and so to greatly injure her in person and estate, etc., did inveigle her into his private office, etc., and then and there seduce, debauch, and have carnal knowledge of her, said plaintiff, without her consent and against her will, . . . and did then and there, by means of the premises aforesaid, communicate said disease unto the plaintiff, whereby she became sick and diseased in body, suffered great anguish of mind, and hath been unable to attend to her necessary business, and perform her necessary work and labor, and hath been compelled to and did necessarily pay, lay out, and expend large sums of money in and about the curing and healing of said disease, to wit, $5000, and hath been brought into public shame, scandal, and disgrace, and other wrongs to said plaintiff did, whereupon plaintiff saith she is injured, and hath sustained damage to the amount of $30,000," etc.

To this narr. defendant filed two pleas, one of "not guilty" and a second one of "not guilty, etc., at any time within two years next before the commencement of this suit," to which latter plea plaintiff demurred, specifying: "(1) That the plea raises no issue of fact, but alleges new matters not properly issuable. (2) The plaintiff is not barred from recovering for the cause of action stated in two years, but in six. (3) The plaintiff cannot take nor offer any certain issue upon the second plea. (4) That it is otherwise uncertain, informal, and insufficient."

The defendant joined in demurrer.

Rufus E. Shapley, for the demurrer.

The only actions which by our statute must be brought within two years are the following actions of trespass, viz., assault, menace, battery, wounding, and imprisonment. The present action is neither in form nor in effect one of these. The Act is to be strictly construed, not extended to include or to except cases other than those specified.

Angell on Lim., §§ 23 and 29, p. 485.

It is properly in form an action on the case and, like actions *quod servitium amisit*, is for the consequential injury, not for the trespass.

Angell on Lim., 327.
2 Chitty Pl., 265 *et seq.*
2 Burr., 753.
1 Tidd's Pr., 5.
Coke *v.* Sayer, 2 Wils. 85.
Macfadzen *v.* Olivant, 6 East, 388.

It is the plaintiff's right to pass over the *immediate* injury and sue for the consequential damage.

1 Chitty Pl., 128 *a* and 129, citing Mr. Justice BLACKSTONE in Scott *v.* Shepperd, 2 Bla. Rep. 897.
Williams *v.* Holland, 6 Car. & Payne, 23.
Sanborn *v.* Neilson, 5 N. H. 314.

The plea is improper in form, and should have been "*actio non accrevit*," etc., and not "not guilty."

Angell on Lim., § 320.
Dyster *v.* Battye, 3 Barn. & Ald. 448.

W. B. Broomall (*Jno. G. Johnson* with him), for defendant.

The act complained of, as laid in the narr., is rape, and being a felony, no civil action lies therefor until the public wrong is redressed. Until this is done, the right of civil action is not merely in abeyance, but it does not exist. It would be necessary, therefore, to lay in the narr. that the rape had been punished.

1 Chitty Pl., 129.

There is no authority for maintaining case in a cause like the one in hand in which the injuries complained of were the direct result of an unlawful, wilful, and forcible assault without any intervening cause. If, however, it should be held that case was rightly brought, the plea of the statute is good. The first section of the Act of March 27, 1713 (Purdon's Digest, vol. 2, p.

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930), by which actions of assault are limited to two years after the act, is almost an exact copy of the third section of the statute of 21 James I., chap. 16. The spirit of the law is to apply a shorter limitation to actions for injuries to the person, because this act is known at once and the injury is immediate, and to apply a longer limitation to actions for injuries to property, because it may be some time before the act becomes known to the injured party, and the injury may be longer in developing. It is evident that it is the character of the act rather than the technical form of the action, that is the subject of the classification in the Act.

De Haven *v.* Bartholomew, 7 P. F. Sm. 126.
Wickersham *v.* Lee, 2 Norris, 422.

Shapley, in reply.

The facts set forth in the narr., and which the defence claim constitute an assault amounting to a rape, are recited merely by way of inducement, and form no part of the body of the declaration which states the cause of action.

C. A. V.

January 25, 1884. (THE COURT being about to overrule the demurrer.) Demurrer withdrawn by leave of Court. A. M. B.

C. P. No. 3. December 15, 1883.

Kingsessing and Tinicum Meadow Co. v. Farrell.

Taxes assessed under the Act of April 3, 1851—Set-off—Damages caused by the Meadow Company "blinding" the sluices.

Rule on defendant for judgment for want of a sufficient affidavit of defence.

Scire facias sur claim for taxes assessed under Act of April 3, 1851 (P. L. 338), against meadowland owned, or reputed to be owned, by defendant.

The affidavit and supplemental affidavit of defence set forth that the plaintiffs were incorporated for the purpose of protecting certain meadow-lands from overflow; that banks were accordingly built, and sluices made at intervals in them, "so that in case of high water they could be kept closed, and at lower water opened," in order to let out the accumulated water; that these sluices had been "blinded"—*i. e.*, permanently closed—under the direction of the managing officers of the plaintiff corporation, against the protest of the deponent and other members of the Meadow Company; and that deponent's meadows, in consequence, became overflowed, and remained so a long time, destroying his crops, and causing a loss to him of $752, which he claims to set-off.

J. J. Knox, for the rule.

The Meadow Company, plaintiff, was incorporated under the Act of April 3, 1851 (P. L. p. 338), to protect certain lands from destructive overflow of tides and freshets. Every land-owner within the district is *nolens volens* a member of the corporation, and the land is liable for the taxes levied, not by virtue of any contract its owner may have made, but in obedience to legislative enactment. If the Meadow Company has not adopted the best method of protecting the land in question, the defendant must urge his objection not here, in answer to our claim, but at the next regular election of managing officers. Conceding, for the sake of argument, that the affidavits allege negligence, unliquidated damages not capable of exact statement except by verdict, are not a proper set-off.

Meadow Co. *v.* Farrell, 8 WEEKLY NOTES, 502.
Lehmaier *v.* Born, 1 Id. 444.

Charles Downing, contra.

This plaintiff is not a public corporation. The case of Meadow Company *v.* Farrell, cited by counsel from 8 WEEKLY NOTES, 502, is incorrectly reported. It was an action upon promissory notes given by Mr. Farrell for meadow taxes assessed for the years 1874–5–6–7, and as it was subsequent to 1877 that the sluice-ways were blinded, the rule for judgment was made absolute, the Court holding that he could not set off damages that had accrued after the giving of the notes. Judge HARE expressly said that this question of set-off might come up against the payment of after-accruing taxes.

Aubrey H. Smith, in reply.

A portion of the supreme power of this Commonwealth was given to the company plaintiff by the Act of April 3, 1851, incorporating it. As to the constitutionality of the Acts incorporating meadow companies, see—

Rutherford *v.* Maynes, 1 Out. 78; S. C., 9 WEEKLY NOTES, 221.
Garrett *v.* Kilpatrick, 13 WEEKLY NOTES, 384.

C. A. V.

December 22, 1883. THE COURT. Rule absolute. A. M. B.

C. P. No. 4. Feb. 16, 1884.

Woodward v. The Church.

Practice—Rule to strike off appearance, and return—Corporation—The de facto officers of a corporation are entitled to represent it.

Rule upon J. Henry Williams, Esq., to show cause why his appearance for defendant should not be stricken off, and upon the relator, and upon Thomas J. Reynolds, who filed the return of the corporation defendant as accounting warden thereof, to show cause why the said return should not be stricken off.

This was a proceeding in mandamus to restore the petitioner to the exercise of his rights as a

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member of the Church of the Evangelists, the corporation defendant. A return to the alternative writ was filed by one Thomas J. Reynolds, as accounting warden of the defendant, and denied the allegation in the suggestion. At the time of the issuing of the writ and of the return an injunction had been granted by the Court of Common Pleas No. 1, restraining one Neilson and others from interfering with Reynolds and others in the exercise of their duties as vestrymen of the corporation defendant (Sommers *v.* Neilson, 40 Leg. Int. 270). The cause was carried by appeal to the Supreme Court, which reversed the decision of the Common Pleas, and dismissed the bill. The defendants in the suit of Sommers *v.* Neilson then obtained the present rule, claiming the right to represent the corporation defendant.

Robert H. Neilson, for the rule.

The Supreme Court has decided that those who filed this return are not the corporation.

[THAYER, P. J. Yes, but it does not follow that those you represent are.]

J. Henry Williams, for the defendant.

We are still the *de facto* corporation.

Henry C. Olmsted and *C. Stuart Patterson*, for petitioner.

Amos Briggs, for J. Henry Williams.

Eo die. THE COURT. Rule discharged.

G. R. V. D.

C. P. No. 4. Dec. 12, 1883.

Foulke, Administrator of Deveney v. Hitzeroth.

Partnership—Settlement of account, between surviving partner and estate of deceased partner—Under what circumstances the costs of proceedings to settle the account will be imposed upon the surviving partner.

Sur exceptions to report of Master.

Suit in equity brought by W. G. Foulke, administrator of Deveney, against Hitzeroth, surviving partner of the firm of Deveney & Hitzeroth, to settle the balance due by the defendant to the estate of his deceased partner.

The bill charged that the decedent Deveney had a two-thirds interest in the assets of the firm, and the defendant Hitzoroth a one-third interest, and called upon the defendant to state an account upon that basis.

The answer set up that each partner was entitled to a one-half interest in the firm, and further charged that the decedent Deveney, who had kept the books of the firm for a series of years, had been guilty of such fraudulent conduct towards the defendant, as to require an entire restatement of the accounts as kept in the books.

C. Stuart Patterson, Esq., was appointed Master to state an account, and report the facts to the Court. Before him the defendant under call made a statement of the account between himself and the estate of his deceased partner, showing a balance due by the defendant to the estate of $7093.69. After much testimony had been taken upon the issues raised, the Master reported that he found no evidence of fraud on the part of Deveney, and that the share of Deveney in the assets was two-thirds, and of Hitzeroth one-third, as stated in the bill, and reported that the balance due by the defendant was $17,180.86.

The Master having been asked to put the entire costs of the proceeding upon the defendant upon this point reported as follows:—

"In equity costs do not necessarily follow the event, as at law, but are awarded to one party or the other, or apportioned, in the exercise of the Chancellor's discretion. The general rule in partnership suits is that the costs up to decree, including the costs of taking the account, are payable out of the fund.

Lindley on Partnership (ed. 1878), 973; Newton *v.* Taylor, L. R. 19 Eq. 14.

"The fund," of course, means not the amount which, upon stating the account is found due to the plaintiff, but the net balance which is awarded to the partners in the proportion of their respective interests, and the effect of the rule, as above stated, is to divide the costs between the parties in that proportion in which the several partners are found to be interested in the firm assets. But to this rule it is a recognized exception, that when an issue is raised as to the *quantum* of a partner's interest in the firm, the cost of litigating that issue must be borne by the party against whom that issue has been decided.

Norton *v.* Russell, L. R. 19 Eq. 345.
Hawkins *v.* Parsons, 8 Jur. N. S. 452.
Parsons *v.* Hayward, 4 De G. F. & J. 474.

Here comes in also the equity rule, that, where charges of fraud are asserted, and upon examination found to be groundless, the party who has put such charges forward must bear the costs of the inquiry.

Daniell's Ch. Pr., 1366, 1399.

The application of these principles to this cause is obvious. The main litigation has been as to the *quantum* of the defendant's interest in the firm, and as to the question whether or not the plaintiff's decedent had committed a fraud. On both points, the Master has found against the defendant. If those untenable grounds of defence had not been put forward, the taking of the accounts would have been easy, speedy, and inexpensive, for the plaintiff has frankly accepted the defendant's statement of collections and disbursements, without cavil or question, except as to certain items, which were so clearly objectionable that their exclusion from the account was not

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seriously contested. In view of these circumstances, the Master is of opinion, that the defendant individually should pay the costs."

Exceptions to the Master's report were filed by the defendant, *inter alia*, because the Master erred in imposing the costs upon the defendant personally, and not upon the partnership fund.

H. M. Dechert, for the exceptions.

A surviving partner is in the position of a trustee, and he is entitled to have his accounts settled by a Master. In insisting upon this course, particularly in a case where all the books were kept by the deceased partner, the surviving partner does not render himself liable for the costs.

R. C. Dale, contra.

Had the defendant submitted the books to the Master to state an account, and declined to undertake to do it himself on account of his inability and ignorance of the books, the fund must have borne the expense. The defendant undertook, however, to establish an affirmative proposition, that his deceased partner had been guilty of fraud in keeping the books. Failing in this, he must pay the costs. One who charges fraud in his pleadings, and fails to sustain it in his proofs, is not favored in a Court of Equity. See cases on this point cited in argument of counsel, Spering's Appeal (10 Sm. 199).

C. A. V.

December 19, 1883. THE COURT. Exceptions dismissed.

ARNOLD, J., absent in Quarter Sessions.

W. H. W.

C. P. No. 4. December 14, 1883.

Hall v. Second and Third St. Passenger Railway Co.

Common carrier—Street car—Loss of money therein—A person who drops his money in a street car is entitled to remain on the car a reasonable length of time to look for it.

Rule to take off nonsuit.

This was an action on the case to recover against the defendant, a street railway company for an unlawful attempt by its servants to eject the plaintiff from one of its cars.

On the trial of the cause the plaintiff showed the following case:—

The plaintiff entered one of the defendant's [illegible] ductor. The conductor then without allowing him time to look for his money, told him he must pay or get out, and upon the plaintiff's refusal to comply, pushed him, with the assistance of the driver, as far as the door of the car, tearing his clothes and injuring his shoulder, when the money was found by a lady who was sitting on the opposite side of the car. The plaintiff then paid his fare, and was allowed to ride to his destination.

ARNOLD, J., entered a nonsuit, saying that it was the plaintiff's duty to pay his fare when it was demanded, and failing in this, it was the duty of the conductor to eject him.

The plaintiff having obtained this rule—

Geo. W. Thorn, showed cause.

There was nothing to submit to a jury, the plaintiff refused to pay his fare when it was demanded, and the employés attempted to eject him without any unnecessary violence. There was no demand by the plaintiff for a reasonable time to look for his money, but an allegation that he was going to ride until be found it. There is no authority in law to show that a conductor must take the word of a passenger that he has lost his money.

J. D. Yocum, for the rule.

We do not claim that conductors are bound to believe the assertion of a passenger that he has lost his money, but when they attempt to put such passenger out they do so at their peril. He had a right to remain as long as he had a reasonable expectation of finding his money.

Maples *v.* New York & N. H. R. Co., 38 Conn. 559.

He was entitled to a reasonable length of time to search for his money, and what is reasonable time is a question for the jury.

Thompson on Carriers, 338.
Schouler on Bailments, 613.

THE COURT. Rule absolute.

W. M. S., JR.

Orphans' Court.

November 19, 1883.

Truefitt's Estate.

Interest upon loans of public and private corpo-

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bonds and mortgages of certain real estate, Pittsburgh loans and Philadelphia and Reading Coal and Iron Company's bonds, on which interest was payable semi-annually on April and October 1st. By her will the decedent gave one-half the income of her estate to her husband for life, and the other half to her daughter, Mrs. Emily V. Wilson, and after the death of her said husband, the whole income to Mrs. Wilson. Mr. Truefitt died December 27, 1882, and the question was whether the semi-annual income falling due April 1, 1883, should be apportioned between his executrix and Mrs. Wilson, or whether the whole should be paid to Mrs. Wilson.

The Auditing Judge (ASHMAN, J.) decided that the income upon the loans and mortgage bonds should not be apportioned, and that the whole income from the Pittsburgh loan and the Reading Coal and Iron Co.'s bonds should be paid to Mrs. Wilson. To this the executrix of Mr. Truefitt filed exceptions.

Byerly Hart, for the exceptant.

In Pennsylvania public funds seem unapportionable.

Earp's Appeal, 1 Parsons, 453.

[HANNA, P. J. We decided this in Fassitt's Estate, 2 WEEKLY NOTES, 571.]

That is following English law, which should not guide us, as the English public funds are in the nature of annuities, not bonds. As regards the Reading Coal and Iron Company's bonds, they are certainly not public funds. They at best are corporation obligations, such as have been held to be apportionable.

Rogers's Trust, 1 Drewry & Smale, 338.

Interest on a mortgage is apportionable.

Ebb's Estate, 36 Leg. Int. 65.

Stock dividends are apportionable.

Earp's Appeal, 4 Casey, 368.

H. G. Ward, contra. Interest upon bonds and mortgages is due *de die in diem* for forbearance of the principal; but rents, annuities, interest upon public obligations, or obligations of private corporations are entire net sums, not due until the days fixed for payment, and not apportionable.

Pearly *v.* Smith, 3 Atkyns, 260.
Sherrard *v.* Sherrard, Id. 502.
Wilson *v.* Harmar, 2 Ves. 672.

In all these cases it was said that interest upon bonds, or bonds and mortgages, would have been apportioned. Lord ERSKINE said, in Banner *v.* Lowe (13 Ves. 135), that the rule as to bonds and mortgages applied, notwithstanding particular times of payment are fixed by the condition. Interest on a mortgage is in fact due from day to day, but rents, annuities, and interest on the public funds to be due on certain days are not apportionable. There is an exception in the case of annuities for the support of children, widows, or married women living separate from husbands, founded upon a presumed intention that the interest of the beneficiaries should be apportioned every day up to the discontinuance of the annuity by death, marriage, or attaining majority. An instance is—

Hay *v.* Palmer, 2 Peere Williams, 502.

In England, by Stat. 33 and 34 Vict. ch. 35, rents are now apportionable.

In Pennsylvania it has been held that income from public debts and those of corporations are not apportionable.

Earp's Appeal, 1 Parsons's Sel. Eq. Cas. 453.
Smith *v.* Wistar, 5 Phil. 145.
Blight *v.* Blight, 1 Smith, 421.

December 29, 1883. THE COURT. *In re* Earp's will (1 Parsons's Eq. Cases, 453), Judge KING, following the rule in England, held, that interest accruing upon the funded debt of the United States, and dividends upon stock of private corporations, and interest upon loans issued by them, payable after the death of testator, were not apportionable between the executors and the residuary legatees, but formed part of the income of the residuary estate applicable to the trusts of the will. When we take into consideration the circumstances of that case, the question arising between the executors representing the general estate and the widow and children of testator, the objects of his bounty, it is not surprising that the leaning of a Court of Equity should be in favor of the latter. The principle there adhered to has been followed in the case of the loans of the Commonwealth and of municipal corporations. And we are not aware of any variation except as to annuities, or trusts for the maintenance and support of minor children or other beneficiaries, to support whom the testator may be under either a legal or moral obligation. There it is presumed that the income, from whatever source, was intended to be so applied, and therefore apportionable. In Gheen *v.* Osborn (17 S. & R. 171), the gift of an annuity to a widow in lieu of dower was held to entitle her representatives to an apportionment of payments which had not fallen due, and at common law could not be apportioned. The rule in Earp's Will, *supra*, was recognized in Fassitt's Estate (2 WEEKLY NOTES, 571), but interest on city of Philadelphia loan was apportioned, for the reason that the loan represented investments of money at interest by the trustees, and equity will not suffer the *cestui que trust* to be prejudiced by changes in the character of the investments. We are satisfied of the propriety of the rule, that dividends and interest upon loans of the General and State Governments are not apportionable, except as before mentioned, for the reasons stated by Judge KING, but we fail to appreciate its application, either to the debts

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of municipal or private corporations, the creatures of statute. (Commonwealth *v.* Gloucester Ferry Co., 2 Outer. 116.) Dividends are not payable until declared, and a debt due by the sovereignty cannot be enforced. But the debt of a municipality or other corporation may be enforced by suit, as if the debtor were an individual. The holder of preferred stock may have an action of *assumpsit* in case of failure to declare the dividend. (Railroad Co. *v.* Jackson, 27 P. F. Smith, 321.) And bonds or loans issued by a city for improvement of its streets are part of its funded debt, and it is bound to provide for the payment of the interest thereon. (Commonwealth *v.* Pittsburgh, 7 Norris, 66.) If, then, these corporations are held to the performance of their contracts as individuals, there is no good reason why the interest they agree to pay to their creditors should not be apportioned, precisely as that payable by any private debtor upon his bond or mortgage or other evidence of indebtedness. According to Judge STORY, in his work on Equity, sections 476, 480, etc., the doctrine of non-apportionment should not be recognized in a court of equity. And in England, by Statute 34 and 35 Victoria (see 2 Williams on Executors, 839), it is declared, "all rents, annuities, dividends, and other periodical payments in the nature of income, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." And the rigor of the common law rule as to rents has been relaxed by our own Act of February 24, 1834, in favor of the life tenant.

But it is conceived that legislation is unnecessary to remedy the injustice of the doctrine of non-apportionability in cases not clearly within the reasons for its establishment. If the obligations of municipal and other corporations are to be treated as those of the individual citizen, as we think they should be, then we need but apply the plain principles of equity as between the life tenant and remainderman. As there is no difficulty in making the apportionment, there is no actual necessity for the rule which forbids it, and, as remarked by Judge KING in Earp's Will, *supra*, 467, "the treasury had no interest in the subject." Again, by an apportionment of the interest, the intention of a testator to provide for But, by reason of his death, prior to the date upon which the interest, accruing *de die in diem*, upon the investments in municipal and coal and iron company bonds, became payable, as a convenience to the corporations, if apportionment be denied, the intention of testatrix will clearly be frustrated, and the *cestui que trust* deprived of a portion of the income to which he was entitled. A result certainly not contemplated by testatrix, and not demanded by any principle of equity, should not be permitted.

Notwithstanding the great respect we entertain for the opinion of so distinguished a jurist as Judge KING, we are obliged to differ from the conclusion reached by him, so far as respects the interest payable upon the loans of municipal corporations, and bonds or loans of other corporations, whether railway, canal, coal, iron, or manufacturing. For the reasons given, we are of opinion it should be apportioned between tne parties entitled to such income for life, or other limited period, and those in remainder. In this connection we may also refer to Smith *v.* Wistar (5 Phila. Rep. 145), where it is held, that ground-rent due after the death of the widow, the tenant for life, was apportionable to the date of her death, not under the Act of 1834, but according to the general principles of equity, which favor "an equitable division of the whole interest bequeathed between the remainderman and the tenant for life, and leaves the latter in possession for the means of support at a time when they are more necessary than any other." And the same learned Judge (HARE, P. J.), in Ebb's Estate (13 Phila. Rep. 44), reached a conclusion similar to the view entertained by us in the present case, and held that interest on the mortgage bonds of the Philadelphia and Erie Railroad Company, and of the Junction Railroad Company, payable after the death of the minor *cestui que trust*, should be apportioned between her administrator and the parties claiming under the executory bequest, upon the ground that he could not discover any reason why the rule applicable to the bonds of individuals should not also be applied where the debtor is a corporation.

Being of opinion, therefore, that the interest upon the Pittsburgh loans and Philadelphia and Reading Coal and Iron Company bonds, paya-

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, MARCH 27, 1884.* [No. 16.

Supreme Court.

July, '83, 58. Jan. 16, 1884.

Perry v. Dicken.

Attorney and client—Contingent fees—Evidence.

A contract between an attorney-at-law and a client for a contingent fee is a valid and binding contract in this State.

The validity of such a contract is not interfered with by reason of the fact that the attorney is also a material witness in the case, where it does not appear that the fee was at all intended as a reward for the attorney's services as a witness.

Semble, that an attorney is a competent witness on behalf of his client. The propriety of his taking the witness stand commented upon.

PAXSON, TRUNKEY, and STERRETT, JJ., dissented.

Error to the Court of Common Pleas No. 3, of Philadelphia County.

Assumpsit, by J. Charles Dicken against Emma M. Perry, to recover compensation as per contract for legal services. Pleas, non-assumpsit, set-off, payment with leave, etc.

On the trial, before LUDLOW, P. J., the following facts appeared: John F. Perry was the owner of certain real estate situate in the city of Pittsburgh on the corner of Duquesne Way and Eighth Street, valued at from $40,000 to $50,000. In the year 1863, Mr. Perry, being involved in business troubles, conveyed this property by a deed absolute on its face to his brother Hugh Perry, under a verbal agreement that Hugh was to raise by his bond secured by a mortgage on the premises $15,000, out of which John F. Perry's debts were to be paid, and when Hugh Perry was repaid out of the rents what he had advanced, he was to reconvey the property to John F. Perry. The property remained in the name and possession of Hugh Perry up to and after the death of John F. Perry in 1868, shortly after which event the widow of John F. Perry called on J. Charles Dicken, Esq., an attorney-at-law residing in Pittsburgh, the plaintiff in this case, and talked with him, among other things, about the possibility of recovering the property which had been conveyed to Hugh Perry, and which he had refused to reconvey according to the agreement. She was advised that the deed which was absolute on its face was in truth and point of law only a mortgage, and that the title to the property never had passed out of John F. Perry, but that it was held as a trust by his brother for certain purposes, and that those purposes having been served the property belonged to the estate of John F. Perry, and was vested in the daughter, Emma M. Perry.

Suit was brought in the name of the latter, and the case tried in the District Court of Pittsburgh. After a protracted trial Miss Perry obtained a verdict, and upon an appeal taken to the Supreme Court the judgment of the Court below was affirmed, and title to the property (excepting a certain portion which is not necessary to be alluded to for the purposes of this case), was established in Miss Perry.

Miss Perry, after she came of age and just before the trial of the case, agreed with Mr. Dicken to give him in consideration of his services in assisting in the preparation and trial $5000, contingent upon her success. There were engaged in the case several other counsel on behalf of the plaintiff, Messrs. Weir & Gibson, and Bigham & Son, whose fees were also contingent. Besides acting in the capacity of attorney, Mr. Dicken was the most important witness in the case, on whose testimony largely depended the result of the trial, he having been the sole witness to the arrangement and verbal agreement entered into between John F. Perry and Hugh Perry in 1863 at the time of the execution of the deed. He was not attorney of record. He afterwards brought this suit to recover the amount of his fee of $5000.

The defendant requested the Court to ge, *inter alia*, as follows:—

(1) If the jury find from the evidence, that the question in the case of Perry *v.* Perry was, whether the deed made by J. F. Perry to Hugh Perry was an absolute deed or mortgage, and that Dicken was the only witness on the part of the plaintiff to prove that it was a mortgage, although they may find that there was other testimony to confirm him, then his alleged contract with Emma M. Perry, just before the trial, that he should be paid by her a fee of $5000 for his services in the preparation and trial of the cause, if successful, or nothing if he was not, was illegal, and no recovery can be had in this suit therefor. *Refused.*

(2) If the jury find from the evidence that Dicken was the main witness in the case of Perry *v.* Perry, any contract made by him with Emma M. Perry, for a contingent fee for his services, dependent upon the result of the case, was illegal, and no recovery can be had thereon in this case. *Refused.*

(3) It being a fact proved in this case, that Dicken was the main witness in the cause of Perry *v.* Perry, he could not make a contract for

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a contingent fee for his services in that cause which can be enforced in this case. *Refused.*

Verdict and judgment for plaintiff. The defendant thereupon took this writ, assigning for error the refusal of the Court to affirm the points as above set forth.

George Junkin (with whom was *Edward Shippen*), for plaintiff in error.

This raises a single question, but a very important one. It involves the purity of the administration of justice.

In England, unquestionably, under the admitted facts in this case, this suit could not have been maintained. (See Earle *v.* Hopwood, 9 C. C. B. N. S. 566. But in this country, we have, with questionable propriety, allowed an attorney, by contracting for a contingent fee, to become a party as well as an advocate. The best writers upon professional ethics have, however, condemned the practice, and warned against the baleful influence of such a mode of dealing with clients.

Sharswood's Legal Ethics, 102.
Ormerod *v.* Dearman, 4 Out. 561.
Dawkins *v.* Gill, 10 Ala. 206.
Grove *v.* McCalla, 9 H. 44.
Clippinger *v.* Hopburgh, 5 W. & S. 315.
Hatzfeld *v.* Gulden, 7 Watts, 152.
Felson *v.* Himes, 5 Barr, 452.

But this case is far worse than one of a mere contingent fee. Under color of a contingent fee, it was a contingent reward for testifying as a witness. No liberality of decision can so override the policy of the law as to validate such a bargain, made by an attorney with a young woman lately a minor, on the eve of a trial. The Act of 1869 permitting interested witnesses to testify has no application to the case.

Francis E. Brewster (with whom was *W. D. Moore*), for defendant in error.

The same policy of law which now permits a party in interest to testify in his own behalf will not exclude the attorney from speaking from the witness stand in favor of the client, even if he have the greatest pecuniary interest in the result of the case. In either case the interest of the witness, whatever it may be, goes only to his credibility. Under the decisions of this Court a contract for a contingent fee is as valid as an agreement to receive and pay for the necessaries of life. It stands upon the same footing, and is enforceable to the same extent and in the same way, and is entitled to the same protection.

Strohecker *v.* Hoffman, 7 Har. 227.
County of Chester *v.* Barber, 1 Out. 463.

Perry, and tried in the year 1874, in the District Court of Allegheny County. The question involved in the ejectment was, whether or not a certain deed made in the year 1863, by John F. Perry (father of Emma M. Perry), now deceased, to Hugh Perry, for valuable real property on Du Quesne Way in the city of Pittsburgh, was intended by the parties thereto simply as a security for money, and, therefore, a mortgage, or whether it was what it purported to be, an absolute deed for the premises therein described. The claim of the plaintiff here, so far as it is for professional services, is founded upon an alleged express agreement for a fee of $5000, contingent upon the success of his client in recovering the disputed property.

That an attorney may agree with his client to render services for a contingent fee, is now well settled in Pennsylvania; the learned counsel who argued the cause concedes that the decisions of this Court recognize the right of the members of the profession so to contract. Miles *v.* O'Hara (1 S. & R. 32), Boulden *v.* Hebel (17 S. & R. 312), Strohecker *v.* Hoffman (7 Harris, 227), Dickerson *v.* Pyle (4 Phila. 257), and Chester Co. *v.* Barber (1 Out. 463) are all to this effect.

It is doubtless true that such a practice may sometimes lead to speculative litigation or result in oppression from an unconscionable bargain; and, so far as its tendency is to the perpetration of these abuses, it does not tend to promote the highest standard of professional ethics. Yet it is certainly true, as stated by Judge Lewis in his Abridgment of the Criminal Law, that "Many of the most eminent and upright gentlemen of the bar have felt no repugnance to this method of compensation; it has been practised without the slightest censure by gentlemen who have risen to the highest legislative and judicial stations in the Commonwealth, and who have been distinguished ornaments of the profession."

As those who have rights but no means to pursue them are obliged to resort to this means of procuring legal redress, it becomes the duty of the Courts, as we have already held, to see that no improper advantage is taken either of the ignorance or necessities of those who enter into such contracts.

If, then, the agreement between Emma M. Perry and J. Charles Dicken, was for his professional services as an attorney, the mere fact that his only hope for reward depended upon his success, would not defeat its provisions or prevent his recovery of the sum stipulated. That the

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satisfy them by sufficient evidence either of his employment as attorney or of the existence of a contract, made with him as such," they should find for the defendant.

But, it is said, that Dicken not only participated in the trial as an attorney, but he was the principal witness in behalf of his client; that he was, therefore, interested in the result, and, as the amount of his interest was fixed only a short time before the trial, that it was against the policy of the law and in derogation to his high privilege as a member of the bar, that he should be thus called to testify. If it appeared that the contingent fee was a reward for his services as a witness, this contention would certainly be sustained; such a contract would be not only reprehensible, but highly immoral, against public policy, and therefore illegal and void. There is nothing in the evidence to indicate that there was any corrupt intention to influence the testimony of the witness; it was known from the commencement of the proceedings in ejectment that Dicken's testimony would be required; he was the only person present at the execution of the deed, and who knew the true nature and character of the transaction with the intent of the parties thereto. His testimony, however, became more important and essential, by reason of the death of a witness a few days before the trial. It is immaterial here whether the amount of his compensation was only determined a short time before the trial or at an earlier date, if the fee was for professional services, and that was a question solely for the jury; Dicken testifies, however, that the amount had been fixed before the ejectment was brought, and that he thought he had been secured to the amount of $5000 in the contract with Weir & Gibson, who were associated with him in the case.

Since the Act of 1869, no interest or policy of law, except as provided in that Act, will exclude a witness from the stand; the law of evidence as it had been previously understood, affecting the admissibility of witnesses, was by that Act revolutionized, the former policy of the law was abandoned, and a new one adopted. If no interest or policy of law will exclude even the parties, from testifying, upon what principle can we hold that it is immoral and tends to perjury to admit the attorney to testify. We are ignorant of the fact that there is anything in the nature of the profession or in its tendencies, which will behalf of his client, as the question of his own credibility and of the accuracy of his statements afford for him most indelicate questions for discussion. Absolute necessity may, however, in some cases disclose a duty which an attorney cannot disregard. Aside from this, if called as a witness, he is bound to testify, and certainly it cannot be against public policy for a member of the bar to do voluntarily that which by the law he is obliged to do.

We are disposed to adopt the language of WOODWARD, J., in Strohecker *v.* Hoffman (7 Harris, 227), where he says: "Agreements fairly made between counsel and clients, are as obligatory as between other parties; and when a desperate claim has been successfully asserted by counsel on the faith of an agreement that one-half of the recovery shall reward his skill and diligence, it is an ungracious plea to urge that the agreement was without consideration and void."

If all that is assumed in the defendant's points were true, we can discover no principle or policy of the law, which would render the alleged contract illegal, and there certainly was no error in the refusal of these points, where that refusal was accompanied by clear and explicit instructions that the plaintiff must show that the fee of $5000 was for services to be rendered as an attorney and not as a witness in the ejectment.

We discover no error in the ruling of this case and the

Judgment is affirmed.

Opinion by CLARK, J.

PAXSON, TRUNKEY, and STERRETT, JJ., dissent.

H. P.

Oct. & Nov. '83, 52. October 25, 1883.

Johnston v. The Elizabeth Building and Loan Association.

Building and loan associations—Act of April 12, 1859—Mortgage—Evidence—Surety.

One who deals with a corporation in its corporate character cannot impeach the charter in a collateral proceeding by alleging that conditions precedent to the existence of the corporation have not been complied with.

Declarations of the secretary of a corporation as to the

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A building association need make no inquiries as to the purpose for which a loan made by it to one of its members is obtained, nor as to the use to which the money may be put.

In an action on a mortgage given to a building association incorporated under the Act of April 12, 1859 (P. L. 544), by one of its members to secure a loan made to him by the association, it is not competent for defendant to show that less than the face value of the mortgage has been advanced to the mortgagor, since the presumption is that the difference between the two sums is the premiums legalized by that Act. (Seldon *v.* Reliable Savings and Building Association, 32 Smith, 336, affirmed.)

A member of a building association who has borrowed money from the association, cannot prove as a set-off to an action therefor, that the association suspended business subsequently to the loan, and that he suffered pecuniary loss of profit on account of such suspension.

Error to the Common Pleas No. 2, of Allegheny County.

Scire facias sur mortgage, by the Elizabeth Building and Loan Association against Josiah P. Johnston, with notice to Allen Williams, terretenant, on a mortgage given by defendant to plaintiff to secure payment of $3000, with interest.

On the trial, before KIRKPATRICK, J., the following facts appeared: The Elizabeth Building and Loan Association was incorporated in 1873, under the Act of April 12, 1859, and its supplements. Article III. of its charter provided that "The capital stock of the Association shall consist of two thousand five hundred shares, of the value of two hundred dollars each, provided that the Association may commence business when one thousand shares shall have been sold."

On June 11, 1874, the association made a loan to one of its members, and took the mortgage in suit from defendant as security therefor. Afterwards, and before this suit was commenced, defendant sold the mortgaged property to one Allen Williams.

Defendant offered to prove that prior to the execution of the mortgage, one thousand shares of plaintiff's stock had not been sold as provided in Article III. of its charter. This for the purpose of showing that the association was not legally constituted. Objected to by plaintiff as irrelevant. Objection sustained. Exception. (First assignment of error.)

Defendant then offered to prove that in the spring of 1879, Allen Williams, being about to purchase the mortgaged property from defendant, inquired of the secretary of the plaintiff association as to the amount due on the mortgage; that the secretary after examining the books of the charge of the books and accounts of the association, including the mortgage in question. Objected to by plaintiff. Objection sustained. Exception. (Second, third, and fourth assignments of error.)

Defendant further offered to prove that the loan in consideration of which the mortgage was given was made to one Wm. L. Penny, a stockholder of the association; that Penny transferred fifteen shares of stock to defendant, and that thereupon defendant gave the mortgage as security for said loan. This for the purpose of showing that it was not a loan to defendant on which plaintiff could collect usurious interest. Objected to by plaintiff. Objection sustained. Exception. (Fifth assignment of error.)

Defendant also offered to prove that only sixteen hundred and fifty dollars was advanced by plaintiff on the mortgage. Objected to by plaintiff. Objection sustained. Exception. (Sixth assignment of error.)

That the plaintiff association after the giving of the mortgage in suit, suspended business without cause for a long time. This for the purpose of proving damage from loss of profits to defendant, as a set-off to plaintiff's claim. Objected to by plaintiff. Objection sustained. Exception. (Seventh assignment of error.)

Verdict for plaintiff for $4151.13, and judgment thereon; whereupon defendant took this writ, assigning for error the above rulings on evidence.

J. S. Ferguson, for plaintiff in error.

The limitation in Article III. of plaintiff's charter not having been complied with, it could do no business as a corporation, so far at its members were concerned. Any business it did must have been as a voluntary association, and as such it can recover no more than the sum actually advanced on this mortgage with legal interest.

Jarrett *v.* Cope, 18 Smith, 67.
Rhoads *v.* Hoernerstown B. and S. Association, 1 Norris, 180.
Workingmen's B. and L. Association *v.* Coleman, 8 Norris, 428.

The secretary was the mouthpiece of the association, kept its accounts, collected its debts, and had therefore authority to make admissions binding on the association against a party who having dealt with him in good faith has sustained a loss in consequence.

Field on Corporations, sec. 193.

Defendant should have been allowed to show to whom and for what purpose the loan was made, for if it was not intended to be used for building purposes, it was not within the scope of

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The invalidity of the charter of a corporation cannot be inquired into collaterally, and especially not by a member who has enjoyed its privileges.

Spahr *v.* Farmers' Bank, 13 Norris, 429.
Dyer *v.* Walker, 4 Wright, 157.
Mechanics' B. and L. Association *v.* Minnich, 1 Kulp, 513.

The officers of a corporation are special, not general agents, and have no power to bind the corporation except within the limits prescribed by the charter or by-laws. The secretary had no power to satisfy the mortgage, and therefore his declaration in regard to it could not estop the corporation.

Gass *v.* Citizens' B. and L. Association, 14 Norris, 101.
Adriance *v.* Roome, 52 Barb. 399.
Dabey *v.* Stevens, 40 How. (N. Y.) 341.
Clark *v.* Des Moines, 19 Iowa, 199.
Marsh *v.* Fulton Co., 10 Wallace, 676.
Custer *v.* Titusville, 13 Smith, 381.
Pennsylvania Railroad Co.'s Appeal, 30 Smith, 265.

January 7, 1884. THE COURT. The evidence, the rejection of which forms the subject of the first assignment of error, was clearly incompetent. The tendency and object of it was to impeach the charter of the plaintiff's corporation. That this cannot be done in a collateral proceeding has been so often decided that a reference to the authorities is almost needless. It is sufficient to refer to Spahr *v.* The Bank (13 Norris, 429), which is one of the later cases. Rhoads *v.* Hoenerstown Building and Savings Association (1 Norris, 180) has no application.

The second, third, and fourth assignments of error may be dismissed with the remark that there was neither evidence, nor even an offer to show, that the secretary had any authority to bind the corporation by any such admission as is there stated. Moreover, the admission could only be held to apply to a payment made voluntarily and pursuant to the charter and by-laws, and not to the amount collectible on the foreclosure of the mortgage.

The difference in result where a borrower pays up his stock to the end, and a defaulting borrower was pointed out in Watkins *v.* The Building Association (1 Out. 514), and need not be here repeated. (See also Gass *v.* Citizens' Building and Loan Association, 14 Norris, 101.)

The fifth assignment is equally without merit. The proposition [illegible] Gass *v.* Citizens' Building and Loan Association, *supra*, was the case of a surety. And there is nothing in the Building Association Law, or in the charter of the plaintiff's company that makes it the duty of the association to iuquire for what purpose loans are being obtained, or to require any stipulation from the borrower as to the use he shall make of the money. (Juniata Building and Loan Association *v.* Mixell, 3 Norris, 313.)

The sixth assignment is ruled by Selden *v.* Reliable Saving and Building Association (32 P. F. S. 336), and need not be discussed. The seventh assignment alleges that the Court below erred in excluding evidence that the plaintiff Association, after the giving of the mortgage sued on, suspended business for a period of some length. If the fact be so, the defendant below was not injured. He was a member. The action of the association was in part his, and was evidently for the purpose of a temporary relief from the burdens imposed upon all. The only effect was to prolong the period of winding up the affairs of the association. The defendant would be in the precise position in the end as if the suspension had not taken place.

Judgment affirmed.

Opinion by PAXSON, J.

GREEN, J., absent. T. W. B.

Oct. & Nov. '83, 61. October 26, 1883.

Mackrell, Executrix, v. Wolff et al.

Evidence—Execution of writing—Proof of handwriting of subscribing witness — Actions against executors—Interested parties at time of signing—Act of April 15, 1869.

In an action against an executor, upon an instrument of writing alleged to have been executed by the decedent (prior to the Act of April 15, 1869) the execution of the paper cannot be proved by proof of the handwriting of a deceased subscribing witness thereto, who, at the time of attestation, was a party interested therein.

In such case the subscribing witness, if living, would be incompetent to prove the execution of the instrument. The action being against an executor, the Act of 1869 has no application.

Error to the Court of Common Pleas No. 2, of Allegheny County.

[illegible]

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On the trial, before KIRKPATRICK, J., the following facts appeared: The plaintiffs were the owners of two notes, under seal, which were as follows:—

"PITTSBURGH January 2nd 1859

"I James Mackrell has received from Mrs. Charles Fredrick Wolff the sum of six hundred Dollars in Gold belonging to the heirs of Charles Fredrick Wolff I James Mackrell will pay the same amount to the heirs of Charles Fredrick Wolff inside of Twenty years with six per cent interest I James Mackrell hold my hand upon this pen until signed and sealed.

"JAMES MACKRELL X [SEAL]"

"Witness EMILY WOLFF

The second was as follows:—

"PITTSBURGH June 14th 1861

"I James Mackrell has received from Mrs Charles Fredrick Wolff the sum of Four hundred Dollars I James Mackrell will Pay the same to Mrs Charles Fredrick Wolff inside of eighteen years or in case of death I will Pay the Children of Mrs Charles Fredrick Wolff with six per cent interest

"Witness JAMES MACKRELL X [SEAL]

"EMILY WOLFF

"AUGUSTUS WOLFF

Charles Frederick Wolff, named in the notes, died in 1853, and his wife, named in the notes as Mrs. Charles Frederick Wolff, died in May, 1878. James Mackrell, the alleged maker of the notes, died in January, 1879, and was over eighty years of age. Emily Wolff, the sole attesting witness to the first note, and one of the attesting witnesses to the second note, was a daughter of said Charles Frederick Wolff and said Mrs. Charles Frederick Wolff, and was a sister of the plaintiffs. She was fourteen years of age at the date of the first note, and seventeen years of age at the date of the second note. She died in October, 1861. Augustus Wolff, an attesting witness to second note, was a son of said Mr. and Mrs. Charles Frederick Wolff, and a brother to Emily Wolff and the plaintiffs. He died in 1862.

The said notes in suit were not in the handwriting of said James Mackrell, nor was the signature in his handwriting, but the plaintiffs claimed that they were executed by his making a mark or cross after his name had been written. It was shown that the said James Mackrell in his lifetime could write his name as early as 1841, and as late as 1873, but his will, dated February 26, 1877, was signed by his making a mark.

Plaintiffs, having proved the signature of Emily Wolff, as attesting witness, offered in evidence the two notes. Objected to by defendant "because there has been no competent proof of the execution of these notes. The only evidence offered upon the part of the plaintiff is as to the signature of the attesting witness; the attesting witness was at the time of the execution of these notes an interested party. And the attesting witness, being now dead, if living, would be an interested party, and would be an incompetent witness upon the trial of this case, and that the notes offered cannot be proved by proving her handwriting. And, still further there has been no sufficient proof of identity that James Mackrell, deceased, was the James Mackrell that was the party mentioned in these notes."

Objection overruled, and the notes admitted in evidence. Exception.

The Court instructed the jury that if they believed the signatures to the notes to be the signatures of James Mackrell, the plaintiffs were entitled to recover.

Verdict and judgment for plaintiffs. Defendant thereupon took this writ, assigning for error the admission in evidence of the said two notes.

J. Erastus McKelvy, for plaintiff in error.

The execution of the notes in suit could not be proved by proving the signature of Emily Wolff, an attesting witness, who was an interested party in said notes at the time of their respective dates, and who, if living, would be a necessary party to the suit, and incompetent as a witness.

Swire *v.* Bell *et al.*, 5 Durnford's & East's Rep. 371.
Nelius *v.* Brickell's Adm'r, 1 Haywood, 25.
Lessee of Hamilton *v.* Marsden, 6 Binney, 45.

The Act of April 15, 1869, does not affect the question in this case. The notes were dated long prior to its passage. The attesting witness died long prior to its passage, and this action was brought in 1881, after the death of James Mackrell, against his executrix, which brings it within one of the exceptions prescribed by said Act.

S. A. McClurg (*Charles Robb* with him), for defendants in error.

We may admit the principle decided by the cases cited by plaintiff in error, but it does not cover this case. In those cases both the interest of the attesting witness and the law which excluded interested witnesses existed at the time of attestation, and continuously until the time of the trial. In this case the Act of 1869 intervened, and it makes an attestation by an interested witness as good as an attestation by a disinterested one—the parties all living, as of course is the case when the paper is signed. Thus the attestation is made good, and the witnesses dying, it is proper to prove their handwriting by a competent witness.

Powers *v.* McFerran, 2 S. & R. 44.

The Act of 1869 applies to attestations before its passage, as well as after. It affects simply the remedy. It has never been doubted that a contract made before the Act of 1869, but incapable then of proof, because of the want of a disinterested witness, can, since the Act, be established by the testimony of witnesses made competent by that Act. We, of course, exclude cases where rights of property have in the meantime vested. The same principle applies to subscribing witnesses.

Patterson *v.* Shrader, 12 WEEKLY NOTES, 429.

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October 26, 1883. THE COURT. This record presents the single question whether the paper upon which the suit below was brought was sufficiently proved to entitle it to go to the jury. It was admitted by the learned Judge below, and this ruling was assigned for error here.

This was an action of debt brought by Charles F. Wolff *et al.*, as heirs of Charles F. Wolff, deceased, against Agnes A. Mackrell, executrix of James Mackrell, deceased, upon two sealed instruments for the payment of money, purporting to be signed by James Mackrell, who was the testator of the defendant below. In each paper the promise to pay was "to the heirs of Charles Frederic Wolff inside of twenty years."

Both papers were signed by Emily Wolff as a subscribing witness. It was admitted that she was one of the heirs of Charles Frederic Wolff deceased, and had she lived would have been a necessary party plaintiff.

At the time of the trial below she was deceased, and the plaintiffs offered to prove her handwriting as a subscribing witness, which was allowed by the Court. We are of opinion that it was error to admit this evidence. At the time Emily Wolff signed the papers as a witness, she was an interested party, and hence disqualified.

When the case was called for trial she could not have been examined if living for the reason that the suit was against an executor. The rule in such cases is that where a subscribing witness to a bond is interested therein, as well at the time of attestation as at the trial, he cannot be examined as a witness to prove the execution, nor is proof of his handwriting sufficient for the purpose. (Swire *v.* Bell, 5 D. & E. 371; Nelius *v.* Brickell's Admin., 1 Haywood, 25.)

Where, however, a subscribing witness becomes interested after subscribing, even by his voluntary act, his handwriting may be proved. (Hamilton *v.* Marsden, 6 Binney 45.)

It was urged, however, that the Act of 1869 having been passed after the attestation and before the trial, the case does not come within the rulings above cited. We are unable to see what the Act of 1869 has to do with this case. It does not apply to actions brought by or against executors or administrators. But it was urged that if the paper had been executed after the passage of this Act of 1869, the subscribing witness would not have been disqualified upon the ground of interest, and if so, it would be competent to prove her handwriting upon the trial. We do not propose to decide upon the effect of the Act of 1869 in the case of a subscribing witness, for it is not necessary to this case. The Act did not operate when the papers were signed, for it had not then been passed. It did not operate when the cause was tried for the reason already stated. All the Act does is to permit interested persons to testify in certain cases with a proviso that in a particular class of cases it shall not apply. The case in hand belongs to the latter class.

The judgment is reversed, and a venire facias de novo awarded.

Opinion by PAXSON, J.

GREEN, J., absent. W. R. S.

Jan. '83, 321. March 9, 1883.

Weaver v. Lutz.

Mechanic's lien—Scire facias—Execution—Estoppel.

Where the equitable owner in possession of land causes improvements to be erected thereon, without the coöperation of the legal owner, a mechanic's lien binds no other or greater estate than that of the equitable owner.

Where, however, improvements are made by the holder of the equitable title, and a mechanic's lien is filed against him as contractor and against the holder of the legal title as owner, and a scire facias is issued, duly served, judgment obtained, and on execution the property is sold to a *bona fide* purchaser, such sale divests the title of the legal owner who has thus permitted judgment to be recovered against him. The judgment confirms prior averments which are permitted to stand unchallenged and the claim becomes *res adjudicata.*

Error to the Common Pleas of Lehigh County.

Ejectment by Samuel F. Lutz against Reuben Weaver, the alleged owner, and George W. Griesemer, his tenant, to recover possession of a certain tract of land.

On the trial, before ALBRIGHT, P. J., the following facts appeared: Samuel F. Lutz, the plaintiff, was the owner of a certain tract of land. In April or May, 1877, the said Lutz entered into a parol contract to sell half an acre of said land to one Franklin Miller, and then, or a little earlier, the boundaries were agreed upon, the land staked off, and the price ($250) settled, and Miller took possession. Lutz, however, refused to execute a deed until the purchase-money was fully paid.

Shortly afterwards Miller commenced the building of a frame dwelling-house upon the said land, which, Lutz alleged, and was uncontradicted, Miller had done "on his own hook." A mechanic's lien was filed against Franklin Miller as contractor, and Samuel F. Lutz as owner; a scire facias issued which was served upon Lutz and Miller and judgment was had thereon; a levari facias was issued and the property sold by the sheriff to Reuben Weaver. Weaver entered upon the land, and thereupon Lutz brought this action of ejectment.

The defendants requested the Court to charge:—

(1) That the sheriff's sale under the lev. fac. against Franklin Miller, as contractor, and Sam-

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uel F. Lutz, as owner, divested the title of Miller and Lutz to said premises. *Refused.*

(2) Samuel F. Lutz, by his agreement with Franklin Miller, agreed to convey the premises in question in this case, upon the payment of a certain sum of money. Franklin Miller built a house upon said premises with the knowledge and consent of the said Samuel F. Lutz, the improvements made thereon costing about $400. It being the undisputed testimony that these improvements were made by Franklin Miller, and that no tender having been made by Lutz before suit brought of the value of the improvements, this action cannot be maintained. *Refused.*

The Court charged, *inter alia*, as follows: "According to the title as it appears by writing, the plaintiff here is entitled to this land."

Verdict for plaintiff, on condition that if the defendants, within thirty days, pay to plaintiff the purchase-money stipulated in the parol agreement, etc., the plaintiff shall release his claim to the premises. Judgment was entered on the verdict. The defendants took this writ, assigning for error the refusal of their points, and the portion of the charge above quoted.

Evan Holben, for plaintiffs in error.

The title of Lutz was divested by the sheriff's sale. If he had a defence to the mechanic's lien he should have made it after the scire facias had been issued and served upon him. It has been held that where a married woman is the owner of the land, and her husband erects a building on it, with her consent, it will be bound by a mechanic's lien.

Woodward *v.* Leiby, 12 Casey, 437.

But not if it be filed against the husband alone without referring to the wife.

Finley's Appeal, 17 Smith, 453.

But if the lien be filed against the husband and the wife, and judgment obtained thereon, and the property sold as the property of the wife, or of the husband and wife, the wife's property is divested.

Balt. R. R. Co. *v.* Gourley, 39 Leg. Intell. p. 52.

Henniger & Dewalt, for defendant in error.

It is contended by the plaintiffs in error that Lutz should have made his defence to the sci. fa. on the mechanic's lien. This Court has, however, ruled differently.

Van Billiard's Adms. *v.* Nace, 1 Grant, 233.
Leiby *v.* Wilson, 4 Wr. 67.
Woodward *v.* Leiby, 12 Casey, 437.

October 1, 1883. THE COURT If, while Miller was in possession and owning the equita-

On such facts the joining of Lutz with Miller in the claim filed, would be improper. Upon application of the former the claim as to him should have been stricken off, or, after scire facias issued, the facts would have constituted a good defence for him in a proper issue. The case of Van Billiard's Adm'rs *v.* Nace *et al.* (1 Grant, 233), nor Leiby *v.* Wilson (4 Wright, 67), will not prevent such defence.

If, however, such facts did exist in regard to Lutz, he wholly neglected to allege or prove them at the proper time. The claim was filed against both of them in due form. It charged Miller as contractor and Lutz as owner or reputed owner. The scire facias thereon was duly served. Judgment was regularly obtained against them. Execution issued, and the property was sold to one of the plaintiffs in error. He appears to have been a purchaser in good faith, relying on the correctness of the averments of record. The claim of record charged the estate of Lutz with liability for the erection of the building as owner thereof. That averment was confirmed by the judgment. Whether it was a fact admitted or previously in dispute, the judgment finding it to exist was conclusive. (Rockwell *v.* Langley, 7 Harris, 502; Philadelphia *v.* Girard's Heirs, 9 Wr. 9.) This fact was not one incidentally cognizable in that action, but was directly in issue. The judgment could not have been rendered against Lutz on any other grounds than the affirmance of the liability of his estate in the premises, or his ownership of the building. That judgment has not been set aside nor reversed. Legal effect must be given to the facts on which it must necessarily have been founded. (Farrington *v.* Woodward, 1 Norris, 259.) In the absence of covin or collusion, it cannot be attacked collaterally. (Postens *v.* Postens, 3 W. & S. 127; Sheetz *v.* Hanbest, 31 P. F. S. 100.)

The title which passed at the sheriff's sale does not rest solely on the correctness of the claim originally filed as a mechanic's lien. The subsequent judgment confirmed prior averments, and the claim became *res adjudicata*. If improperly entered against Lutz before, thenceforth the debt became a good and valid lien, and supported a sale of the whole estate of the defendants in the judgment.

Moreover, Lutz having permitted a judgment to be recovered against him in the form stated, and having suffered it to stand unchallenged, and a sale to be made based thereon, should not now be allowed to aver a claim in opposition to the

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Common Pleas—Law.

C. P. of Clearfield Co. February, 1884.

Ross v. Miller et al.

Justices of the peace—Jurisdiction—Foreign attachment—Claim exceeding $100—Acts of Assembly.

Justices of the peace have no power to issue attachments against non-resident debtors where the plaintiff's claim exceeds one hundred dollars.

Act of May 8, 1874 (P. L. 123), entitled "An Act to provide for the collection of debts against non-resident debtors," considered and construed.

The Act of July 7, 1879, entitled "An Act to enlarge the jurisdiction of justices of the peace," etc., does not enlarge the jurisdiction conferred by the said Act of May 8, 1874.

Review of the Acts of Assembly conferring power on justices of the peace to issue writs of attachment.

Certiorari to justice of the peace.

The transcript showed that on October 10, 1883, upon affidavit of plaintiff that the defendants, T. T. Loomis, J. E. Miller, and A. Decreet, doing business as Loomis, Miller, & Decreet, were indebted to him in the sum of $188.15, and that said defendants were non-residents of the Commonwealth, the justice took a bond from the plaintiff, with surety, and thereupon issued a writ of foreign attachment, which was returned by the constable, October 16, 1883, served, by attaching one gray horse (and other property) of defendants, in the possession of A. D. Loomis, and by leaving with him a copy of the attachment, etc. By the copy of the bond and writ annexed to the transcript, it appeared that the amount of the bond was left blank, no penal sum being inserted, and that the return to the writ was signed, but not sworn to by the constable.

On October 18, 1883, a summons issued, returnable October 24th, against the defendants. Returned, not found, etc.

October 24, 1883, defendants not appearing, judgment was entered by default for the plaintiff for $188.15.

The defendants took this certiorari and filed the following exceptions:—

1. The justice had no power to issue an attachment against non-residents, for any claim exceeding $100.

2. The justice had no jurisdiction.

3. The justice did not require the plaintiff to execute and file a bond in double the amount of plaintiff's claim, as is required under the Act of 8th May, 1874.

4. The summons being issued on October 18, 1883, and returnable October 24, 1883, was a long summons. The defendants being non-residents, the justice should have issued a short summons, and the judgment is void, the justice thereby acquiring no jurisdiction of the persons of the defendants.

5. To sustain a judgment by default, it must appear by the record, that the constable was sworn to his return; in this case neither the return to the attachment nor to the summons are sworn to.

6. The constable's return to the attachment is deficient, in that it does not state specifically the manner in which he served the attachment.

7. The constable's return does not show that he took the property into his possession, or that he took security from the defendants or any person for them, as required by the third section of the Act of May 8, 1874.

8. The record does not show that actual notice in writing was given defendants of said action, and the nature thereof.

D. S. Herron, for plaintiff.

Orvis & Snyder, for defendants.

February 16, 1884. THE COURT. This cause comes before us upon a writ of certiorari issued out of our Court of Common Pleas, and directed to W. N. Prothero, Esq., a justice of the peace in and for Clearfield County. Eight exceptions have been filed to the regularity of the proceedings had before the justice, the first, and most important, raising the question of the jurisdiction of the justice.

The proceeding was by a writ of attachment issued by the justice under the provisions of the Act of Assembly passed May 8, 1874, entitled "An Act to provide for the collection of debts against non-resident debtors." The first section of this Act provides, "that it shall be the duty of any alderman or justice of the peace, for any claims not exceeding one hundred dollars, to issue an attachment against any defendant non-resident of this Commonwealth," etc. The amount to which jurisdiction is confined is a sum "not exceeding one hundred dollars," and the writ of attachment shall issue upon proof by affidavit, that the defendant is a "non-resident of the Commonwealth." The record sent up by the justice shows the plaintiff's claim or demand to be one hundred and eighty-eight dollars, and therefore it is in excess of the sum named in the Act; and if there was nothing more, it would plainly appear that the justice had no jurisdiction, and that the judgment was void.

The plaintiff, however, contends, that the Act of Assembly which became a law July 7, 1879, entitled "An Act to enlarge the jurisdiction of justices of the peace," etc., in its first section, which provides, that the alderman, magistrates, and justices of the peace in this Commonwealth

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shall have concurrent jurisdiction with the Courts of Common Pleas of all actions arising from contract, either express or implied, etc., wherein the sum demanded does not exceed three hundred dollars, etc., has so enlarged the jurisdiction of justices as to authorize the justice to issue the attachment in question.

All civil jurisdiction vested in justices of the peace, is, by some special statute, and, without special authority, they are without jurisdiction. (Taylor *v.* Manderson, 1 Ashmead, 130; Herrigas *v.* McGill, 1 Ashmead, 152.)

A brief review of the Acts of Assembly conferring power on justices of the peace to issue writs of attachment is deemed important in order to arrive at a right understanding of the case in hand. The Legislature, first by the Act of August 22, 1752, gave to the justices the right to issue a domestic attachment upon sums not exceeding five pounds, but under the statute it was necessary that the defendant should be, or have been, an inhabitant of the Commonwealth, and have left his place of abode without satisfying his debts. The jurisdiction to issue writs of domestic attachment was subsequently, by the Act of December 4, 1807, enlarged to a sum not exceeding one hundred dollars. The Legislature again by the Act of July 12, 1842, conferred upon justices of the peace the power to issue writs of attachment "upon proofs," etc., that the defendant is about to remove from the county any of his property with intent to defraud his creditors, etc. This Act of Assembly, by the phraseology of the twenty-seventh section, shows that the defendant must be a resident of the Commonwealth, and the Supreme Court has decided that it is a remedy provided in lieu of imprisonment for debt, proceeding against the person for the purpose of reaching the goods, and that it did not intend to give to the justices of the peace and aldermen the high power of proceeding *in rem* against persons resident in other States and kingdoms. (Vansyckel's Appeal, 1 Harris, 128.) So, that up to the time when the Act of May 8, 1874, was passed, Courts of Common Pleas only had, under the Act of June 13, 1836, jurisdiction and power to issue writs against persons non-resident of this Commonwealth, for any sum demanded or due. The right exercise of that power was, and is, ofttimes full of difficulty, raising close and within the Act of 1879, unless the words "shall have concurrent jurisdiction with the Courts of Common Pleas of all actions arising upon contracts, either express, or implied," import such enlargement.

The remedy provided by the Act of 1874, is not similar to the Act of June 13, 1836, authorizing the issue of writs of foreign attachments. The mode of procedure differs in many important particulars. That the Legislature did not by this Act of May 8, 1874, intend to make the jurisdiction of justices of the peace concurrent with the jurisdiction of the Common Pleas Courts in writs of foreign attachment, we think, is plainly manifested in that the Act of May 15, 1874, conferred jurisdiction on the Common Pleas Courts to issue writs of foreign attachment in causes of action *ex delicto*, and it is not to be inferred that the law-making powers were ignorant of the law passed so short a time previous. We think too, that there is sufficient in the Act of 1879, taking its several provisions together, to manifest the intent of the legislative mind to confine it to actions where a personal service or a service shall be had as in cases of ordinary summons issued by a justice. The enumeration also, of "all actions of trespass, and trover and conversion," we think is conclusive evidence that under the words "shall have concurrent jurisdiction," etc., it was not intended to embrace actions in form of attachments, such as are the proceedings by attachment under the Act of July 12, 1842, and the Act of May 8, 1874. The jurisdiction sought to be enlarged being of a high and summary character, we think, fully justifies us in applying the rule of construction to this statute of July 7, 1879, which became a law without the signature of the Governor, that the enumeration therein of certain kinds of action precludes us from including all others, particularly if those sought to be included are themselves anomalous and of unusual character and form of procedure.

We are, therefore, of the opinion, that the Act of July 7, 1879, does not enlarge the jurisdiction conferred by the Act of May 8, 1874, and the judgment entered by the justice was void for want of jurisdiction. This finding would make it unnecessary to consider the remaining exceptions, unless it be to settle the practice under the Act in future proceedings had in this and other causes.

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C. P. No. 2. January 16, 1884.

Creary v. McAnnally.

Practice—Act of March 22, 1877—Actions for the recovery of wages for manual labor take precedence on the trial list.

This was a motion for an order to advance the case upon the trial list under rule of Court, Common Pleas Rules of 1884, page 66, § 164.

The statement of plaintiff's claim was as follows:—

Wages as a domestic servant for ten weeks from 14th August, 1883, to October 23, 1883 @ $3 $30
Interest from October 23, 1883.

A. B. Guilbert, for the motion.

THE COURT. It is ordered that the above case be advanced upon the trial list, under Act of March 22, 1877.

Per FELL, J. S. H. T.

C. P. No. 3. Jan. 5, 1884.

In re Application of Mrs. C. B. Kilgore.

Attorneys-at-law—Power of the Courts to appoint—Act of April 14, 1834—Admission of women to practice at the bar—Married women—Inability of married women to contract to render services—Antenuptial agreement.

Motion for the admission of Mrs. Carrie Burnham Kilgore to practise as an attorney-at-law.

A written motion had been filed December 22, 1883, and was ordered for argument for January 5, 1884.

A diploma of the University of Pennsylvania dated June 17, 1883, conferring upon Mrs. Kilgore the degree of Bachelor of Laws, and a certificate showing her admission to practise in the Orphans' Court of Philadelphia County, were presented.

Damon Y. Kilgore (*Horatio Gates Jones* with him), for the motion.

Mrs. Kilgore is qualified under the Act of 14 April, 1834 (P. L. 354).

"The Judges of the several Courts of this Commonwealth shall respectively have power to admit a competent number of persons, of an honest disposition and learned in the law, to practise as attorneys in their respective Courts." The rule of Court, made in pursuance of this law as a guide to the exercise of this discretionary power, makes citizenship of this State a requisite to be possessed by the person applying for admission, "He shall be a citizen of this State and of full age." The applicant here is a citizen of this state, of full age, and is therefore within the discretion of this Court. The masculine pronoun "he" is applicable to both sexes.

[FINLETTER, J. The use of the pronoun "he" in the rule of Court has no significance, as it was inserted many years ago, when such an application as this was not thought of.]

The fact that it has long been the *custom* in this State to admit only male citizens to practise as attorneys of the Courts has been referred to by Judge HARE as a ground for refusing this applicant admission to the bar in Court of Common Pleas No. 2 (14 WEEKLY NOTES, 30). No *custom* can be said to have arisen, since this is the first and only instance in this State of a woman having qualified herself and made application to be admitted as an attorney.

Again, it is not only the right of a woman, citizen of Pennsylvania, to practise law as an attorney, under our State law, but being a citizen of the United States (Burnham *v.* Luning, 29 Legal Intelligencer, 5), it is also a right guaranteed in the national Constitution and recognized by Congressional legislation.

[FINLETTER, J. I cannot see the need of extending the argument to the applicant's right under the Constitution of the United States. The question is simply as to the right of the applicant to admission to the bar under our Act of Assembly. The Court is bound to admit her unless she is subject to some disability. If the rule of Court is in conflict with the Act it is not binding on the Court, and must not be enforced.]

In refusing the motion for Mrs. Kilgore's admission in Court of Common Pleas No. 2, Judge HARE said, that "in the case of a married woman there seem to be some reasons that may not apply to the case of a single woman." A married woman may act as arbitrator, executrix, administratrix, guardian, attorney in fact, and trustee, then why not as an attorney-at-law? There is no doubt as to a married woman's power in this State either to appear in person, or to appoint an attorney independent of her husband. The power to delegate authority implies the power to act by delegated authority.

Mrs. Kilgore, however, is not subject to the common law disabilities of a married woman. By an antenuptial agreement made when she had full power to make a valid contract, she reserved to herself control both of person and of property.

[Contract handed to the Court.] By this contract she has as much power in this respect between herself and her husband, as she had before marriage. Her husband has no common law power to coerce her to commit a tort, and therefore by her own act she would be estopped from pleading coverture either to shield herself from a contract, or in case of a tort to avoid punishment for it.

[LUDLOW, P. J. I suppose your position is

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that the antenuptial agreement has done away with the applicant's disability as a married woman to contract with third parties?]

We contend that there exists no legal disability in a married woman which disqualifies her for admission to practise as an attorney. If, however, the Court should be of the opposite opinion, we submit that the antenuptial contract made Mrs. Kilgore, for the purposes of this application, a single woman.

[LUDLOW, P. J. Can a married woman by an antenuptial agreement make her estate liable for anything but necessaries? Suppose, for instance, she, as an attorney-at-law, contracted to conduct a case for $500, and afterwards refused to do so, how could she be sued?]

She could be sued as an attorney-at-law, and the husband would be joined *pro forma;* or she could be disbarred.

[FINLETTER, J. The complete answer to the question would be that those who employed her, would know her position and ought to take the consequences of choosing her.]

C. A. V.

March 18, 1884. THE COURT. Upon a very simple motion a question of more than ordinary importance is presented for the consideration of this Court. Can a married woman in the existing state of the law be admitted as a member of this bar? That is the question which must be answered.

It may be admitted at once that no inherent reason exists why a woman, married or single, may not engage in any business which a man may lawfully follow. It ought, however, to be remembered that the Creator of the universe, for a reason which any reasonable being ought to consider self-evident, made a distinction between the sexes, and saw fit in the propagation of the species to protect the physically weaker sex by laws as inflexible as other and general laws governing the universe, and to place under the protection of the male sex the female, simply because as a general and universal law applicable to all created living organisms the female requires protection.

Of exceptional cases we do not speak, but of general laws, by which alone we must determine principles of universal application. Again, experience, if it proves anything, establishes the fact that while a dividing line cannot be accurately drawn between duties chiefly appertaining to the male and female, the laws of God, or for those who deny his existence, the laws of nature, distinctly point to the female for the perform- them. In passing, however, may be named domestic duties generally, and those which appertain to the married woman in the care, protection, and education of children; and the very fact that the employment of woman to do that which by common consent a man only should do causes a shock, is an argument of some force from nature itself. It is the emphatic assumption of a general principle. I do not stop to reason by analogy from the lower creation, for there the instinct implanted at once settles the question. The argument drawn from the abuse of power by the male sex does not destroy the principle which is assailed. Legislation itself has of recent years largely extended and protected the rights of married women, and yet any one familiar with the decisions of our own Supreme Court has not failed to notice the fact that recent decisions have curtailed the liberal interpretation of the laws relating to married women which at first swayed the Court, because it was found by experience that that which was very properly intended as a shield had in many cases proved to be a double-edged sword; and it is a question yet to be solved how far this inversion, so to speak, of the order of nature will not finally produce an unnatural competition between the sexes, and what is worse, a condition of society wherein worthless husbands, fathers, sons, and brothers will depend upon the exertions of those who ought to receive and enjoy that protection which Nature intended. These general thoughts are suggested, not because they are dogmatically asserted to be true, but because they lead to the determination of another question involved in this case. How far can a court of justice, of its own motion, take the important step involved in the decision of this case without the authority of the law? I say without the authority of law, for I contend that no law exists by which we can grant this motion. By the law of England "all may be attorneys which the law will permit; women may not be attorneys, nor infants, nor villeins, nor any who are in custody, nor any other who is not free of himself." (Minor, Of Justices, p. 135.) True, the Act of 1834 declares that "persons" may be admitted to practise as attorneys. It is an undenied and undeniable proposition that contemporaneous exposition and uniform practice is a fundamental canon of construction. From the foundation of this Commonwealth down to a recent date, no motion like this one has ever been made. The universal interpretation of the law was one way only, and no lawyer in all past time ever made such a motion, because

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estate. Introduce the principle that contemporaneous construction and uniform practice does not in a court of justice mean something definite, and no man's title to his property, to his personal liberty, or to life itself will be safe. Sad havoc will thus be wrought with the interpretation of law and the stability of society itself.

Once more. The applicant is a married woman, and here is another and most serious difficulty presented, which ought not to be settled by judicial decision. While a married woman may act in certain fiduciary offices, it is not the law that she may enter into ordinary contracts not specially provided for by Act of Assembly. This proposition will, I am sure, not be doubted, and yet while the law acting upon her as an individual, and not in a representative capacity, is so determined, we are requested by our official sanction to hold her out to the world as a person capable of making any contract. If the contract of a married woman is (except for necessaries) *absolutely void*, and if she is at the present time only able to contract by virtue of *express legislation*, how is she to hold the office of attorney and be clothed with the legal power necessary in the premises? It is useless even to reason that her husband may be made responsible. Such is not the law, and should it be held to be so, it would be a clear act of injustice to him, and, argue as we may, would expose him to very great perils, especially because they are indefinite. Nor will it answer the purpose to declare that the Court may discipline the woman should she misbehave in the office of attorney. To such an argument the answer is, that the last tribunal in the Commonwealth which ought to hold out to the world a person as capable of entering into general, and, so to speak, everyday contracts, is a court of justice, whose officers should at least be clothed with legal power to do what they pretend to do, and who, therefore, should be unable to mislead the ignorant, and ought not to be permitted to advise those who might be willing to take the risk. Without assuming to do more than state a fixed opinion, enough has been said to prove not only that the question at issue is a large one, but that its solution can only be found in legislative action. In the Legislature we have the reflected will of the people. There may arguments for and against the proposed action be freely and candidly discussed. A great social problem is to be solved; a principle which, look at it as we may, is a new one, is or is not to be introduced into our social economy. Every consideration warns us that at least further progress, as it is called, should be considerately and carefully discussed. If right (and that be the sentiment of the majority), let the principle be adopted in the form of a law which will dispel doubt and lead to accurate legal results—if wrong, let it be fairly defeated.

Senator Hoar struck the keynote of this controversy, when in the United States Senate, upon this subject being under discussion, he said: "Now, with the greatest respect for that tribunal [Supreme Court of the United States] I conceive that the law-making and not the law-expounding power in this Government ought to determine the question what class of citizens shall be clothed with the office of the advocate." Again, "Would it be tolerated if the Supreme Court undertook by rule to establish any other disqualification—any of those disqualifications which have existed in regard to holding any other office in the country?"

In conclusion, I am opposed to the admission of this lady, who is a married woman of unquestionable character and ability:—

First. Because no law or custom sanctions it, but, on the contrary, contemporaneous exposition and universal practice condemn it.

Second. To grant this motion would be in the present condition of the law an act of judicial legislation, and, therefore, of judicial usurpation.

Third. Because in this instance the applicant being a married woman, she cannot enter into those contracts without ability to make which she cannot legally practise as an attorney of the Courts.

Fourth. Because the question is one peculiarly the subject of legislation, and therefore must be solved by legislative and not by judicial authority.

Motion dismissed.

Opinion by LUDLOW, P. J.

FINLETTER, J., dissents. A. M. B.

C. P. No. 4. Feb. 16, 1884.

McCormack v. Spackman.

Practice—Rule to strike off judgment, when taken too late—The Court will not entertain a rule to strike off a judgment where the ground upon which the rule is based has been considered and passed upon by the Supreme Court on a writ of error, brought on account of the refusal of the Court below to open the judgment.

Rule to strike off judgment.

Judgment was entered for want of an affidavit of defence upon copy of book entries filed. A rule to open the judgment was discharged. Defendant removed the case to the Supreme Court, assigning as error the insufficiency of the copy filed to warrant a judgment, and the refusal to open the judgment. The judgment being affirmed, and a remittitur filed, defendant took this rule. The "book entries" contained no charge against defendant.

Andrew Zane, Jr., and *Andrew Zane*, for the rule.

The copy filed is insufficient to entitle plaintiff to judgment.

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Wall *v.* Dovey, 10 Sm. 212.
Williamson *v.* Earp, 5 WEEKLY NOTES, 40.

[THAYER, P. J. The question is whether having assigned the insufficiency of the copy as error in the Supreme Court, and the judgment being affirmed, it is not too late to strike off the judgment.]

J. W. Mercur, contra.

Eo die. THE COURT. Rule discharged.

G. R. V. D.

Orphans' Court.

February, 1884.

Kohler's Estate.

Pecuniary legacies charged on land—When personalty insufficient to pay all as they become due, pro rata distribution should be made, and resort had to the land for the balance.

Sur petition to pay balance of legacies, and answer.

The petition of Frederick and Louis Kohler set forth that their father died in 1881, leaving to survive him a widow and nine children, all now minors but the petitioners. By his will the decedent gave to each child $2000 on arriving at majority. The residue of his estate, both real and personal, was given to executors in trust to pay the income to the widow for life with limitations over to the children. The executors' amount showed a balance of $10,000.60, as to which the Auditing Judge, PENROSE, J., said: "This balance being insufficient for the payment in full of the legacies to the children of testator, a *pro rata* proportion, viz., $1111.17, will be paid to Frederick and Louis Kohler, who are the only ones who have as yet attained majority, and the balance will be retained for distribution among the other children as they become respectively entitled thereto. The legacies being chargeable upon the land by reason of the blended disposition of the real and personal estate in the residuary clause of the will, the legatees have it in their power by proper proceedings to obtain payment in full."

After this adjudication this petition was filed, asking for an order of sale. The guardian, who

March 1, 1884. THE COURT. The answer to this petition seeks to impeach in a collateral proceeding a decree of distribution which was unappealed from, and has ripened into a judgment. The personal estate left by the testator proving insufficient for the payment in full of the legacy of $2000 to each of the children as they should severally arrive at the age of twenty-one years, the Auditing Judge awarded to the two children who had attained their majority, a *pro rata* proportion of their legacies. It is objected to the prayer for payment of the balance out of the lands upon which the legacies are charged, that the proper fund for that purpose is the personal estate. This exception, besides coming too late, is without merit. If allowed, it would frustrate the expressed intention of the testator to give to his children pecuniary legacies of equal value. Payment of the full amount of their bequests to the older children will exhaust the fund long before the younger legatees are eligible to take; and the interest of the latter in the real estate may in the mean time have been swept away.

The petition is granted, and payment of the balance of the legacies therein named, with interest, is decreed to be made out of the lands, in conformity with the provisions of the Act of 24th of February, 1834.

Opinion by ASHMAN, J. W. H. W.

January 22, 1884.

Neal's Estate.

Decedent's estate—Distribution—Issue devisavit vel non—Pendency of, in the Common Pleas—The Court will not decree a partial distribution while the issue is undetermined, even where the same distributees would take under the Intestate Act, and an ample fund would remain to protect undetermined interests.

Sur petition for order of continuance.

For a full statement of facts see Hambleton *v.* Mendenhall (*ante*, 172), where a rule to show cause why a verdict obtained by a collusive agreement of counsel, dated October 9, 1883, upon an issue of *devisavit vel non*, upon the alleged will of William Neal, the decedent, should not be set aside, was made absolute by the Court of Common Pleas No. 1, on January 12, 1884.

When the account of Neal Hambleton, executor of the alleged will, was up for audit before

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the prayer of which is fully set out in Hambleton *v.* Mendenhall, before cited, and a continuance was accordingly granted until the time prayed for.

On December 22, 1883, the Real Estate Title Insurance and Trust Company was appointed guardian of said minor. On January 10, 1884, the audit was continued to January 17, and on January 12 the Court of Common Pleas set aside the verdict in the issue *devisavit vel non*, and granted a new trial.

On January 17 a petition was presented on behalf of certain legatees, under said will, praying that the account might be audited, and a partial distribution made to the petitioners of the funds in the executor's hands.

The prayer was refused, PENROSE, J., making the following order:—

"And now, January 17, 1884, it being represented to the Court that the verdict in the Court of Common Pleas upon the issue *devisavit vel non*, granted by the Register of Wills in the matter of the alleged will of said decedent, has been set aside by the said Court and a new trial ordered, and that the controversy as to said will has not yet been determined, it is ordered that further proceedings on said account be suspended until said will shall have been duly established, or until the further order of this Court."

The case was argued before the Court in banc on exceptions to the order of continuance.

J. Cooke Longstreth, for Neal Hambleton, executor and exceptant.

A partial distribution should be made to those parties who would take as legatees, and under the intestate laws.

A writ of error has been taken to the Supreme Court from the order of the Common Pleas granting a new trial.

Gable's Appeal, 4 Wright, 231.
Com. *v.* Snyder, 12 Smith, 153.
Hammett's App., 2 Nor. 392.

George M. Connaroe, for Joseph Hambleton, attorney in fact for certain persons entitled under the intestate laws.

No distribution should be allowed until the accountant's right to distribute is established, and it can go through a proper channel, and the rights of all parties should be preserved *in statu quo* until a new trial be had in the Common Pleas.

February 16, 1884. THE COURT. The cases in which a partial distribution of the estate of a decedent has been ordered, have all turned upon the question whether a present division would impair the ultimate safety of disputed interests. No inquiry was directed, because no inquiry was called for, to the title of the party by whom payment was to be effected. This circumstance renders the decisions in Gable's Appeal (4 Wr. 231), Commonwealth *v.* Snyder (12 P. F. S. 158), and Hammett's Appeal (2 Norris, 392), of slight relevancy to the matter in hand. The merits of the controversy over the will, and the number of the parties whom it involves, are considerations which must yield in importance to those which concern the legal character of the accountant. It is not necessary to get beyond Blackstone to know that an executor derives his authority not from the act of the Register, but from the will of his testator. The presumption, however, from the facts which are spread upon this record, is, that no will is in existence. The verdict in favor of such a writing, and which was assailed, whether rightfully or wrongfully cannot now be known, upon the ground of fraud, was set aside and the judgment thereon vacated. Every incident of the will fell with the overthrow of the verdict, so far at least that the Register would be justified, if, indeed, it would not be his duty, to commit the administration of the estate to an administrator *pendente lite*. We should speculate upon the chances of the new trial if with these facts and this possibility before us we should interfere with the decree of the Auditing Judge suspending action upon the account.

The exceptions are accordingly dismissed.

Opinion by ASHMAN, J. W. L. S.

December 18, 1883.

Silberman's Estate.

Executor, dismissal of—When justifiable under Act of May 1, 1861—Insolvency—Indebtedness to estate, and unfriendly relations imperil estate.

Sur petition for dismissal of executor and answer.

The facts set forth in the petition and answer sufficiently appear in the opinion of the Court.

R. P. White, for petitioner.

The interests of the estate are in jeopardy. This is sufficient ground for dismissal.

A. J. Bamberger, for respondent.

The mere fact of insolvency is not always sufficient cause for dismissal.

[PENROSE J. Has the respondent become insolvent since the death of the testator?]

Yes; but this does not put the estate in peril.

December 29, 1883. THE COURT. The facts appearing from the petition and answer bring this application within the object and purpose of the Act of May 1st, 1861 (Purdon, 1424, pl. 59). That Act provides a more efficient remedy for the dismissal of an executor or other trustee than was supplied by the Act of 1832, and authorizes the exercise of such authority by the Court whenever it shall be made to

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appear that the executor, etc., is wasting or mismanaging the estate, or that for any reason the interests of the estate or property are likely to be jeopardized, or when such executor, etc., is, or is likely to prove insolvent. In this case there is no allegation of any waste or misappropriation of assets of the estate, but it is charged that respondent has mismanaged its affairs; and the existence of such a want of harmony between him and his co-executors appears as would furnish a sufficient reason for the vacation of the letters testamentary granted him; and, taken in connection with his admitted misfortune in business, rendering himself and the firm of which he is a co-partner insolvent and largely indebted to the estate, but little doubt arises that the relief sought by the petitioners should be granted. While respondent and his co-partners preferred other creditors by confession of judgment, upon which execution issued and sheriff's sale held, it would seem proper that respondent should also seek to likewise secure the estate he represented as a creditor of his firm. There would be no impropriety in this, in the absence of fraud or concealment. But it does not appear he took any step to effect this. And to say he has waived his share of the commissions as executor to indemnify the estate, is of no importance, for *non constat*, he would be entitled to any. Again, being an insolvent debtor to the estate, it is exceedingly inappropriate that respondent and his co-executors should be compelled to join as adversaries in any future litigation, should it become necessary. The executors should not be placed in such an attitude against one of their number, and in the language of the Act, the interests of the estate might thereby be jeopardized. This it is the duty of the Court to avert, and the course to be adopted is pointed out by the statute. In Edwards's Estate (35 Leg. Int. 182), the executor, if not actually insolvent, was found "likely to prove insolvent," and, taken in connection with other circumstances appearing, a proper case was shown for the application of the provision of the Act of Assembly, and the letters testamentary were vacated. Here it is admitted the executor is insolvent, and both his individual and partnership property has been sold by the sheriff. He is also largely indebted as a member of his late firm to the estate. These facts, and the unfriendly re-

December 19, 1883.

McCawley's Estate.

Decedent's estate—Trustee's commissions—A trustee who has paid over the income of the trust for several years without charging commissions, and declared that he did not desire a commission, will be held to have made a gift of his commissions to the cestuis que trustent.

Sur exception to adjudication.

It was in evidence before the Auditing Judge (HANNA, P. J.) that the exceptant's testator, Charles A. Repplier, was for a number of years before his death the sole trustee of the estate of Emma McCawley, deceased.

From January, 1878, until his death, February 25, 1883, he collected and paid over the income to the *cestuis que trustent* without deducting his commission, and made declarations to them that he did not charge them commissions.

The widow and executrix of Repplier made claim for the commissions which he had not collected.

The Auditing Judge disallowed this claim, and to this finding exceptions were taken.

R. D. Maxwell, for exceptant.

Edward Shippen and *George W. Thorn*, contra.

December 29, 1883. THE COURT. The mere declaration by a trustee of an intention in the future to make no charge of commissions, treated as an executory contract, is not binding, for want of a consideration, nor is he estopped in the settlement of his final account from demanding commissions, simply because he has from time to time paid over the entire income to the *cestui que trust* without deducting them. But here the Auditing Judge has found as a fact not merely the expression of an intention, but that it was actually carried into effect; in other words, that there was a complete gift by the trustee in his lifetime, which, of course, is binding upon his executrix.

Unless, therefore, we are prepared to hold that such a gift cannot be made by a trustee, the exceptions must be dismissed. A gift requires no consideration, and having once been made, it is not in the power of the donor to revoke it and turn the donee into a debtor for the amount. There was no attempt by the trustee while he

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, APRIL 3, 1884.* [No. 17.

Supreme Court of the United States.

October 11, 1883.

Porter, Assignee, v. Lazear.

Dower—Bankruptcy—Sale of lands by assignee — Will not divest wife's right of dower.

In Pennsylvania, as in other States, dower is not barred by an assignment of the husband's estate under the Bankrupt Act of the United States, and a sale by the assignee in bankruptcy under order of the Court.

In that State, with the exceptions that a sale on a judgment, a mortgage, or an order of the Orphans' Court, passes the land freed from dower, the right of dower does not differ in nature or extent from dower at common law, and neither an absolute conveyance by the husband, nor an assignment by him for the benefit of creditors, whether executed voluntarily or under a requirement of the insolvent law of the State, impairs the wife's right of dower.

The third proviso of the second section of the Bankrupt Act of August 19, 1841, providing that "nothing in this Act contained shall be construed to annul, destroy, or impair any lawful rights of married women, which may be vested by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this Act," was not in the nature of an exception to or restriction upon the operative words of the Act, but a mere declaration, inserted for greater caution, of the construction which the Act must have received without any such proviso. The omission of the proviso in the Act of June 22, 1874, does not enlarge the effect of the assignment, or of the sale in bankruptcy, so as to include lawful rights which belong not to the bankrupt, but to his wife.

The *dictum* in Worcester *v.* Clark (2 Grant, 84), that a sale in pursuance of a decree in bankruptcy would bar dower were it not for the third proviso of the second section of the Act or Congress of August 19, 1841, dissented from.

Lazear *v.* Porter, Assignee, 6 Norris, 513; s. c., 6 WEEKLY NOTES, 321, affirmed.

Error to the Supreme Court of Pennsylvania.

Amicable action of assumpsit, by W. D. Porter, assignee in bankruptcy of S. B. W. Gill, against Chalotte C. Lazear.

The Supreme Court of Pennsylvania entered judgment for the defendant (Lazear *v.* Porter, Assignee, 6 WEEKLY NOTES, 321), and the plaintiff took this writ, assigning for error the entry of said judgment.

The facts agreed upon in the case stated are fully set forth in the report of the case in the Court below (6 WEEKLY NOTES, 321), and in the following opinion.

D. T. Watson, for plaintiff in error.

Thos. C. Lazear, for defendant in error.

(The case was submitted on printed briefs.)

October 29, 1883. THE COURT. This is an action by the assignee in bankruptcy of S. B. W. Gill to recover the purchase-money of land of the bankrupt, sold by the plaintiff to the defendant.

In the case stated by the parties the following facts were agreed: On the 28th of November, 1877, Gill, upon the petition of his creditors, was adjudged a bankrupt by the District Court of the United States for the Western District of Pennsylvania, and the plaintiff was afterwards appointed assignee of his estate, which included two lots of land in Pittsburgh. On the 27th of May, 1878, the assignee, pursuant to an order of the District Court, and for the purpose of raising money to pay the bankrupt's debts, sold these lots by public auction to the defendant for the sum of $465, subject to the lien of a certain mortgage for $2550; but the order of the Court directed, and the advertisement thereof stated, that all other liens and incumbrances should be discharged by the sale. At the time of the commencement of the proceedings in bankruptcy, the bankrupt had a wife, who is still living, and who claims a right of dower in the land. The sale having been confirmed absolutely by the District Court, the assignee thereupon executed and tendered a deed of the land to the defendant, and demanded payment of the purchase-money, which was refused, by reason of the incumbrance of the right of dower. It was agreed that if the Court should be of opinion that the right of dower of the bankrupt's wife was divested by the bankruptcy proceedings and sale, judgment should be entered for the plaintiff for the sum of $465, with interests and costs; otherwise, judgment for the defendant.

Upon the case stated the Supreme Court of Pennsylvania gave judgment for the defendant, and the plaintiff sued out this writ of error.

The single question is, whether a wife's right of dower is barred by an assignment in bankruptcy, and a sale by the assignee in bankruptcy under order of the Court. By the law of England, which is our law in this respect, except so far as it has been changed by statute, the wife's right of dower is no part of the estate of the husband, and is not affected by proceedings in bankruptcy against him. (Squire *v.* Compton, Vin. Ab. vol. 9, p. 227, Dower, G. pl. 60; Smith *v.* Smith, 5 Ves. 189.) If it is barred in this case, it must be either by force of the provisions of the recent Bankrupt Act, or by reason of the nature of the right of dower under the local law of Pennsylvania.

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But, under the provisions of the Bankrupt Act, all that passes to the assignee by the assignment in bankruptcy, or that can be sold by direction of the Court, is property or rights of the bankrupt, or property conveyed by the bankrupt in fraud of creditors, unless, indeed, a person holding a mortgage or pledge of, or lien upon, property of the bankrupt elects to release the same. (Rev. Stat., §§ 5044–5046, 5061–5066, 5075; Stat. 22d June, 1874, c. 390, § 4; Donaldson *v.* Farwell, 93 U. S. 631; Dudley *v.* Easton, 104 Id. 99, 103.)

The law of Pennsylvania as to the liability of the right of dower to be taken for the debts of the husband is certainly in some respects peculiar.

An Act passed in 1705, "for taking lands in execution for payment of debts," provided that all lands of a debtor, having no sufficient personal estate, should be liable to be seized and sold upon judgment and execution obtained against him; and that in case of default in payment of any debt secured by mortgage of real estate, the mortgagee might by writ of scire facias obtain execution to be levied by sale of the mortgaged premises. (1 Dall. Laws of Penn. 67–71.) Another Act passed in the same year, "for the better settling of intestates' estates," while recognizing a right of dower in the widow, "which dower she shall hold as tenants in dower do in England," authorized the administrator, in case of insufficiency of the personal estate, to sell and convey the lands of the deceased, including the rights of the widow therein, for the payment of his debts. (Id. Appendix, 43–45.)

It was established by judicial decisions in Pennsylvania, upon the construction and effect of these statutes, before the beginning of the publication of reports, that the wife's right of dower could be taken and sold on execution upon a judgment recovered against the husband, or upon scire facias on a mortgage executed for valuable consideration by him alone, or under a devise by him for the payment of his debts. (Howell *v.* Laycock, cited in 2 Dall. 128, and 4 Dall. 301, note; Graff *v.* Smith, 1 Dall. 481, 484; Scott *v.* Crosdale, 2 Dall. 127; s. c., 1 Yeates, 75; Mitchell *v.* Mitchell, 8 Penn. State, 126; Blair County Directors *v.* Royer, 43 Penn. State, 146.) The grounds of these decisions prevails against the right of dower. A purchaser under an execution against the husband takes the land discharged of dower; and the only mode of proceeding on a mortgage with us, is to sell the land by an execution. We have no Court in which the equity of redemption can be foreclosed."

In Helfrich *v.* Obermyer (15 Penn. State, 113, 115), Chief Justice GIBSON said: "Land is a chattel for payment of debts, only when the law has made it a fund for that purpose. It then has undergone a species of conversion, so far as may be necessary to the purpose of satisfaction, which extinguishes every derivative interest in it which cannot consist with the qualities it has been made to assume. Thus, a judgment, or a mortgage, binds it and converts it; and it is seized as personal property on a fieri facias, which commands the sheriff to levy the debt of the defendant's goods and chattels. We readily comprehend how a sale on a judgment, a mortgage, or an order of the Orphans' Court, passes the land freed from dower; but the reason is not so obvious why a sale under a testamentary power, created in good faith, for the benefit of creditors, should do so. It is because the law makes a decedent's land a fund for payment of his debts, by giving the creditors a lien on it, which might be enforced by judicial process, and would extinguish the widow's dower in it. It would come to the same thing in the end, and she is consequently not injured by a process substituted by the husband to produce exactly the same result."

It thus appears that the right of dower in Pennsylvania does not differ, in nature or extent, from the right of dower at common law, except so far as the local law has made it a chattel for the payment of debts of the husband, either by converting it into personalty, in his lifetime, by virtue of the effect attributed by that law to a judgment recovered against him, or a mortgage executed by him, either of which could only be enforced in that State by a levy of execution in common form, or by giving his creditors, after his death, a lien upon the whole title in the land.

The State Court has accordingly constantly held that, with these exceptions, the right of dower is as much favored in Pennsylvania as

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Penn. State, 526; Kelfrich *v.* Obermyer, above cited; Worcester *v.* Clark, 2 Grant, 84.)

In Worcester *v.* Clarke, just cited, it was held that the sale of a bankrupt's real estate by his assignee under the Bankrupt Act of 19th August, 1841, c. 9, did not divest the widow's right of dower. It is true that the decision was put upon the ground that the right of dower was saved by the proviso, inserted in the second section of that Act, that "nothing in this Act contained shall be construed to annul, destroy, or impair any lawful rights of married women, which may be vested by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this Act," and that the Judge delivering the opinion said that, were it not for that proviso, he should have no difficulty in holding that a sale in pursuance of a decree in bankruptcy would, like a sheriff's sale by virtue of either a judgment or a mortgage, bar dower. But the decision is significant as evidence that by the law of Pennsylvania a right of dower is "a lawful right, valid by the law of the State," and as treating the question whether it was divested by proceedings in bankruptcy as depending upon the true construction of the Bankrupt Act. Upon this question of construction, we are not bound by the opinion of the State Court, and have no hesitation in disapproving the dictum, and in holding that the proviso relied on was not in the nature of an exception to or restriction upon the operative words of the Act, but was a mere declaration, inserted for greater caution of the construction which the Act must have received without any such proviso, and that the omission of the proviso in the recent Bankrupt Act does not enlarge the effect of the assignment or of the sale in bankruptcy, so as to include lawful rights which belong not to the bankrupt but to his wife.

The result is, that, so far as this case depends upon the construction of the Bankrupt Act of the United States, this Court is of opinion that there is nothing in that Act, or in the proceedings under it, to bar the wife's right of dower in lands of which her husband was seised during the coverture, and that, so far as it depends upon the law of Pennsylvania, the decision of the Supreme Court of that State in this case, reported in 87 Penn. State, 513, is in accord with all the previous adjudications of that Court, and is strong, if not conclusive, evidence against the plaintiff in error.

It may be added that this decision is in conformity with one made twelve years ago by Judge CADWALADER in the District Court of the United States for the Eastern District of Pennsylvania (*In re* Angier, 10 Amer. Law Reg. (N. S.) 190; S. C. 4 Bankr. Reg. 619).

Judgment affirmed.

Opinion by GRAY, J. A. B. G.

Supreme Court.

July, '83, 226. January 29, 1884.

Schott v. Harvey.

Negligence—Fire-escapes—Act of June 11, 1879.

Under the provisions of the Act of June 11, 1879 (P. L. 128), the owner in fee of a factory is not responsible to a person employed in such factory for an injury occurring by reason of failure to provide a fire-escape, when at the time of the injury the property was leased, and the lessee was actually in possession.

The "owner" contemplated by said Act, upon whom is placed the burden of providing the fire-escape and the liability in case there is a failure to provide the same, is the person in actual possession and occupancy of the premises used as a factory at the time the injury in question is inflicted.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Matilda H. Schott by her next friend, Christian Schott, against Joseph Harvey, to recover damages for personal injuries suffered by the plaintiff in escaping from a factory of which the defendant was the owner of the freehold, in consequence of its not being provided with a fire-escape.

On the trial, before HARE, P. J., the jury found the following special verdict:—

"The jury find that the defendant, on October 12, 1881, was seised in fee simple of the Randolph Mills on Randolph Street, above Columbia Avenue, Philadelphia. That he was not in actual possession of said mill on that day, but that said mill was in possession of Charles H. Landenberger, a lessee from year to year, beginning January 1, 1880, under a lease which was a renewal of a lease to Mary A. Landenberger, which commenced January 1, 1879, and was renewed to Charles H. Landenberger, September 26, 1880, to take effect January 1, 1881, and that said lessee occupied and used the said mill exclusive of the defendant; that the said mill was burned on the night of October 12, 1881; that the said mill was more than three stories high, and that operatives were employed therein, and that the plaintiff was at work as an operative in the said mill at the time of the fire, and was injured by being compelled to jump out of a fourth-story window of the said mill; that there was no external fire-escape on said mill, and that if there had been the plaintiff could have got out of the mill without injury. If, upon the above facts, the Court should be of the opinion that the plaintiff is entitled to recover, then we find for the plaintiff, and assess the damages at $700; but if the Court should be of the opinion that the defendant was not the owner of the mill at

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the time of the fire within the meaning of the Act of June 11, 1879, then we find for the defendant."

Judgment was subsequently entered for the defendant on the above special verdict, whereupon the plaintiff took this writ, assigning the said action of the Court as error.

Charles S. Keyser (*John A. Clark* with him), for plaintiff in error.

The owner is he who has the freehold.

Holdship *v.* Abercrombie, 9 Watts, 54.
Church *v.* Griffith, 9 Barr, 117.
Robinson *v.* The County, 7 Barr, 161.
Callen *v.* Hilty, 2 Harris, 289.
McGee *v.* Fessler, 1 Barr, 131.
Offerman *v.* Starr, 2 Barr, 396.
Harvey *v.* Lloyd, 3 Barr, 340.
Cobel *v.* Cobel, 8 Barr, 342.
Burns *v.* Cooper, 7 Casey, 429.
Shinn *v.* Holmes, 1 Casey, 144.
Grier *v.* Sampson, 3 Casey, 183.
Witmer's Appeal, 9 Wright, 455.

The word "owner" is also so used in our legislation in connection with real estate.

It would not be trespass at common law in the owner to affix a fire-escape to the leased building. Putting up fire-escapes is a public necessity for the general preservation of human life, and it is a rule that it is better to suffer a private injury than a public inconvenience, and rights of necessity form a part of our law.

Palmer *v.* Silverthorn, 8 Casey, 69.

It is not trespass because the owner is compelled to do it by statute.

Turnpike *v.* Brosi, 10 Harris, 29.

The tenant possesses the term of years only.

Coke Litt. 46 A. etc.

R. C. McMurtrie (*John Roberts* with him), for defendant in error.

The Legislature must be deemed to have intended by the "owner" the person in possession, occupying and using the premises in such a way as to give rise to the duty. The defendant was in no sense the owner of a "factory," though he owned a building which Landenberger occupied and used as his factory. When the defendant leased the building it was not subject to the provisions of the Act.

Lee *v.* Kirby, 10 Weekly Law Bulletin (Columbus and Cincinnati), 449, and cases cited there.

If the defendant was the owner within the meaning of the Act, its constitutionality is more than doubtful; for then it imposed a duty on one who could not lawfully perform it, because signed. The said verdict finds, *inter alia*, that the defendant was seised in fee of the Randolph Mills at the time they were destroyed by fire, on the night of October 12, 1881, that he was not in the actual possession thereof on that day, having previously leased the same to Charles H. Landenberger, who was the tenant occupying the same; that the said mill was burned on the night before stated; that it was more than three stories high; that the plaintiff, with other operatives, was at work in said mill, and was injured by being compelled to jump out of a fourth-story window; that there was no external fire-escape on said mill, and if there had been the plaintiff could have got out of the mill without injury. The single question for our determination is, whether the defendant was the owner of the mill within the meaning of the Act of June 11, 1879, entitled an Act to provide for the better security of life and limb in cases of fire in hotels and other buildings. (P. L. 128.) The first section of said Act provides:—

That every building within this Commonwealth used as a seminary, college, academy, hospital, asylum or hotel, for the accommodation of the public; every storehouse, factory, manufactory or workshop of any kind, in which employés or operatives are usually employed at work on the third or any higher story; every tenement house or building in which rooms or floors are usually let to lodgers or families, and every public school building, where any of such buildings are three or more stories in height, shall be provided with a permanent, safe, external means of escape therefrom in case of fire. And it shall be the duty of the owners or keepers of such hotels; of the owners, superintendents or managers of such seminaries, colleges, academies, hospitals, asylums, storehouses, factories, manufactories or workshops; of the owners or landlords of such tenement houses or their agents, and of the board of school directors of the proper school district, to provide and cause to be affixed to every such building such permanent fire escape.

The second section provides for the examination, testing and approval of such fire-escapes by certain officers mentioned therein; while the third section makes every person whose duty it is to put up such fire-escapes liable to the party injured in case he neglects or omits to put up

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duty unknown to the common law and punishes a neglect of that duty in the measure above stated. It is almost needless to say that such an Act cannot be extended by implication to parties who do not clearly come within its terms.

The special verdict does not technically bring this case within the Act, but as the Randolph Mills were acceded upon the argument to be a factory, I will consider the case as if such fact had been embodied within the verdict. We find, then, in the Act, that it is made the duty of "the owners, superintendents, or managers of such . . . . factories . . . . to provide and cause to be affixed to every such building such permanent fire-escape."

It will be noticed that the Act is in the disjunctive. The duties are imposed upon the owners, superintendents, or managers of factories, the owners or keepers of hotels, owners or landlords of tenement houses, or their agents, etc. Which of these classes did the Legislature intend to make responsible for a neglect to comply with the law? If the object was to impose a joint liability upon all, the Act would not have been framed in the disjunctive. A more reasonable construction would seem to be that it was intended to reach the person in possession with a power of control, whether he be owner, superintendent, or manager. However hard such a rule might be in the case of a superintendent or manager, he could avoid the responsibility by declining to act as such in a factory where the principal refused to provide it with an efficient fire-escape.

But the question which more immediately concerns us is, who is the owner of a factory within the meaning of the Act? The plaintiff contends that the owner is the person who holds the fee in the land ou which the factory building stands.

The word factory is a contraction of manufactory, which Webster defines to be "a building, or collection of buildings, appropriated to the manufacture of goods," but a manufactory is something more than a building. It includes not only the building, but the machinery necessary to produce the particular goods manufactured and the engine or other power requisite to propel such machinery. A building with only bare walls and a roof would no more be a manufactory than it would be a hotel. Such a building is the lessee of the building, then he is a tenant in possession. For all practical purposes he is the owner until the end of his term, which may be in one year or in one hundred years. There is a large amount of property held in reversion in the city of Philadelphia. Some of the leases are for a term of several hundred years. However long the term, the lessee is but a tenant for years. The fee is in him that hath the reversion, yet the broad principle contended for will make the reversioner, who has practically parted with all control of the property, responsible for the neglect of the tenant in possession to put up fire-escapes. And this would be so even if the property leased had been a vacant lot and the factory building had been erected and the machinery placed therein by the tenant subsequent to the lease. We cannot impute to the Legislature an intention of doing a thing so palpably unjust and absurd as this. When, therefore, they use the word "owner" in this connection it is plain the owner at the time of the injury was contemplated without regard to the quantity or duration of his estate. It will be noticed that the Act does not say the owner of the factory building or of the ground on which it stands.

A number of authorities were cited showing the construction which has been placed upon the word "owner," both by the Legislature and the Courts. But the meaning of the word depends in a great measure upon the subject matter to which it is applied, and as it is used in each of the instances cited in an entirely different connection, they throw scarcely a glimmering of light upon the question.

The term "owner" is undoubtedly broad enough to cover either view of the case. A tenant for years, a tenant for life, and a remainder man in fee is each an owner. So there may be a legal and an equitable estate; the trustee and the *cestui que trust* are both owners. When, therefore, the Legislature used a term of such varied meaning we must presume they intended such an owner as is in the possession and occupancy of the premises, who has the immediate dominion and control over it, and the manner of whose use of it makes a fire-escape necessary. Had the owner in fee been intended, it was easy to have said so. This view meets all the requirements of the Act. It places the responsibility where it properly belongs, upon the person in possession

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and in the recent case of Lee *v.* Kirby, decided in the Superior Court of Cincinnati (Weekly Law Bulletin, volume 10, page 440), a similar construction was placed on the word "owner." It was there held by HARMON, J., that the owner in fee of a lot and building thereon which he does not occupy, but which is let to a firm which occupy it and use the same as a factory or workshop, is not the "owner" of any factory, workshop, etc., within the meaning of the Act relating to fire-escapes, and it is not without weight that three of the Courts of Common Pleas for the county of Philadelphia have adopted the same view.

The fact, as found by the special verdict, that the defendant renewed the lease before its expiration is without significance. Our conclusion that the owner in fee, unless in the occupancy and possession of the premises, is not the owner contemplated by the Act, renders any further discussion of the case unnecessary.

Judgment affirmed.

Opinion by PAXSON, J. J. H. W.

Jan. '83, 360. February 14, 1884.

Griffen, Smith & Co. v. Phœnix Pottery Company.

Lease, construction of clause in—Covenant—Action of.

A clause in a lease, which provides that the lessee shall "pay all taxes, water-rents, and assessments upon the premises," includes a charge for paving and curbing the streets in front of the leased premises, when ordered by the municipal authorities.

In an action of covenant by the lessors in the above case against the lessees for the cost of curbing and paving the leased premises:

Held, that the fact that the parties to the lease had agreed that a third party should do the work, and that the question of the liability therefor should be subsequently determined, was not such an alteration of the covenant as to render necessary a change in the form of the action.

Error to the Common Pleas of Chester County.

Covenant, by the Phœnix Pottery Company against Henry R. Griffen *et al.*, trading as Griffen, Smith & Co., to recover, under a clause in a lease, the amount of money paid for paving and curbing certain streets surrounding their property in the borough of Phœnixville.

On the trial, before FUTHEY, P. J., the following facts appeared: The Phœnix Pottery Company leased their real estate, buildings, and machinery to Griffen, Smith & Co. for the term of twenty years, from the first day of January, 1877, for the purpose of carrying on the pottery business. An annual rental of $872 was reserved, and, in addition thereto, the lessees covenanted "to pay all taxes, water-rents, and assessments upon the premises."

The lease contained an arbitration clause, which provides that "should any dispute arise during the term of this lease, between the lessees and the company, it shall be referred to three persons as arbitrators, to be chosen, one by the lessees, one by the company, and they choosing a third. If either party, on ten days' notice and request in writing, fail to nominate an arbitrator, the other may nominate two, who shall choose a third. The decision of said arbitrators shall be final and conclusive upon both parties."

After the making of this lease, and the taking of possession of the property by the defendants, the borough authorities ordered the paving and curbing of Starr, Church, and Prospect streets, which surround the property on three sides. Notice of this order to pave and curb was given to the plaintiffs, and also to the defendants, and the question then arose as to which party was liable for the payment of the work, under the terms of the lease.

According to the testimony of George S. Griffen, a member of the firm of Griffen, Smith & Co., it was agreed between that firm and the plaintiffs that the Phœnix Iron Company, who owned the adjoining property, and were then engaged in similar work, should do this work of paving and curbing, as they had the facilities for such work at their command; that the borough authorities should not be permitted to do it, in view of the fact that, in such an event, an assessment of twenty per cent. additional expense would be likely incurred, and that the question of liability of the plaintiffs or defendants for the amount of the bill should be determined in the future.

In accordance with this understanding between the parties, the Phœnix Iron Company performed the work, and presented a bill for $634.84 to the plaintiffs, which was paid by them. This suit is brought to recover the amount of this bill against the defendants.

After this work was done by the Phœnix Iron Company, the defendants gave the plaintiffs notice that arbitrators would be chosen by them, under the above-mentioned clause in the lease, for the purpose of determining this question. The plaintiffs thereupon revoked the clause in the lease providing for submission of questions to arbitration, holding that it was one which should be determined by the courts, and not one —in the contemplation of the parties at the time of the execution of the lease—to be submitted to arbitrators. They subsequently gave notice to the defendants, and also to the arbitrators chosen by the defendants, before their action, of their revocation of this clause of submission in the lease.

The defendants requested the Court to instruct the jury as follows:—

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"That the cost of paving the property of the Phœnix Pottery Company is not an assessment within the contemplation of the parties to the lease, and that therefore the jury should find for the defendants." *Refused.*

"That the order to curb and pave Church Street having been given without the passage or publication of a borough ordinance, as required by law, did not create a legal assessment upon the plaintiffs' property, and the defendants are not liable for anything done in pursuance of said order." *Refused.*

"That under the present form of action the plaintiffs are not entitled to recover. *Refused.*

Verdict for the plaintiffs in the sum of $713.43, and judgment thereon; whereupon the defendants took this writ, assigning for error, *inter alia*, the refusal of defendants' points as above.

H. H. Gilkyson and *Wm. M. Hayes*, for plaintiffs in error.

The action should have been in assumpsit, for it is well settled that any alteration of a specialty by parol makes the whole contract parol, and covenant cannot be maintained upon it.

Vicary *v.* Moore, 2 Watts, 451.
Vaughn *v.* Ferris, 2 W. & S. 46.
Hunter & Springer *v.* McHose, 11 WEEKLY NOTES, 377.

The cost of curbing and paving the property was not such legal assessment as the lessees had in contemplation at the time of the lease; they never intended that the real estate should be increased in value by an expenditure of over $600 in any one year of the term.

To constitute a legal assessment the borough authorities must first pass an ordinance requiring the work to be done.

Kepner *v.* Commonwealth, 4 Wright, 124.
State *v.* Van Geisen, 3 Green, 339.
State *v.* City of Bayonne, 6 Vroom, 332.
Irvin *v.* Devors, 65 Missouri, 625.

But no ordinance was ever passed requiring one of these streets to be paved and curbed.

The lessors could not revoke the arbitration clause in the lease.

"Where a contract contains an arbitration clause, a party has no right to resort to an action at law if there has been a tender of readiness to proceed in the arbitration by the adverse party."

Abbot *v.* Shepherd, 4 Phila 90.
Andrews *v.* Lee, 3 P. & W. 101.
Watson *v.* Wetter, 10 Nor. 385.
Flaherty *v.* Germania Ins. Co., 1 WEEKLY NOTES, 352.
Williams *v.* Danziger, 10 Nor. 233.
Hostetter's Appeal, 11 Nor. 133.

R. T. Cornwell (*Carroll S. Tyson* with him), for the defendants.

The lessees rented this property for a period of twenty years, and appear to have assumed to pay every character of charge or imposition against the property, and all expenses to which its ownership might give rise during their term. There was an express covenant to pay "taxes, water-rents, and assessments."

This claim for curbing and paving was an assessment.

Pray *v.* Northern Liberties, 7 Casey, 69.
Pennock *v.* Hoover, 5 Rawle, 291.
2 Dillon on Municipal Corporations, chap. 19, p. 727.
Oswald *v.* Gilfert, 11 Johns. Rep. 443.

No ordinance was required; the Act of Assembly authorizes the borough authorities to require and direct the curbing and paving in accordance with the general regulations prescribed.

The question between the parties was wholly one of law, and not within the meaning of the arbitration clause in the lease. In such a case either party may refuse to be bound by the submission, and resort to the courts.

Mitchell *v.* Harris, 2 Ves., Jr. 129.
Scott *v.* Avery, 5 H. of L. Cases, 811.
Gray *v.* Wilson, 4 Watts, 39.
Ins. Co. *v.* Morse, 20 Wallace, 450.
O'Reilly *v.* Kerns, 2 Smith, 214.
Reading Manf. Co. *v.* Graeff, 14 Smith, 395.
Mentz *v.* Ins. Co., 29 Smith, 480.

The parol agreement in this case, that the Phœnix Iron Company should do the paving in order to save the penalty and costs that would have been incurred had the borough performed the work, could in no way alter the effect of the written contract.

McCombs *v.* McKennan, 2 W. & S. 216.
Ellmaker *v.* Insurance Company, 6 W. & S. 439.
Harley *v.* Parry, 6 Harris, 44.
Shaeffer *v.* Giesenberg, 11 Wright, 500.
McManus *v.* Cassidy, 16 Smith, 260.
Quigley *v.* Bailey, 39 Leg. Int. 62.

February 25, 1884. THE COURT. It is unnecessary to consider the effect of the clause of arbitration, contained in the original agreement, and the refusal of the defendant in error to submit the "dispute" to arbitrators. The parties subsequently agreed that the defendant in error should do the work in question, or have it done by the Phœnix Iron Company, and the liability of the lessees to pay therefor should be determined after it was completed. It was done by the latter company, and the defendant in error paid therefor.

The Court was correct in holding that the agreement of the lessees "to pay all taxes, water-rents, and assessments upon the premises," included the charge for paving and curbing the street in front of the leased premises. The parol agreement, under which the specific work was done, did not change the specialty to such an extent as to prevent an action of covenant from being maintained thereon. (McManus *v.* Cassidy, 16 P. F. S. 260.)

Judgment affirmed.

PER CURIAM.

CLARK, J., absent. W. M. S., Jr.

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Oct. & Nov. '83, 193, 194, 195, 196, 197, 212.
November 6, 1883.

Pennsylvania R. R. Co. v. City of Pittsburgh. (Four cases.)
Pennsylvania Company v. Same. (Two cases.)
The Citizens Passenger Railway Company v. Same.

Taxation—Corporations—Act of January 4, 1859—Liability of real estate of corporations under—The term "railroads" embraces street railways—City of Pittsburgh.

Under the Act of January 4, 1859, sect. 3 (P. L. 828), real estate situated in the city of Pittsburgh, belonging to railroad companies, though such as is ordinarily and properly pertinent to the several railroads, and to the railway as such, and is strictly necessary for their proper operation in exercising their several franchises, is liable to taxation for city purposes.

The real estate of a street passenger railway is within the meaning and spirit of an Act making the real estate of "railroads" liable to taxation, though the railway company was not incorporated till after the passage of the Act.

Wayne Co. *v.* Del. and Hudson Canal Co., 3 Harris' 351, distinguished. Hestonville, etc., R. R. Co. *v.* Philadelphia, 8 Norris, 214, followed.

PAXSON and GREEN, JJ., dissented.

Error to the Common Pleas No. 1, of Allegheny County.

Sci. fa. sur municipal lien.

On February 17, 1882, the Collector of Delinquent Taxes of the city of Pittsburgh filed a number of claims for city taxes, assessed for the year 1880, against certain real estate belonging to the Pennsylvania Railroad Company, the Pennsylvania Company, and the Citizens Passenger Railway Company. The properties prior to that time had never been subjected to taxation; and were not, and never have been, taxed for county purposes. Affidavits of defence were filed in each of the cases, and also pleas of *nunquam indebitatus*. The parties agreed to dispense with trials by jury, and submitted the cases to the Court (STOWE, P. J.), agreeably to the Act of April 22, 1874 (P. L. 109). Instead of trying all the cases it was further agreed by counsel that certain cases only should be tried, and these were selected so as to present the question of liability in all its aspects. The assessed properties which were selected were as follows:—

First. The Duquesne Freight Station of the Pennsylvania Railroad Company, situated at the foot of Liberty Street, in the city of Pittsburgh, and being a building used exclusively for the receipt and delivery of freight in the city of Pittsburgh, and being the company's terminal freight station at that place. *Second.* A tract of land owned by the Pennsylvania Railroad Company, bounded by Grant and Liberty Streets and Seventh Avenue, used exclusively for the receipt and delivery of freight in bulk, and covered by tracks, except so much as is necessary to provide ingress and egress for teams. *Third.* The offices of the Pennsylvania Railroad Company, used by its cashier and clerks, in connection with the Duquesne Freight Station. *Fourth.* Certain property on the south side of Liberty Street, in the Ninth Ward, and extending from Washington Street eastwardly to the ward line, on which is situate the Union Station, round-houses, tracks, and ways of approach to the passenger station and other buildings used in connection with the railroad. *Fifth.* The property of the Pennsylvania Company (lessee of the Pittsburgh, Fort Wayne, and Chicago Railway), upon which is erected the company's general offices and its terminal freight station; and all of which, with the exception of that occupied by said offices and freight station, is completely covered by tracks. *Sixth.* A lot of ground owned by the Citizens Passenger Railway Company, situate on the north side of Butler Street, between Forty-first and Forty-second Streets, on which is erected a large stable, used exclusively for the purpose of stabling the horses used by the company in operating its road. This lot was purchased and owned in fee simple by the company.

As to each and all of these properties, STOWE, P. J., to whom the case was referred for trial without a jury, found that it was "such property as is ordinarily and properly pertinent to the railroad as such, and strictly necessary for its proper operation in exercising its franchises. It is used exclusively for railroad purposes, and was so used during the years for which the taxes in question were assessed."

A portion of these properties is made up of certain streets surrendered to the railroad company by the city of Pittsburgh for railroad purposes; a portion of it is owned in fee simple by the company; a portion was acquired by condemnation proceedings under the company's charter; and a portion consists of a large, open, paved space, on which the Union Station fronts, and which is used by the public in general having business at that station.

The Act of January 4, 1859, sect. 3 (P. L. 828), under which the city of Pittsburgh assessed the foregoing properties, is as follows:—

"That all *real estate* situated in said city, owned or possessed by any *railroad company*, shall be and is hereby made subject to taxation for city purposes, the same as other real estate in said city."

The defendants requested the Court to affirm the following points:—

1. That the word "real estate," as used in laws imposing taxation, does not include real

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property owned by corporations, and used by them in, and necessary for, the exercise of their corporate franchises; and therefore the Act of January 4, 1859, under which the city of Pittsburgh claimed the right to impose tax upon the property against which the lien in this case was filed, did not authorize the imposition of said tax.

2. That the word "railroad," in the Act of January 4, 1859, did not include passenger railways, the construction of which was subsequently authorized, and upon which special taxes were imposed for city purposes.

3. That the Acts of March 28, 1872 (P. L. 606) and May 5, 1876 (P. L. 124), limited the right of taxation for city purposes to property liable to assessment for county purposes; and it appearing that the property against which the lien in this case was filed was not assessed for county purposes, and it not appearing that it was by law assessed for county purposes, the authorities of the city of Pittsburgh were not authorized to make the assessment of taxes now claimed.

4. That the property against which the lien in this case was filed, being necessary for the exercise of the franchises of the defendant corporation, cannot be sold upon a judgment against it; and the proceeding in this case being *in rem*, the plaintiff cannot recover in this suit.

STOWE, P. J., refused the above points, and, in an opinion filed, held that the several properties were subject to the taxes assessed thereon.

The defendants excepted to the refusal of the above points, and filed the following exceptions to the decision:—

1. The Court erred in deciding that the term "real estate" in the Act of the 4th day of January, 1859, has any application to the property described in the lien in this case filed, or that said property is real estate within the meaning of that term as used in said Act.

2. The Court erred in deciding that such portion of the property described in the lien in this case filed, as does not belong to the defendant company in fee simple, is within the purview of said Act of the 4th day of January, 1859.

3. The Court erred in not holding that it was beyond the power of the assessing officers of the plaintiff city to include as assessable the property described in the lien in this case filed.

4. The Court erred in not holding that such portions of the property described in the lien in this case filed, as do not belong to the defendant company in fee simple, were not the subject of assessment for the purposes of taxation.

5. The Court erred in not holding that the property described in the lien in this case filed was exempt from any proceeding such as this—that is to say, the Court erred in not holding that said property was exempt from process *in rem*.

6. The Court erred in deciding that the defendant company's property, described in the lien filed, is subject to taxation by the plaintiff for city purposes.

The Court, after argument, dismissed all the exceptions, and entered judgments for the plaintiff, whereupon the defendants took these writs of error, assigning for error the dismissal of said exceptions, and the judgments for plaintiff.

The several cases were argued together.

Hampton & Dalzell for the Pennsylvania R. R. Co. and Pennsylvania Company, plaintiffs in error.

It having been found as a fact by the Court below that the property now assessed is indispensable to the railroad as such, our first proposition is, that the term "real estate" in tax laws has no application to such property.

Schuylkill Bridge Co. *v.* Frailey, 13 S. & R. 422.
Lehigh Coal Co. *v.* Northampton Co., 8 W. & S. 337.
Navigation Co. *v.* Berks Co., 1 Jones, 202.
Railroad *v.* Berks Co., 6 Barr, 70.
N. Y. and E. R. R. *v.* Sabin, 2 Casey, 242.
Westchester Gas Co. *v.* Chester Co., 6 Casey, 232.
Coatesville Gas Co. *v.* Chester Co., 1 Outerbridge, 476.
Northampton Co. *v.* Lehigh C. and N. Co., 25 Smith, 461.
Wayne Co. *v.* Del. and Hudson Can. Co., 3 Harris, 351.

The only proper subject of assessment for city purposes by the city of Pittsburgh is such property as is subject to taxation for county purposes; and by the repealing clauses of the Acts of 1872 and 1876, the Act of January 4, 1859, is abrogated, and the assessment here made is without authority and void.

Act of May 5, 1841, sect. 16, P. L. 348.
Act of March 28, 1872, sect. 2, P. L. 606.
Act of May 5, 1876, P. L. 124.

The property here assessed is of such a character as not to be subject to a proceeding *in rem*.

Germania Bank's Appeal, 10 Norris, 345.
Junction R. R. *v.* Phila., 7 Norris, 428.
Wilson *v.* Comm'rs, 7 W. & S. 199.
Williams *v.* Controllers, 6 Harris, 277.
Schaffer *v* Cadwalader, 12 Casey, 126.
Phila. *v.* Am. Phil. Soc., 6 Wright, 9.

J. F. Slagle (*Wiley*, with him), for the Citizens Passenger Railway Co., plaintiffs in error.

The Act of January 4, 1859, is not applicable to passenger railways in the city of Pittsburgh, because the Citizens Passenger Co., the first passenger railway established in that city, was not incorporated till after its passage, and by the terms of the Act incorporating it, a tax of $40 upon each car used, and of five per cent. of the net profits, was imposed upon the company besides the expense of maintaining the streets upon which its road is constructed. It will not be presumed that the Legislature intended to tax twice.

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Boroughs on Taxation, pp. 57, 178.
N. Y. & E. R. R. *v.* Sabin, *supra.*
Act of March 22, 1854, P. L. 203.

Passenger railways are not necessarily included in the term "railroads" in legislative enactments.

Hestonville, etc., R. R. *v.* Phila., 8 Norris, 210.

D. T. Watson (*Thos. S. Bigelow* and *W. C. Moreland*, City Attorney, with him), for defendant in error.

The taxing power is vested absolutely in the Legislature, and is limited only by its discretion.

N. Y. and E. R. R. *v.* Sabine, *supra.*
Butler's Appeal, 23 Smith, 451.
In re Washington Ave., 19 Smith, 363.
P. F. W. and C. R. R. *v.* Comth., 16 Smith, 74.
Cooley on Taxation, pp. 14, 15.

The Legislature may delegate to cities the right to levy taxes for municipal purposes.

Butler's Appeal, *supra.*

There is no ambiguity or uncertainty in the terms of the Act of January 4, 1859 (P. L. 828), and where there is no ambiguity there is no room for construction.

Bradbury *v.* Wagenhorst, 4 Smith, 182.
Spangler *v.* York Co., 1 Harris, 323.
Comth. *v.* Ins. Co., Id. 166.
Potter's Dwarris on Statutes, p. 184.
Scott *v.* Reid, 10 Peters, 524.

Railway companies are included in the term "railroads."

Hestonville, etc., R. R. *v.* Phila., *supra.*

January 7, 1884. THE COURT. These six cases were argued together. They present substantially the same question. The contention is whether taxes, for city purposes, may lawfully be assessed, by the city of Pittsburgh on certain property situate therein, owned by these corporations.

The property of the railroad companies consists of freight stations, offices and depots, round house, and machine shops, passenger stations, and ground covered by tracks, and used as ways of approach to the stations and buildings used in connection with the railroads; and the property of the passenger railway company is occupied for the stabling of horses of the company. It is found as a fact in each case, that the property is such as is ordinarily and properly pertinent to the several railroads, and to the railway, as such, and is strictly necessary for their proper operation in exercising their several franchises, that the property is used exclusively for such purposes, and was so used during the years for which the taxes in question were assessed, and that the property was not then or now assessed as taxable for county purposes.

It is conceded, under the legislation existing prior to the Act of 4th January, 1859 (P. L. 828), that this property would not be liable to taxation as real estate. Its exemption from such taxation was settled by a long line of cases, among which are Ridge Turnpike Company *v.* Stoever (6 W. & S. 378); Lehigh Coal and Navigation Company *v.* Northampton County (8 Id. 337); Railroad *v.* Berks County (6 Barr. 70); Navigation Company *v.* Same (1 Jones, 202); Wayne County *v.* Del. and Hud. Canal Company (3 Harris, 351); N. Y. and Erie Railroad Co. *v.* Sabin (2 Casey, 242); West Chester Gas Company *v.* The County of Chester (6 Id. 232); Carbon Iron Company *v.* Carbon County (3 Wright, 251).

While the language of previous Acts, subjecting real estate to taxation, was broad enough in its general terms to include the public works of a corporation, used as such, with the necessary appurtenances, yet the Courts held they were exempt from taxation as land, but were subject to it in another form. (Coatesville Gas Co. *v.* County of Chester, 1 Out. 476.) The cases rested on the presumed intention of the Legislature, in the absence of express declaration, not to subject such property to taxation as land.

The power, however, of the Legislature to make it subject to taxation, as real estate, cannot be successfully denied. The taxing power in this Commonwealth is vested absolutely in the Legislature, and when not prohibited by the Constitution, it is limited in the exercise of that power by its discretion only. It may tax every species of property permanently within the limits of this State, not exempt by the Constitution thereof or by the Constitution and laws of the United States.

Whatever power it possesses it may delegate to a municipal government to be legitimately exercised within its corporate limits. (N. Y. and Erie R. R. Co. *v.* Sabin, *supra;* Pitts., Ft. Wayne and Chicago R. R. *v.* Commonwealth, 16 P. F. Smith, 74; *In re* Washington Avenue, 19 Id. 363; Butler's Appeal, 23 Id. 451.) The fact that it may authorize the laying of a municipal tax which may be burdensome in its character, does not make it unconstitutional. (Kelly *v.* Pittsburgh, 4 Norris, 170; s. c., 14 Otto, 78.)

Legislative power to tax the property in question, as real estate, being clear, it remains only to consider whether the Legislature has authorized it to be so taxed. This depends on the effect to be given to the Act of 4th January, 1859. It is entitled, "An Act to enable the city of Pittsburgh to raise additional revenue." A very natural and effective way to raise more revenue, was to impose taxes on property which at that time was exempt from such taxation. Therefore sect. 3 of the Act declares "that all real estate situated in said city, owned or possessed by any railroad company shall be and is hereby made subject to taxation for city purposes, the same as other real estate in said city." This Act contains no obscure language.

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It expresses no doubtful meaning. It speaks so clearly that it cannot be misunderstood. Its purpose is distinctly stated in the title. To that end the enacting clause provides that "all real estate" in the city belonging to any railroad company shall be "subject to taxation for city purposes the same as other real estate in the city." *Other real estate in the city* was then taxable for city purposes. Up to that time all the real estate of any railroad company was not subject to taxation the same as other real estate for the purpose named. Thenceforth for that purpose no distinction was to be made between the real estate of a railroad corporation, and that owned by any individual. The law-makers are presumed to have known that this property was then exempt from such taxation. All other real estate of any railroad company outside of that in question was already subject to this form of taxation. Unless the intention of the Act was to bring this property within the taxing power of the city, this section has no meaning. We cannot impute to the Legislature the folly of assuming that it did not intend to produce a practical result for the benefit of the city. The fact that such property had theretofore been held to be an incident to the corporate franchises of the railroad companies matters not. It nevertheless was real estate. Lands purchased and owned by copartners as partnership property may, for for many purposes, be considered personal property, yet for all purposes of taxation, it is real estate. The fact that this property was held and used by the railroad companies to facilitate the working of their roads did not destroy its character as real estate.

It is claimed that the property is exempt from taxation as real estate, under the authority of Wayne County *v.* Del. and Hud. Canal Company (*supra*), notwithstanding the Act of 1859. At first view that case might appear to sustain that claim. A careful examination of the case, however, leads to a different conclusion. The Act authorizing the canal company in that case to improve the navigation of the river, declared that "the property of said company whether real or personal, within this State, shall at all times be liable for its debts, and subject to taxation in like manner as similar property held by an individual or by a corporation, now is or may be." The preamble to the Act recites the fact that the canal company had been incorporated by the Legislature of the State of New York; and by the Act of our Legislature of 1st April, 1825 (P. L. 141), the company was authorized "to purchase and hold any quantity of lands situate at any place within ten miles of the waters of the Lackawaxen, not exceeding five thousand acres." Undoubtedly the purpose of the clause first quoted was to make all the property of the company within this State liable for its debts and subject to taxation. How liable and how subject? It did not attempt to create any new forms of proceeding; but to preserve and apply the forms of law then applicable to each kind of property. Its property was to be liable for its debts and subject to taxation, "as similar property held by an individual or by a corporation." That is, so much of its property as was subject to sale on execution, or to taxation as individual property might be so sold and taxed; but such other property as it held and used as essentially necessary for the enjoyment of its franchise, was to be held liable for its debts and subject to taxation in like manner as similar property held by a corporation—that is, by other corporations. The exemption of such property, of a corporation from taxation as real estate, was then well recognized law. The Act does not contain anything indicating an intention to change the manner of its taxation. The Court, therefore, ruled that case on the general principle recognized in other cases where the charters did not contain such language. It is not applicable to the present case.

We discover nothing to exempt the passenger railway company from the operation of the Act of 1859. Such a company is within the intent and spirit of the Act, making its real estate subject to taxation as such. (Hestonville, Mantua, and Fairmount Passenger Railroad Company *v.* Philadelphia, 8 Norris, 210).

The alleged error in the mode of proceeding to make the assessments was not so strongly pressed in the argument. We think the several Acts of Assembly justified the proceeding. The Act of 1859 subjecting this property to taxation declares: "All taxes levied in pursuance of this Act may be collected as debts of similar amounts are recoverable by law."

The Act of March 22, 1877 (P. L. 16), March 28, 1872 (P. L. 606), and May 5, 1876 (P. L. 124), appear to justify the mode of proceeding. We discover no error in the judgments.

Judgment affirmed in each case.

Opinion by MERCUR, C. J.

PAXSON and GREEN, JJ., dissent.

CLARK, J., absent. W. R. B.

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Common Pleas—Law.

C. P. No. 1. January 5, 1884.

Carroll v. Burns.

Will—Construction of—Intention of testatrix not within rule in Shelley's Case—In devise to A. for life with remainder to her lawful issue and the heirs and assigns of such issue, the word "issue" is a word of purchase, and not of limitation, giving A. an estate for life only.

Case stated.

The following facts were agreed upon for the opinion of the Court in the nature of a special verdict:—

Jane Brooks, of the city of Philadelphia, widow, died seised in fee of premises known as No. 939 Suffolk Street. By her will dated June 11, 1861, and duly proved June 19, 1861, she devised and bequeathed as follows:—

"All the rest, residue, and remainder of my estate, real and personal, I devise and bequeath unto my said three daughters, to have and to hold to them during their natural lives, and after their death then to their lawful issue of my said three daughters and the heirs and assigns of such issue."

Two of these daughters have conveyed to the third, Martha J., wife of John E. Antrim, their two-thirds in fee in the above-named premises, and by sundry mesne conveyances the title of Mrs. Antrim has become vested in the plaintiff, who agreed to sell the premises in question to the defendant, and, in pursuance thereof, has tendered the defendant a deed which he refused to accept on the ground that the title of Mrs. Antrim now vested in the plaintiff is not a good and marketable title in fee. It is admitted by both parties that the title of Mrs. Antrim is fully and properly in the plaintiff. If the Court be of opinion that the plaintiff has a good and marketable title in fee, then judgment to be entered for the plaintiff for the amount of the purchase-money, but if not, then judgment for the defendant.

P. E. Carroll, for the plaintiff.

Under the devise an estate in tail vested in the daughters, of whom Mrs. Antrim is one, by application of the rule in Shelley's Case. By that rule of property when an estate of freehold is limited to one for life, and by the same deed or will there is a further limitation to the heirs, or heirs of the body, of the person, the entire fee, or fee tail is vested in the first taker, so that the heirs or issue shall take by descent.

Smith on Executory Interests [209], § 401.

The word "issue" in a will is construed as a word of limitation so as to confer on the ancestor an estate tail, if there be no expressions clearly showing a contrary intent.

Id. [248], § 504.

There are no such expressions in the devise explanatory of the restricted use of the term "issue," and it means "heirs of the body." This would be an estate tail, but for the Act of 27th April, 1855, which makes an estate tail an estate in fee simple.

The foregoing views are sustained by the following decisions of our Supreme Court, the opinion in each case being by STRONG, J.

Kay *v.* Scates, 1 Wr. 31.
Haldeman *v.* Haldeman, 4 Id. 29.
Criswell's Appeal, 5 Id. 288.
Physic's Appeal, 14 Id. 128.
Nice's Appeal, 14 Id. 143.
Curtis *v.* Longstreth, 8 Id. 297.

Hampton L. Carson (*W. A. Redding* and *J. L. Jones* with him), for the defendant.

Did the daughters take an estate in fee under the rule in Shelley's Case, or is the gift to the issue of the daughters a gift to them as *purchasers*, so as to prevent the operation of the rule?

Before the rule can be applied, it is necessary to ascertain the intention of the testatrix. Did she use the word "issue" in the technical sense of "heirs of the body," or did she, by the superadded words of limitation, to wit: "the heirs and assigns of such issue," so far limit and restrain the generality of the term "issue" as to make it equivalent to the expression "children"?

This is a question of intention, to be ascertained according to the ordinary rules of construction peculiar to wills.

In Hileman *v.* Bouslaugh (1 H. 344), GIBSON, Ch. J., said at page 352: "It (the rule in Shelley's Case) operates only on the intention, when it has been ascertained, not on the meaning of the words used to express it. . . . The question on a will is not whether the testator intended that the rule should not operate, for that is not subject to his power, but whether he used the words 'heirs of the body' as synonymous with the word 'children,' or its proper equivalent."

So also, STRONG, J., in Guthrie's Appeal (1 Wr. 9), said: "It is therefore always a precedent question, in any case to which it is supposed the rule is applicable, whether the limitation of the remainder is made to the heirs in fee or in tail, *as such*, and in solving this question, the rule itself renders no assistance."

The rule is silent until the intention of the grantor or devisor is ascertained. (Id.)

The controversy is narrowed then to this:—What is the meaning of the words "heirs and assigns of such issue," in the devise?

Whatever may be the views of Smith in his work on Executory Interests, we insist that the question has been determined in Pennsylvania by the case of Robins *et al. v.* Quinliven (29

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Sm. 333), where after an estate for life to the ancestor, the remainder was given to her issue and *their heirs forever*, in the proportions to which they would be entitled under the intestate laws of Pennsylvania respectively, the Court held that by the word "issue" the testator meant children, and intended that they should take the remainder as purchasers and not as heirs by descent, and that the first taker took a life estate.

Gross on the Rule in Shelley's Case in Pennsylvania in Table VI. presents an analytical statement of the cases of our Supreme Court where the word "issue" has been regarded in the technical meaning of the words "heirs of the body," but no limitations like those under consideration are exhibited as conferring an estate tail or in fee upon the ancestor. On Table VII., where the word "issue" is regarded in a sense different from the technical meaning of the words "heirs of the body," appear cases (Nos. 35, 36, 37, 39, 40 and 40 *a*) in which the *prima facie* meaning of "issue" is converted into a word of purchase by superadded words in fee.

C. A. V.

January 12, 1884. THE COURT (after reciting the facts of the case stated *ut supra*). The single question for the consideration of the Court is, What estate did Mrs. Antrim take in the premises in controversy under the will of her mother? Is the word issue in the devise a word of limitation or of purchase? It is undoubtedly the rule that "issue" in a will, *prima facie*, means "heirs of the body." But the testatrix appears to have used "issue" in its restricted sense meaning children, and intending that they should take the remainder as purchasers, and not by descent. In order to effectuate her intention it must be construed as a word of purchase. "Issue" has been one of the most vexed words in the books, but the recent case of Robins *et al. v.* Quinliven (29 Sm. 333), settles its force in our State, and controls the limitations under consideration, giving the first taker, Mrs. Antrim, a life estate in the premises in question.

Judgment for the defendant on the case stated.

Oral opinion by PEIRCE, J. J. P. G.

C. P. No. 1. January 19, 1884.

Richards v. Johnson.

Practice—Pleading—Rule to plead—A party may withdraw a rule to plead, when the same has been filed through inadvertence, and no copy served on opposing counsel or his client, notwithstanding a plea has in fact been filed.

Rule to show cause why plaintiff should not be allowed to withdraw a rule to plead.

Assumpsit on a promissory note. On December 6, 1883, a summons issued, and a copy of note was filed. At the same time plaintiff's counsel filed a declaration having on the back a printed rule to plead, which he signed through inadvertence. No copy of the declaration or rule to plead was served on the defendant or his counsel. On January 12, 1884, a plea was filed by defendant. On January 15, 1884, the present rule was granted.

J. M. Williamson, for the rule.

It is undoubtedly the rule that a party who intends to ask for judgment for the reason that the affidavit of defence is insufficient, must do so before he has taken any steps in the cause, subsequent to the affidavit, calculated to mislead his opponent.

O'Neal *v.* Rupp, 10 Harris, 395.
Johnston *v.* Ballantine, 1 WEEKLY NOTES, 626.

But where the reason of the above rule is absent, the rule itself is relaxed.

Joynes *v.* Kohler, 12 Phila. 337.

In the present case nothing has been done *calculated to mislead the defendant.*

The rule to plead was inadvertently left upon the narr. but it exercised no coercive force upon the defendant, and the filing of a plea upon his part was entirely voluntary because the rules of Court require that "In all suits a copy of the declaration and every subsequent pleading shall be served by the party, or his attorney filing the same, on the opposite party or his attorney of record; *otherwise such declaration or other pleading may be treated as a nullity.*" Rule XXXI., § 133.

Neither the narr. nor the rule to plead was served upon the defendant, and hence any acts done by him, or on his behalf, were purely voluntary, and not consequent upon any step of the plaintiff calculated to mislead him.

R. D. Maxwell, contra, relied upon.

O'Neal *v.* Rupp, 10 Harris, 395.
Johnston *v.* Ballentine, 1 WEEKLY NOTES, 626.

THE COURT. Upon the facts stated in the affidavit that there was a mere oversight in omitting to draw the pen across a printed rule on the back of the narr. We think this rule ought to be made absolute. If it was calculated to mislead the defendant, and had exercised a coercive force upon him, the case would have been different.

Rule absolute.

Oral opinion by ALLISON, P. J. G. S. P.

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C. P. No. 2. March 10, 1884.

Gate v. City of Philadelphia.

Contract with city—Appropriation for specific articles—Contractor entitled to recover, if he has not exceeded the appropriation, notwithstanding a city department and the City Controller have improperly allowed the appropriation to be diverted to an erroneous use.

Sur exceptions to referee's report.

Assumpsit. It appeared that plaintiff was the lowest bidder for supplying the Water Department with oils and tallow for the year 1881. The contract was awarded to him on January 21, 1881, specifying that it was made under "Schedule D, Item 14." Plaintiff furnished goods to an amount within the appropriation, but when his warrant was presented to the City Controller that official refused to countersign it on the ground that the item was exhausted. On examination it appeared that the Water Department had drawn a warrant for $550 for sponge-cloth, etc., against item 14 for oils and tallow instead of against the proper item of "small stores," and this blunder not having been discovered by the City Controller, had apparently exhausted item 14. Under these circumstances the Controller refused to countersign plaintiff's warrant and the latter then brought suit. It was referred by agreement to W. F. Johnson, Esq.

The referee found the foregoing facts, and thereupon reported that plaintiff should not be prejudiced by the unwarrantable misappropriation of the funds, and was entitled therefore to recover the amount of his bill with interest.

The defendant filed exceptions to this finding.

C. B. McMichael (*W. N. West*, City Solicitor with him), for the exceptions.

No recovery can be had against the city on any contract unless the plaintiff can show a prior appropriation sufficient, and specifically intended, for the particular contract.

Act of April 21, 1858, P. L. 386.
Ordinance of Councils of Dec. 31, 1877, West's Digest, 84, pl. 23.

The burden of proof is on him. He must see that the money to pay him is ready before he furnishes the goods.

D. B. Meany, contra.

THE COURT. The plaintiff having a contract for supplies of a certain kind under a specific item of the appropriation, was not bound to take

C. P. No. 2. March 10, 1884.

Gunn v. Dickey.

Equitable set-off—When one judgment will be set off against another.

Case stated. The following facts were agreed upon:—

On March 10, 1882, the Hope Thread Company recovered a judgment of $761.83 against Gunn, Johnson & Co. On March 21, 1882, Gunn, Johnson & Co. made an assignment to B. Gunn for the benefit of their creditors. The deed of assignment was duly recorded, and included a claim for damages against the Hope Thread Co., arising from a breach of contract. Suit had been begun on this claim by foreign attachment on February 11, 1881.

On June 21, 1882, judgment was entered against the Hope Thread Co. for $2300, the said company having made no offer at the trial to set off its judgment of $761.83 against Gunn, Johnson & Co. The Hope Thread Co. took a writ of error, and John Dickey, the defendant in this proceeding, became its surety in the recognizance entered by it.

The judgment having been affirmed by the Supreme Court, a scire facias sur recognizance was issued against John Dickey, who then claimed to set off on his recognizance the amount of the judgment recovered by the Hope Thread Co. against Gunn, Johnson & Co., with interest and costs.

By agreement of the parties judgment was to be entered against John Dickey for either $2562.85, or for $1672.30, in accordance with the opinion of the Court that he might or might not set off the judgment.

Prichard, for the plaintiff.

The right to set off one judgment against another is purely equitable. Judgments are not within the letter of the Defalcation Act. This therefore is an appeal to the discretion of the Court, and should not be allowed where the result would be inequitable.

[HARE, P. J. But the equitable right of set-off ought at least to go as far as the legal right; equity ought to follow the law.]

But set-off is not allowable where the judgments are in different rights as here.

Waterman on Set-off, 370.
Ramsey's Appeal, 2 Watts, 229.
Dunkin *v.* Calbraith, 1 P. A. Browne, 47.

The surety made his election not to set off the

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U. S. Circuit Court—Equity.

February 11, 1884.

Philadelphia and Reading R. R. Co. v. Pollock.

Internal revenue—Act of February 8, 1875, section 19 (18 St. 311)—Notes used for circulation—Promissory notes—Wages—Certificates—Taxation.

The nineteenth section of the Act of Congress of February 8, 1875, providing "every association, other than national bank associations, and every corporation, ... shall pay a tax of ten per centum on the amount of their own notes *used for circulation* and paid out by them," does not apply to certificates of indebtedness, bearing interest and payable to bearer on a certain day therein named, issued in denominations of five and ten dollars each, and paid out by a railroad company to its employés for wages, and providing that they would be received by the company at or before maturity for any debts due the company. These notes or certificates, having been issued only to the employés of the company on account of wages, and when paid by the company having been cancelled and not reissued, were not "used for circulation:" and the fact that they were used afterwards by those to whom they were issued to discharge their debts to others or to purchase subsistence for themselves, does not affect the character imposed upon them by the company.

Hearing on bill, answer, and proofs.

This was a bill in equity, filed by the Philadelphia and Reading Railroad Company to enjoin Pollock, collector of internal revenue, and his deputy from proceeding to enforce payment of a tax levied under the nineteenth section of the Act of Congress of February 8, 1875 (18 St. 311) providing "that every person, firm, association, other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation, and paid out by them."

From the pleadings and evidence it appeared that the Philadelphia and Reading Railroad Company issued to its employés for wages in the years 1878 and 1879 certain instruments, in the following form:—

"The Philadelphia and Reading Railroad Company.
"No. Wages certificate.
Philadelphia, December , 1878.

"The Philadelphia and Reading Railroad Company promises to pay to the bearer hereof the sum of Railroad Company, for coal bills of the Philadelphia and Reading Coal and Iron Company, or any other debts due to either of the said companies.

"F. B. GOWEN, *President.*
"S. BRADFORD, *Treasurer.*"

These certificates were printed on tinted paper, embellished with a vignette, and were somewhat narrower and longer in size than national bank notes. For convenience they were made in denominations of five and ten dollars each, and were issued to an amount of about $4,800,000. They were paid only to the employés of the company for wages, and when returned to the company, before maturity, in payment of freights or tolls, and when paid by the company, at maturity, were cancelled and not reissued. There was evidence that in many cases these notes had been used, by the person to whom they had been issued, in payment for goods purchased from storekeepers and dealers, and that wholesale dealers had received them in payment of accounts due by such storekeepers, and that they had been largely dealt in by stock brokers. There was also evidence that they had never been treated as circulation in the localities in which they were thus used, and that they could not be mistaken for bank notes.

James E. Gowen, for complainants.

The certificates are simply interest-bearing promissory notes, payable at a certain time, issued for existing debts, and were never intended or used as "circulation." The extent of the issue is of no importance. The denominations used were to facilitate the payment of thousands of officers and employés, whose salaries were largely in arrear. They were issued only to employés for actual debts, and when returned to the company before or after maturity were cancelled and not reissued. Had the purpose been to use them as circulation they would have been reissued, and in such case a tax could have been claimed only on the average monthly amount in circulation. They were dealt in by brokers and others as any other security, and their credit was fixed by their quotable value at the stock exchange. They resemble warrants issued by municipalities. The distinction between notes issued in payment of existing debts and notes issued for circulation has always been recognized.

Craig *v.* Missouri, 4 Pet. 410.
Atty.-Gen. *v.* Ins. Co., 9 Paige, Ch. 470.
Dively *v.* City of Cedar Falls, 27 Iowa, 227.
Mullarky *v.* Town of Cedar Falls, 19 Iowa, 24.

Obligations which circulate as money are payable on demand.

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the House of Representatives and the Committee on Finance of the Senate, at Washington, have both reported that these certificates are not taxable as circulation under the Act of 1875.

J. K. Valentine, U. S. District Attorney, for respondents.

These notes are within the prohibition of the Act. (Thomas *v.* Richmond, 12 Wallace, 353.) The name given these notes by the company is not essential. Their nature is to be determined by the instruments themselves, their character and purpose. The agreement to receive them for debts due the company is calculated to facilitate their circulation. In fact they did circulate. It is no answer to say they were not reissued. Bank of England notes are not reissued. These are, in all respects, current notes used for circulation, and taxable as such.

Webst. Dict. "Note."
Morse on Banks, 438.
Craig *v.* Missouri, 4 Pet. 410.
Briscoe *v.* Bank of Kentucky, 11 Pet. 257.

The law is so settled in Pennsylvania.

Hazleton Coal Co. *v.* Megargel, 4 Barr, 324.

Also in—

Utica Ins. Co. *v.* Cadwell, 3 Wend. 302.
Leavitt *v.* Yates, 4 Edw. 134.

The case of U. S. *v.* Wilson (*supra*) arose under a different Act, and in that case the notes had been issued by the receiver under a decree of a court, and were sold by the company.

February 14, 1884. THE COURT. We are of opinion that this case is ruled by United States *v.* Wilson (16 Otto, 620). In that case it was sought to subject to taxation, certificates of indebtedness issued by a railroad company, and by a receiver appointed to take charge of it, as notes or obligations within the meaning of section 3408 of the Revised Statutes "calculated, or intended to circulate, or to be used as money." And the Court held that they were not "circulation," and so not taxable.

The tax claimed in this case was imposed under the 19th section of the Act of Congress of February 8, 1875, which provides "That every person, firm, association other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by in the form of promises to pay to bearer a round sum at a future day with interest, and were upon their face stated to be for wages due by the Philadelphia and Reading Railroad Company, and were receivable before or at maturity, in payment of freight and toll bills of the Philadelphia and Reading Railroad Company, and for coal bills of the Philadelphia and Reading Coal and Iron Co., or any other debts due to either of said companies.

These notes were only issued to the employés of the railroad company, on account of wages due them, and when paid by the company were cancelled and not reissued. They were not therefore "used for circulation" by the company, but only as evidences of the company's indebtedness to its employés for wages. That they were used afterwards by those to whom they were issued to discharge their debts to others, or to purchase subsistence for themselves is, in our judgment, indecisive in determining the character of these instruments, because that is to be imposed upon them by the company by *using them as circulation*, and paying them out as such. This, as already stated, was not done.

What is there then to put them in the category as "circulation?" This is claimed to result from the form in which they were issued. But this is fully answered by the Supreme Court in United States *v.* Wilson (*supra*). In every essential particular the certificates issued there, and these in question here are remarkably alike. The former were certificates of indebtedness, good for round sums payable to bearer at a future day with interest, and one-fourth of their face value was receivable before maturity for freight and debts due the company and were paid out again at their face value with interest. Under these circumstances the Supreme Court held that it was not satisfied that these certificates "were calculated or intended to circulate or be used as money." Now, in view of this decision, we cannot hold that certificates of similar form, used by the railroad company not for circulation, but as evidence of wages due to its employés, are within the scope and meaning of the Act of Congress and so subject to the tax imposed by it.

The first prayer of the bill must therefore be granted.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, APRIL 10, 1884.* [No. 18.

Supreme Court.

Jan. '84, 266. February 5, 1884.

Kerr v. City of Corry.

Municipalities—Bonds—Negotiability—Estoppel.

Municipal coupon bonds payable to bearer are at least quasi-negotiable in these particulars—they pass by delivery; the holder may sue in his own name; the transferree for value holds the title as an original obligee; he cannot be affected by equities between the previous holders and the municipality of which he had no notice; neither can he be affected by the default of the officers issuing them, unless such default directly affects their power to make and put them upon the market.

Diamond *v.* Lawrence Co., 1 Wright, 353, commented on, doubted, and an extension of its doctrine refused.

A municipality desiring to aid a manufacturing enterprise gave to the manufacturers a certificate of indebtedness, and subsequently procured the passage of an Act of Assembly authorizing it to issue bonds to pay off its indebtedness only. It then issued bonds in pursuance of the Act of Assembly which it gave to the manufacturers in exchange for the certificate of indebtedness. One of these bonds having subsequently come into the hands of a *bona fide* purchaser for value without notice of the circumstances attending their issue, in a suit by him against the city on said bond:

Held, that the city could not set up as a defence the fact that the manner in which the bonds had been issued was substantially an evasion of the Act of Assembly, and that plaintiff was entitled to recover.

Error to the Common Pleas of Erie County.

Assumpsit, by James B. Kerr against the city of Corry upon unpaid interest coupons accrued on bonds of said city, issued by authority of a special Act of Assembly authorizing an increase of its bonded indebtedness. Plea, non-assumpsit with leave, etc.

The case was tried before a "legal arbitrator" (E. L. Whittlesey, Esq.), under the provisions of the Act of April 6, 1870, applicable to the counties of Erie, Elk, Crawford and Lawrence (P. L. 948; Purd. Dig. pp. 80, 81, pl. 20 *et seq.*).

On the trial, the following facts were proven: In the early part of 1873, certain citizens and the authorities of the city of Corry desired to accelerate the growth of their city by extending financial aid to those who, within the city limits, would build and operate large industrial establishments. The principal enterprise designed to be thus aided was a machine shop to be operated by Gibbs, Sterrett & Co., to whom it was proposed to give $80,000 in bonds of the city. Fearing lest there might be some question as to the validity of bonds issued directly for this purpose, it was decided that a certificate of indebtedness for $80,000 should be issued to Gibbs, Sterrett & Co. And this was accordingly done on the twenty-fourth day of March, 1873, with the express agreement, however, that the said certificate should be subsequently surrendered by said firm, and replaced by bonds of the city to an equal amount, bearing eight per cent. interest, to run not less than ten years.

But by the charter of the city of Corry, passed in 1866 (P. L. 784), the indebtedness of the city could only be increased two per cent. on the last assessment, and the supplement to the charter, passed in 1868 (P. L. 323), required that the amount borrowed in any one year should not exceed the sum of three thousand dollars. To enlarge the debt creating powers of the city, so as to obtain authority for the issue of the bonds to Gibbs, Sterrett & Co., the passage of an Act of Assembly was procured, giving the right to issue bonds to the amount of $125,000, but only to satisfy and discharge the indebtedness of said city, and for no other purpose whatever. On the twenty-seventh day of March, 1873, this Act was approved, by virtue of which the bonds in question were issued.

On June 25, 1873, Gibbs, Sterrett & Co., in pursuance of the contract between them and the city of Corry, surrendered the said certificate of indebtedness, and, by authority of an ordinance of the city councils, confirming the contract and providing for its completion, received bonds of said city to the amount of $80,000, $60,000 thereof being delivered to F. W. Andrews by virtue of an agreement between the parties entitled thereto.

The bonds were in the following form:—

No. 1. STATE OF PENNSYLVANIA. $1000.

Issued in pursuance of an Act of Assembly, approved March 27, 1873, and by action of the Common Council and authorities of the city of Corry.

CITY OF CORRY BOND.

The city of Corry, by these presents, acknowledges itself indebted to the bearer in the sum of one thousand dollars lawful money of the United States of America, which sum of money the said city promises to pay ten years from the date hereof at the office of the Farmers' Loan and Trust Company, in the city of New York, with interest thereon at the rate of eight per cent. per annum, payable semi-annually, on the first days of April and October, on the presentation and surrender of the annexed coupons at the above-mentioned place, as they severally become due.

In witness whereof, etc.

The coupons attached were in the following form, and numbered one to twenty, viz:—

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$40. STATE OF PENNSYLVANIA. $40.

The city of Corry will pay the bearer hereof forty dollars, lawful currency of the United States, at the office of the Farmers' Loan and Trust Company, in the city of New York, on the first day of October, 1873, being six months' interest on bond.

Between the first day of October, 1873, and the first day of April, 1874, the plaintiff, James B. Kerr, in good faith, bought from F. W. Andrews $7800 of the bonds, without notice from whom or how he had obtained the bonds, and without knowledge of any of the facts connected with their issue. The city of Corry being in default in the payment of the accrued interest coupons attached to the bonds owned by him, the plaintiff brought this suit, claiming that the bonds were negotiable, and that he was an innocent purchaser of them.

The legal arbitrator, on the above facts, decided as matter of law that plaintiff could not recover, because the special authority of the Act of Assembly had not been lawfully exercised, but had been used to contravene the constitutional provision that the Legislature shall not authorize any city "to obtain money, or loan its credit, to any corporation, association, institution, or party." That the city was not estopped by any recital in the bond, from showing the *ultra vires* act of its officers in issuing the bonds. And that, upon the authority of Diamond *v.* Lawrence Co. (1 Wright, 353), municipal bonds have not the quality of commercial paper even in the hands of innocent and remote purchasers, but are subject to the equities existing between the original parties. He, therefore, found for the defendant, and against the plaintiff for the costs.

Exceptions were taken by the plaintiff to this award, but they were overruled in an opinion by the Court, principally upon the authority of the case of Diamond *v.* Lawrence Co. (*supra*), and judgment was entered for the defendant. The plaintiff thereupon took this writ, assigning for error the action of the Court in entering judgment for defendant.

M. Crosby and *F. B. Guthrie* (*Julius Byles* with them), for the plaintiff in error.

The bonds recite that they were issued in pursuance of the authority vested by the special Act of Assembly in the councils and city authorities. If the city's officers pervert their authority, it must abide the consequences of their action as against innocent purchasers, who are not bound to look further than the bond and Act of Assembly. For the city is estopped by its own representations from saying, against the claims of such holders, that the bonds were not issued or used for municipal or corporate purposes.

Hackett *v.* Ottawa, 99 United States, 86.
Supervisors *v.* Schenck, 5 Wallace, 772.
Knox *v.* Aspinwall, 21 Howard, 542.
Woods *v.* Lawrence Co., 1 Black, 386.
Coloma *v.* Eaves, 2 Otto, 484.
Commonwealth *v.* Pittsburgh, 10 Casey, 496.
Commonwealth *v.* Allegheny Co., 1 Wright, 237.
Mercer County *v.* Hacket, 1 Wallace, 83.
St. Joseph Township *v.* Rogers, 16 Wallace, 644.
Town of Venice *v.* Murdock, 2 Otto, 494.
Moulton *v.* Savings Bank, 2 Otto, 631.
Humboldt Township *v.* Long, 1 Otto, 642.
Marcy *v.* Oswego, 2 Otto, 637.
Thompson *v.* Lee County, 3 Wallace, 327.
Commissioners *v.* Bolles, 4 Otto, 104.
Davies *v.* Huidekoper, 8 Otto, 100.

An important distinction exists between the provisions of the Act of Assembly in this case and those in the cases of Parkersburg *v.* Brown (16 Otto, 487), Loan Association *v.* Topeka (20 Wallace, 655), Marsh *v.* Fulton County (10 Wallace, 677), and Harshman *v.* Bates Co. (2 Otto, 569). In our case the Legislature authorized the issue of bonds for a strictly legitimate purpose, that is, for the payment of debts. In the cases pointed out the authority was to be exercised to aid some private enterprise, a purpose directly in violation of the Constitution. The purchaser must look to the authority; with the appropriation or disposition of the bonds or proceeds he has no concern.

The bonds in question are negotiable, and carry with them all the essential elements of negotiable paper; they are no more liable to be impeached for any infirmity, in the hands of a *bona fide* holder than other commercial paper.

Gelpecke *v* City of Dubuque, 1 Wallace, 220.
Allegheny City *v.* McClurkan, 14 Pa. 81.
County of Warren *v.* Marcy, 7 Otto, 96.
Commonwealth *v.* The Commissioners, 1 Wright, 37.

Diamond *v.* Lawrence County (1 Wright, 353), the only case which appears to support the non-negotiable theory, is a case which has been criticized and not wholly followed by this Court, and which, it would seem, has been entirely overthrown and rendered obsolete by a more recent case, construing Pennsylvania law by a Pennsylvania Judge.

Mercer County *v.* Hacket, 1 Wallace, 83.

Davenport & Griffith (*A. F. Bole* with them), for the defendant in error.

It was the duty of the purchaser to have read not only the Act under which said bonds were claimed to have been issued, but also the ordinance authorizing their issuance. Having failed to do so, he stands in the same position as though he had read the ordinance appropriating the bonds to the use of a private speculation.

McClure *v.* Township of Oxford, 94 United States, 429.
Ogden *v.* County of Davies, 102 United States, 634.
Loan Association *v.* Topeka, 20 Wallace, 655.
City of Williamsport *v.* Commonwealth, 3 Norris, 501.
1 Dillon on Municipal Corporations, 472.
Hood *v.* Lynn, 1 Allen, 104.
Burroughs on Public Securities, 319.

The bonds having been issued and disposed of

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in violation of the provisions of the Constitution, and of the Act under which they purport to have been issued, they are absolutely void; there can be no innocent holders; and the city of Corry is not estopped in setting up as a defence its own want of power under its charter and constituent statute to enter into the contract.

Hood *v.* Lynn, 1 Allen, 104.
8 American Law Register, 693.
6 American Law Register, 146
Peterson *v.* New York, 17 New York, 452.
Davies *v.* Huidekoper, 98 United States, 98.
City of Parkersburg *v.* Brown, 106 United States, 487.
Keen *v.* Coleman, 3 Wright, 302.
Pennsylvania R. R. *v.* Philadelphia, 11 Wright, 189.
Appeal of the City of Erie, 10 Norris, 398.
Williamsport *v.* Commonwealth, 3 Norris, 487.
Armstrong Co. *v.* Brinton, 11 Wright, 371.
Marsh *v.* Fulton Co., 10 Wallace, 276.
Thomas *v.* Town Lansing, 14 Federal Reporter, 625.
Monumental National Bank *v.* Globe Works, 101 Massachusetts, 58.
Floyd Acceptances, 7 Wallace, 682.
Clemens on Corporate Securities, 76.
Weightman *v.* Clark, 103 United States, 256.
Railroad Co. *v.* County Otoe, 16 Wallace, 667.
Thomson *v.* Lee Co., 3 Wallace, 327.
Co. of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 United States, 631.

The bonds are not negotiable, and the plaintiff stands in no better position than his vendor who received them from the city.

Diamond *v.* Lawrence Co., 1 Wright, 353.
Armstrong County *v.* Brinton, 11 Wright, 371.

February 25, 1884. THE COURT. It does not seem to be disputed but that the plaintiff, James B. Kerr, the owner of the bonds upon the coupons of which, or some of them, this suit has been brought, is a *bona fide* holder for value, and that he was at the time of his purchase without notice of the defence now set up by the city. These bonds with their coupons were in the ordinary negotiable form, payable to bearer, signed by the mayor, treasurer, and clerk of the city, and sealed with its seal. In the body of these obligations we find the statement that they were issued in pursuance of the Act of the 27th of March, 1873, and of the action of the common council and authorities of the city of Corry. About the facts here stated there is no serious dispute, nor do I understand that the power of the municipality to issue this paper, is called in question. Indeed it would be useless so to do, for the Act above recited leaves no room for hesitation; by it the power is clearly conferred, and had these bonds, when issued, been applied to the lawful indebtedness of the city, as in said Act directed, there could be no room for controversy. It is, therefore, manifest that the labored argument on which the legal arbitrator bases his conclusion comes to nothing. If, indeed, his premise were correct the rectitude of his conclusion could not be questioned. If the council of the city of Corry had no power to issue the bonds in controversy, then, without regard to their form, they would be as worthless as so much blank paper, and the operative legal principle here involved applies as well to a natural person, and private corporation, as to a municipality. If one receives the negotiable paper of another purporting to have been executed by an agent, it is not enough to show that it came to hand in the regular course of business, and that the holder gave a valuable consideration for it, for these are of no avail unless it be first shown that the alleged agent had authority to execute it. If, however, it be made to appear that he possessed such power, then may the innocent holder recover though the paper was in fact issued in fraud of the principal's right, and for a purpose not intended.

But the question we have to deal with is not one of power, but rather, as the learned Judge of the Court below has put it, the effect of the perversion of a lawful power by the application of the bonds to an unlawful purpose. The mayor and council had no power to bind the city by the certificate of indebtedness issued to Gibbs, Sterrett & Co., on the 24th of March, 1873; the city owed this firm nothing, and its credit could not be thus loaned; hence, the exchange of bonds for this certificate was a void act; it was a mere gift of these valuable securities to Gibbs, Sterrett & Co., and in their hands they were no better as evidences of indebtedness against the municipality than was the original certificate for which they had been exchanged. The contest here, however, is not with the original holders of these bonds, but with an innocent purchaser who in good faith took them, depending upon the representation appearing on the face of each and every one of them, that they and their coupons when due would be paid to the bearer. It follows that the material inquiry involved in this case is, Was the plaintiff bound not only to inform himself, through the Act of Assembly, of the power of the city authorities to issue the bonds, but did he take them charged with all the equities to which they were subject when in the hands of the first holders? In other words, do they occupy no other relation to the commercial community than do ordinary specialties, and have they in them no element of negotiability? In the Court below these questions, on the authority of Diamond *v.* Lawrence Co. (1 Wr. 353), were answered adversely to the plaintiff, and the bonds were held to be nothing more than ordinary specialties against which any defence might be set up which the city had against Gibbs, Sterrett & Co.

But we cannot agree that the case cited supports the judgment of the Court below. The coupon there sued upon was from a bond which,

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with others, had been issued by the county of Lawrence and passed to the North West Railroad Company, in payment of the county's subscription to the stock of that company. On the 5th of June, 1857, and before the railroad company had transferred the bond, afterward held by Diamond, a bill was filed by the county against the company to prevent a transfer of the bonds, and compel a surrender of them for cancellation. On that bill a decree was made as prayed for, on the ground that there had been a direct violation by the corporation of the Act of Assembly in selling the bonds for sixty-four cents on the dollar. Under these circumstances, Diamond having received a transfer of his bond pending the bill, it was held that he was bound to take notice of the suit then in progress; in other words, the case was disposed of on the doctrine of *lis pendens*, and the assertion found in the opinion that bonds of this character are not to be regarded as negotiable securities, must be taken to mean only that they are not to be treated as paper of that strictly commercial character which relieves its holder from the effects of the doctrine of *lis pendens*. If we were compelled to interpret this opinion, as did the Court below, we would reject it altogether, for thus interpreted it is not law in this Commonwealth, nor any where else. This doctrine, even when applied as it was intended, is not satisfactory, since it puts us as a Court into this anomolous condition that by it we are made to antagonize the sentiment of the commercial world, and the doctrine of every other court whether in this country or England. It has been repudiated by the Supreme Court of the United States, and held not to be the law of Pennsylvania. (Mercer County *v.* Hacket, 1 Wall. 83.) Under these circumstances we will not agree to carry the doctrine of this case a single step beyond the facts upon which it is based; nor are we willing to positively commit ourselves even to this extent, for in so doing we must necessarily overrule the case of Beaver County *v.* Armstrong (8 Wr. 63), in which we held that municipal bonds and coupons are negotiable securities. But returning to the case in hand, we cannot see wherein it differs materially from that of the Commonwealth *v.* The Commissioners of Allegheny County (1 Wr. 237), wherein those commissioners were peremptorily ordered to provide for the payment of the coupons of bonds issued to a railroad company, and, like those in the case of Diamond *v.* Lawrence County, were, by that company, in defiance of the Act of Assembly, sold below par. Here the very same learned justice who delivered the opinion in the Lawrence County case, says that the making of the bonds on their face payable to the company or bearer was of itself sufficient to authorize their transfer; that this was a direction in precise language that the bonds should be transferable on delivery like bank notes or bills of exchange. And all this seemed to him so clear that he alleges he never before heard it doubted, and probably never should again. So also, the very same idea was expressed in the previous case of the Commonwealth *v.* The same Commissioners (8 Ca. 218), as it was in the Commonwealth *v.* Pittsburgh (10 Ca. 496), and Carr *v.* Le Fevre (3 Ca. 413).

Taking the cases here cited as exponents of the doctrine entertained by this Court concerning municipal bonds, and we may summarize it as follows: they have at least a quasi-negotiability in these particulars: they pass by delivery, and the holder may sue in his own name; the transferree for value holds title as an original obligee; he cannot be affected by equities existing between the previous holders and the municipality of which he had no notice; neither can he be affected by the default of the officers issuing them, unless such default directly affects their power to make and put them upon the market.

The judgment is reversed, and a *procedendo* awarded.

Opinion by GORDON, J.

GREEN, J., absent. H. L. N.

[*Cf.* Gibson *v.* Lenhart, *ante*, 149.]

May, '83, 29. May 30, 1883.

City of Harrisburg v. Sheck.

Statute—Repeal of—What necessary for—Special Act not abrogated by subsequent general Act, except by express words of repeal, or irreconcilable repugnancy.

A local statute conferring special privileges is not repealed by a subsequent general statute, legislating for the whole State, unless the later Act contains express words of repeal, or the provisions of the two Acts are so repugnant as to be irreconcilable, and not capable of exercise together.

The special Act of March 18, 1860 (P. L. 175), incorporating the city of Harrisburg, authorized the city to straighten Paxton Creek, and provided for the ascertainment of damages by proceeding in the Quarter Sessions. The General Act of May 23, 1874 (P. L. 230), providing for the incorporation and government of cities (which was formally accepted by the city of Harrisburg), authorized cities to change the channels of water courses, and provided for the ascertainment of damages by proceeding in the Common Pleas:

Held, that the provisions of the former Act were not repealed by the latter.

Error to the Common Pleas of Dauphin County.

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Petition of John M. Sheck, claiming damages against the city of Harrisburg, for straightening Paxton Creek through his lands.

The city of Harrisburg was incorporated by the Act of March 18, 1860 (P. L. 175), the parts material to this case are as follows:—

"§ 42. That the corporation of the city of Harrisburg are hereby authorized to straighten Paxton Creek, wherever the same may be necessary, within the boundary lines of the said city and Swatara Township, and also to change the bed of the said stream wherever it may become necessary to accomplish the desired object of removing all obstructions in said creek, so that no stagnant water will remain in the said creek or its immediate vicinity.

"§ 43. That all persons who may feel themselves aggrieved or in any way damaged by the straightening or changing of the bed of Paxton Creek, shall or may apply to the Court of Quarter Sessions of the county of Dauphin, and have their damages valued and assessed, as is provided for in the previous sections of this Act, relating to the opening, grading, and curbing of streets, lanes, and alleys, within the said city, and the damages, if any, to be paid by the county of Dauphin."

§ 35 provided for the manner of assessment of damages.

§ 44 directed the council to carry into effect the provisions of the Act.

The city expended more than ten thousand dollars in the work of improving and straightening said Paxton Creek, the county paid the damages to property owners. When this Act was passed, Paxton Creek was a sluggish stream, at the east of the city, emptying into the river in Swatara Township, below the city line. The work through the plaintiff's land was done in 1879.

On August 25, 1874, the city of Harrisburg accepted the provisions of the Act of May 23, 1874 (P. L. 230), which provided for " . . . the incorporation and government of cities . . ."

Clause 20, § 30, of said Act provides that "Councils shall have power to establish, alter, and change the channels of water courses," etc., etc.

§§ 53, 54, and 55 provide the manner in which " . . . streams, springs . . . etc," are to be taken possession of by the city, and how damages are to be assessed. It authorizes proceedings to be taken in the Common Pleas.

The plaintiff filed in the Common Pleas his petition, praying for viewers to assess damages.

The city filed an answer denying the jurisdiction of the Common Pleas, and its liability to respond in damages.

The Court overruled the objections set forth in the answer of the city, and appointed viewers; to which action of the Court the city excepted. The viewers filed their report, to which the city filed an appeal and exceptions, *inter alia*:—

"Sixth: The jury had no jurisdiction to award damages against the city of Harrisburg, because the Court had none. If any damages were due or allowable to the petitioner, they were not payable by the city of Harrisburg, but by the county of Dauphin."

After argument on the exceptions, the Court, McPherson, A. L. J., overruled them, saying in an opinion, " . . . . § 43 in the charter of 1860 . . . . was repealed by the Municipal Corporation Act of 1874, which the city adopted in August of that year. We are aware of the legal rule, that a repeal by implication is not favored, and that repugnancy between two Acts must be reconciled if possible, but we do not see how the provisions of these statutes, with regard to the liability for this damage, can stand together. . . . The liability of the city rests upon clause 20 of § 20, § 53, and § 54 of the Act, to which we need not refer in detail. We hold that the city alone is responsible for the damage suffered by Mr. Sheck, and must, therefore disallow this (sixth) exception. . . ."

Afterward, a feigned issue was framed by the Court, upon defendant's appeal, in which it was agreed that a verdict of $500 for plaintiff might be taken, subject to the question of law in the sixth exception (*supra*); whereupon the Court directed judgment to be entered for the plaintiff upon the verdict, and reserved point.

Thereupon, the city of Harrisburg, defendant, took this writ, assigning for error the action and judgment of the Court, as above.

Francis Jordan (*Thos. S. Hargest*, City Solicitor, with him), for plaintiff in error.

The Court should have dismissed the petition as soon as it appeared that the Common Pleas had no jurisdiction. The Act of 1874 did not repeal § 43 of the Act of 1860. It was not designed as a substitute for the charters and constituent Acts of cities that accepted its provisions. It is an auxiliary statute, cumulative legislation for the improvement of local government.

Williamsport *v.* Brown, 3 Norris, 438.
Potter's Dwarris on Statutes, §§ 154–157, and notes.

A general statute, without negative words, can not repeal a previous, particular statute, even though the provisions of the one are different from the other. Repugnancies must be reconciled, if possible, so that both may stand.

Arthur *v.* Homer, 6 Otto, 137.
U. S. *v.* Smith, 2 Blatchf, 127.
U. S. *v.* Tynen, 11 Wallace, 92.
Aspden's Estate, 2 Wallace, Jr., 431.
Egypt Street, 2 Grant, 455
Brown *v.* Commissioners, 9 Harris, 37.
Wright *v.* Vicker's Admr., 31 Smith, 122.
Sifred *v.* Comlth., 12 Weekly Notes, 380.
City of Janesville *v.* Markoe, 18 Wisc. 350.

Weiss & Gilbert (*J. A. Herman*, with them), for defendant in error.

The class of cases cited by the other side is based upon a contract, or rights acquired under the former Act. A charter is in no sense a contract between the State and the corporation.

1 Dillon on Mun. Corp., § 30.

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A subsequent general Act does repeal a prior particular Act, in so far as their provisions are inconsistent.

Keller *v.* Comlth., 21 Smith, 414.
Nussser *v.* Comlth., 1 Casey, 126.
Bourguignon Build. Assn. *v.* Comlth., 2 Out. 54.
McFarland *v.* The Bank, 4 Ark. (Pike), 416.

October 1, 1883. THE COURT. The learned Judge of the Court below held that the Act of 1860 was repealed by implication by the Act of 1874, and upon that ground directed judgment to be entered in favor of the plaintiff.

In this we are constrained to think there was error. The argument is that the two Acts cannot stand together, and their essential inconsistency abrogates the former. Had the earlier Act been of a general character, imposing liability for damages for improvements covering the one in question and providing the method of their ascertainment, there would have been great force in the suggestions of the Court below. But we think an examination of the Act of 1860 shows that it was legislation of a local and special character, conferring a peculiar privilege and imposing a particular obligation, not embraced within either the letter or the spirit of the general law of 1874, and hence not taken away by it, there being no words of express repeal. The Act of 1860 is a local law incorporating the city of Harrisburg (P. L. 1860, p. 175). The 42d section authorizes the city to straighten Paxton Creek wherever the same may be necessary within the boundary lines of the city and Swatara Township, to change the bed of the stream and remove all obstructions, so that no stagnant water will remain in the creek. The 43d section gives a remedy for damages suffered by any person in the straightening or changing the bed of the creek, by application to the Court of Quarter Sessions of the county of Dauphin, and directs that the county shall pay the damages.

The creek being partly in the township of Swatara and partly in the city of Harrisburg, it is obvious that the privilege and the power to enter within the limits of the township for the purpose of straightening the creek are special and peculiar, not within the general powers of the city, and existing only by force of this Act. The obligation of the county to pay any damages occasioned by the work done in straightening the creek, whether in the city or township, is also of a special and particular character, not arising by any general law or any law but this. The right of the city to do this work, and the duty of the county to pay the damages incurred, were certainly a continuing right and duty until the passage of the general law in 1874, in relation to the classification of cities. It is true that this general law gives to councils the power to establish, alter, and change the channels of water courses, and to wall them and to cover them over, but the limits within which this power must be exercised are the territorial limits of the city. No power is conferred by the Act of 1874 to go outside the city limits, and do such or any similar work within any adjacent territory. And so also as to compensation for damages, the fifty-third section of the general law of 1874 gives a remedy against the city by application to the Court of Common Pleas, "in all cases in which *under the provisions of this Act*" any public work is done. But, of course, this remedy could not be co-extensive with the remedy afforded by the Act of 1860, since it is limited to cases arising under the provisions of the Act which confers it. Under the former Act, the obligation to pay the damages is imposed upon the county, which is a different and more extended municipal organization. The Act of 1874 gives no equivalent for this. Before and up to the time of the passage of the Act, although the city did the work, the county was obliged to pay. Under the Act the city cannot do the work outside its own limits, and the county is not obliged to pay for anything. Certainly the latter Act does not supply the former. How, then, can it operate as a repeal by implication? Such repeals are not favored, and are not allowed except in cases of strong repugnancy or irreconcilable inconsistency. (Brown *v.* Commissioners, 9 Harr. 37; Erie *v.* Boots, 22 P. F. Smith, 196; Wright *v.* Vickers, 31 P. F. S. 122; *In re* Barber's Election, 5 Norr. 392.) In Wright *v.* Vickers, WOODWARD, J., said: "To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled." And in Brown *v.* Commissioners, we held that a general statute without negative words will not repeal a previous statute which is particular though the provisions in the two be different. In the present case we perceive no conflict between the Acts in question which renders them inconsistent or irreconcilable. Their provisions are different, but they provide for subjects which are not the same. For this reason they may both stand and be executed together. If the work done in a particular case be a part of the process of straightening Paxton Creek, or changing its bed, the special and local Act of 1860 applies and must be followed, because it was passed for that purpose. The Act of 1874 neither supplies its place nor makes any corresponding provision. The two Acts may be executed, each within its appropriate sphere, without any repugnancy whatever, and hence there can be no repeal by implication. In

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Sifred *v.* Commonwealth (12 WEEKLY NOTES, 380), Mr. Justice TRUNKEY said: "It is against reason to suppose that the Legislature, in framing a general system for the State, intended to repeal a special Act which the local circumstances of one county had made necessary." Entertaining these views, we are of opinion that the learned Court below was in error in entering judgment for the plaintiff on the verdict, and the same must now be reversed.

Judgment reversed, and judgment is now entered for the defendant in the Court below on the questions reserved, *non obstante veredicto*, with costs of suit.

Opinion by GREEN, J.

P. C.

Jan. '83, 400. May 9, 1883.

Blattenberger v. Holman.

Life insurance—Wagering policy—Fraudulent assignment of—Assignee not an innocent holder for value—Warranty—Nonsuit.

Where the assignee of a policy of life insurance took the assignment knowing that the policy had been taken out for speculative purposes by persons having no insurable interest in the life of the assured, and brought suit to recover the money paid as consideration for the assignment, on the ground that it was fraudulent:

Held, that he was a party to the fraud, and could not recover.

Error to the Common Pleas of Perry County.

Case, by John K. Blattenberger against M. B. Holman, to recover a sum of money paid for the alleged fraudulent assignment by defendant to plaintiff of a policy of insurance on the life of Mary Owen.

The facts as they appeared at the trial before BARNETT, P. J., will be found in full in the opinion of the Supreme Court.

Plaintiff offered to prove that at the time the application for the policy in suit was dated, the subject insured, Mary Owen, was in bed sick with her last illness; that the questions (in the application) were never propounded to her; that the answers were copied from another application and filled in from that, or else filled up without being copied from anything; that the subject lived twenty miles from where the application was filled up by Holman; that many material answers were untrue; to that extent that the policy issued in pursuance of the application would be fraudulent and void in law, and there could be no recovery thereon against the Lochiel Company which issued the policy thereon; to be followed with proof that the witness transferred the policy to M. B. Holman on 1st April, 1881, and that M. B. Holman transferred it to the plaintiff on the 13th June, 1881, for the consideration of $350; that nothing was realized upon the policy because the company refused to pay for the reasons assigned in this offer; and that all these facts were known to M. B. Holman, the holder of the policy, before he assigned it to the plaintiff.

Objected to by defendant on the ground that the proof, as offered, was incompetent, and the liability of the company cannot be fixed or determined in this collateral issue. That the witness by whom the offer is proposed to be proved is the beneficiary named in the application and policy issued thereon. That he started a chose in action on the market by his assignment and transfer, and is now estopped from denying his deed. And further, that the offer does not propose to prove that there ever was a legal contest between the company and the policy holder, the plaintiff, by which the fact could be determined that there was no liability on the part of the company, nor does the offer propose to prove that the company ever refused to pay the amount of the insurance prior to the date of the assignment by the defendant to the plaintiff; nor does the offer propose to prove that the company did not recognize and approve of the assignment and collect assessments from the plaintiff after the time that he was the owner of the chose in action.

Objection sustained. Exception.

Plaintiff offered to prove further that the application upon which the policy issued was a forged instrument; that the mark attached thereto, as the mark of Mary Owen, was neither made by Mary Owen herself, nor by anybody authorized to make it for her; that she was not within twenty miles of the place where the mark was made, at the time it was made; that the defendant was present and saw it made, and knew that it was made without authority; that he filled up the application in his own handwriting with the necessary answers and replies, which he copied from another application, or else answered out of his own head; that he was the real owner all the time of the policy issued in pursuance of it, either in whole or in part, although the policy issued in the name of S. E. Klinger; that on this the policy was obtained and assigned, as heretofore set out, of all of which the defendant had knowledge, before and at the time of the assignment to plaintiff; and that plaintiff made application to the company for payment, and it declined to pay for the reasons stated in this offer, and because the policy was fraudulently obtained and void.

Objected to by defendant—

1st. For the reasons given in the objection to the former offer.

2d. That the witness on the stand on the face

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of the paper is the beneficiary; he started the progress of the contract by his own act; he commenced the contract by the procurement of a policy of insurance which he himself originated and put upon the market. He is estopped from proving his own infamy or stultifying his own deed. The offer, as made, would be evidence in a contest between the company and the assignee of the policy, but in this collateral inquiry it is the same character of evidence which is contained in the plaintiff's first offer.

Objection sustained. Exception.

Plaintiff offered to prove further that he presented this claim to the company and it refused to pay it; and that shortly after the Attorney-General had the charter of the company dissolved; that the company, by resolution, refused to pay the claim, because it was fraudulent, as alleged, and that the receiver of the company declined to pay, and the company is insolvent.

Objected to by defendant—

Because the law recognizes but one mode of demand; the offer does not contain or assert any liability by virtue of a guarantee on part of defendant. The offer does not propose to show that the company refused to pay before the transfer of the policy by defendant to plaintiff. The offer does not propose to show when the company refused to pay, nor for what reason, nor when they went into liquidation, and in no way could this offer be evidence, because it is irrelevant and immaterial.

Objection sustained. Exception.

The Court, on motion of the defendant, granted a nonsuit, which the Court in banc subsequently refused to take off. Plaintiff thereupon took this writ, assigning for error the refusal to take off the nonsuit, and the rejection of the evidence offered as above.

W. N. Seibert and *B. F. Junkin*, for plaintiff in error.

One who sells a chattel, note, bond, judgment, or other evidence of a debt, impliedly warrants the title, validity, genuineness, consideration, and right to recover thereon.

Charnley *v.* Dulles, 8 W, & S. 361.
Swanzey *v.* Parker, 14 Wright, 441.
Kauffelt *v.* Leber, 9 W. & S. 93.
Flynn *v.* Allen, 7 Smith, 482.
Chambers *v.* Bank, 28 Smith, 205.

October 19, 1883. THE COURT. The defendant was a holder of a policy of insurance on the life of Mary Owen, issued by the Lochiel Insurance Company, of Harrisburg. One S. E. Klinger was the beneficiary named in the policy. Klinger transferred the policy to the defendant, who in turn assigned it to the plaintiff for the consideration of $350. Upon the death of the assured the plaintiff brought this suit to recover from the defendant the money paid for the assignment, upon the ground that the policy had been obtained from the company under such circumstances of fraud that the company declined to pay. The Court below, after rejecting several offers of evidence on the part of the plaintiff, directed a nonsuit, which, with the rejection of the offers of evidence, is assigned for error.

The entire case is so saturated with fraud that its presence in this Court is offensive. The company which issued the policy was one of those unfortunate excrescences on the insurance system, which sprung up in a night only to be swept away by the Attorney-General.

The transaction out of which this suit grew was a speculation upon the life of a decrepit woman, eighty-four years of age, who was on her death-bed when the policy was issued. The application was dated March 26, 1881; the assured died April 19, 1881. The policy was not only worthless because of the fraud set forth in the plaintiff's offer, but was wholly invalid because taken out for speculative purposes, and by parties who had no insurable interest in the life of Mary Owen. See Gilbert *v.* Moose, decided at the present term, in which this subject is discussed and the authorities cited by our brother GORDON. (13 W. N. C. 489.)

The plaintiff, as assignee of the policy, claims to recover upon the implied warranty of title. It is settled law that one who sells a note, bond, or other *chose in action* impliedly warrants not only the title thereto, but the validity thereof and the right to recover thereon. (Flynn *v.* Allen, 7 P. F. Smith, 485; Lyons *v.* Divelbis, 10 Harris, 185.)

If therefore, the plaintiff took this assignment in ignorance of the true character of the transaction, he is entitled to recover back the money paid therefor. But his own testimony shows

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Mary Owen. S. E. Klinger was the original beneficiary. It was assigned by Klinger April 1, 1881, to Mr. Holman. I bought the policy from Mr. Holman for $350. . . . He said the claim was all right, and the company would assess. The subject was then dead, but he had not filed a death proof. His reason for not filing it was that he was a member of the Legislature and could not attend to it at that time. Holman assigned to me June 14, 1881. . . . I owned other policies of insurance on this same subject, probably interested in four or five. . . . I took out my first policy on Mary Owen in latter part of January or first of February, 1881. About all I had on her I took out at the same time. S. E. Klinger was the beneficiary in these policies. I obtained the policy by arrangement from S. E. Klinger. We first took out the applications, they were all signed on the same day, because I was at Mary Owen's only the one time. Her condition when I was there, was a desirable condition for speculative purposes. . . . I was in the speculative life insurance business as a business. . . . . I knew she was a good risk; one who would drop off soon. She was 84 years of age. I knew she was a favorable risk. It was part of the history of life insurance that whenever an old decrepit and favorable risk was known, speculators took out as many policies as they could on such risk. . . . I took out all my applications on said subject (Mary Owen) on the same day, January 31, 1881. She signed them all on the same day. I did not send them to the respective companies all on the same day of the application. I sent them in accordingly as I sold them to different parties."

In view of this statement by the plaintiff he cannot justly claim to be an innocent assignee of the policy. It is true he may not have known that the signature of the assured was a forgery, if the fact be so, but he did know that it was a speculative policy issued to one who had no insurable interest in the assured, excepting in her death. Such transactions are against the policy of the law. They lead to murder.

The plaintiff bought a worthless thing, knowing it to be worthless. He perhaps supposed that owing to his connection with the company the latter would assess the loss and pay. Be that as it may, he certainly knew that if he got his money some one would be cheated. In doing this the law will not aid him.

We are clearly of opinion that the learned Judge below committed no error when he rejected the plaintiff's evidence and directed a nonsuit.

Judgment affirmed.

Opinion by PAXSON, J.

CLARK, J., absent. T. R.

Oct. & Nov. '83, 9. October 24, 1883.

Appeal of the Executors of Martha McD. Smith.

Trusts—Assignment for benefit of creditors—Act of May 3, 1855—Deeds of assignment—Recording of—Notice—Rule when insolvent is resident in another State—Statute of Limitations of another State, effect of, upon creditors in this State.

An assignment for the benefit of creditors, being a voluntary conveyance, is sufficient of itself to pass the title to the insolvent's personal estate wheresoever situate, and the deed without recording is effective as against the grantor.

The Act of May 3, 1855 (1 Purdon, 92, pl. 8) gives a more extended operation to deeds of this character than they had at common law, and whenever made by one resident out of this State, and recorded in any county of this State where the insolvent has any real or personal estate, it will take effect from its date, saving the rights of "*bona fide* purchasers, mortgagees, or creditors having a lien thereon before the recording, in the same county, and not having had previous notice thereof."

But those who have actual notice of the assignment are not within the saving clause, and can take no title by deed from the insolvent.

Upon a bill in equity filed by assignees for creditors, it is the duty of a court of equity to pursue an insolvent's interest in a trust fund, restrain its improper conversion, control its investment, and generally to prevent any maladminstration of the trust.

Property in this State belonging to an insolvent resident in another, and who has there made an assignment, is distinguished from that of a foreign decedent, or of an involuntary bankrupt, or that in the hands of a receiver, by its having passed from the insolvent to his assignees through a voluntary conveyance; and as the foreign resident before his assignment, for a valuable consideration, could have disposed of the estate here situate, and could have placed the consideration within his own control, he may, with like effect, convey his estate to the benefit of creditors here or elsewhere.

A court of equity will not retain property of a foreign insolvent here for the payment of his creditors in this State; nor will the fact that a statute of limitation of the State of the insolvent's domicile runs after three years, and has been pleaded in bar of a claim of a creditor of this State by the assignees, raise any equity in such creditor to avoid the rule.

Appeal, by L. H. Smith and B. Wolff, Jr., executors of Martha McDowell Smith, deceased, from a decree of the Court of Common Pleas No. 2, of Allegheny County, in equity, directing that the sum of $13,760.47, be accounted for and paid by the appellants, to the complainants in the bill.

Bill in equity, wherein W. H. McDowell *et al.*, assignees for the benefit of creditors of George G. Smith, were complainants, and Martha McDowell Smith was defendant, praying that defendant be required to account for and

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pay over certain money in her possession belonging to said assigned estate.

After the filing of the bill the defendant died, and her executors, L. H. Smith and B. Wolff, Jr., were substituted. An answer was filed, and the cause was referred to an Examiner and Master (C. W. Robb, Esq.), who reported in favor of the complainants. Exceptions filed to the report by the defendants were not sustained, and the Court entered a decree in accordance with the prayers of the bill.

The material facts are stated in the opinion of the Supreme Court, as follows:—

"On the 18th May, 1848, Dr. Charles Smith, of New Brunswick, New Jersey, having made his last will and testament, died, possessed of a large estate, consisting of real and personal property. By his will he bequeathed to Fritz Randolph Smith and Charles Smith Olden, of Princeton, certain personal securities, upon the trust, that the income thereof should be paid to his nephew Charles Gardiner Smith, during his life; to Charles's wife, Martha McDowell Smith, in case she should survive him, during her life; after the death of the said Charles Gardiner Smith, and his said wife, that they should apply the income to the support, maintenance, and education of the children of his said nephew, until they should severally arrive at the age of twenty-one years, and as they arrived at that age, respectively, to pay each of said children one equal share of the fund with its accumulations.

"Charles Gardner Smith died on the 2d November, 1870, leaving surviving him a widow, the said Martha McDowell Smith, a citizen of Pennsylvania, and five children, of whom Geo. G. Smith was one.

"George G. Smith was a citizen of the State of Maryland, became insolvent, and, on the 22d April, 1874, executed a deed of voluntary assignment for the benefit of his creditors, under the laws of that State, to W. H. McDowell, John Lind McAtee, and Theodore Embry. This assignment was duly recorded at the place of the domicile of the assignor, but was never recorded in New Jersey, nor was it recorded in Pennsylvania until in the year 1878.

"On the 5th October, 1874, Geo. G. Smith joined with his brother and sister in an assignment to their mother, Martha McDowell Smith, of all their interest in the fund, held in trust, by Fritz Randolph Smith and Charles Smith Olden, in the State of New Jersey; and on the 15th February, 1875, upon a bill in chancery prepared by Martha McDowell Smith, against the amounting to $59,819.15 should be paid to her; pursuant to this decree the entire fund passed into her hands.

"At the time of this transfer of the New Jersey fund to Martha McDowell Smith, by her children, she had "previous actual notice" of the general assignment for creditors in Maryland; indeed, it cannot be doubted that she had full knowledge of the assignment on and after the 18th June, 1874, when she purchased a portion of the assigned estate from the assignees.

"At the time of the receipt by Martha McDowell Smith of this fund from the executors of Dr. Charles Smith, deceased, in February, 1875, George G. Smith was indebted to his mother in a large sum of money, perhaps exceeding the amount of his share; on the 16th November, 1874, this indebtedness aggregated $29,885.69, whilst his entire liabilities at the same time exceeded $40,000.

"On the 10th February, 1878, this bill was filed, setting forth the facts, substantially as here stated, and praying for proper relief."

The Court below entered the following decree:—

"And now, September 18, 1882, this cause came on to be heard and was argued by counsel; and the plaintiffs having filed of record in this cause an instrument in writing, requesting and authorizing them, for the creditors of George G. Smith, to waive and disregard the plea of the Statute of Limitations as against the claim of the estate of Mrs. Martha McDonald Smith, to participate in the fund which is now or which may hereafter come into their hands for distribution among the creditors of the said George G. Smith, which instrument was signed by the principal creditors of the said George G. Smith; and it appearing to the Court, from the pleadings and evidence in the said cause, and the finding of facts and law by the Master, that Martha McDonald Smith having received in her lifetime from Charles S. Olden, surviving executor and trustee of the last will and testament of Dr. Charles Smith, of New Jersey, deceased, the sum of $11,963.89, in money and bonds, which belonged to George G. Smith, and which passed under his voluntary assignment for the benefit of creditors to the plaintiffs in this suit; which sum, with interest thereon from March 1, 1880, amounts to $13,760,47, now due and payable from L. H. Smith and Bernard Wolff, Jr., executors of said Martha McDonald Smith, to the plaintiffs. Upon consideration thereof, the Court order, adjudge, and

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also first pay the costs of this suit out of any funds of the said estate in their hands."

The appellants thereupon took this appeal, and filled the following asignments of error:—

(1) The above decree of the Court.

(2) The Court erred in holding that the estate of Mrs. Smith should pay to the assignees of George G. Smith the sum of $13,760.47.

(3) The Court erred in deciding that a court of equity, sitting in Pennsylvania, would order and decree the Pennsylvania assets belonging to an insolvent of the State of Maryland should be paid over to the Maryland assignees of the insolvent, and this without any provision in reference to the payment by the Maryland assignees of the Pennsylvania creditors of the insolvent.

(4) Under the circumstances of this case the Court below should have applied George G. Smith's interest in this trust fund to the payment of the Pennsylvania creditors, including Mrs. Smith, and erred in not so decreeing.

(5) The Court below should have entered a decree dismissing the bill on the ground that it was prematurely filed.

D. T. Watson, for the appellants.

The insolvent's interest in the trust fund in the hands of the appellants should be retained for the benefit of the Pennsylvania creditors of the insolvent; for to their claim made to his assignees in Maryland the bar of the statute, which runs after three years, was pleaded, and he who seeks equity must do equity.

Davidson *v.* Barclay, 13 Smith, 406.
Story's Equity Jur., 12th ed., sec. 64, E.

The remedy in equity is not of right, but of grace.

Weise's Appeal, 22 Smith, 351.
Washabaugh *v.* Stauffer, 32 Smith, 502.
Mitchell *v.* Steinmetz, 1 Out. 254.

The assignees should not be permitted to take the fund out of this State without settling with the creditors therein. The rule that equity having obtained jurisdiction will keep it and give entire relief, should be applied.

Bank of U. S. *v.* Biddle, 2 Parsons, 31.
Wilhelm's Appeal, 29 Smith, 120.

The decree of distribution by the New Jersey Court passed a good title to appellants' testatrix; nor does it matter that the appellees were not parties in that proceeding, for they had neglected to record their deed of assignment in New Jersey.

George Shiras, Jr. (with him, *J. M. Stoner*), for the appellees.

If there was inequitable conduct anywhere, it was in appellee's testatrix, who not only attempted to appropriate the insolvent's share in the New Jersey estate, but actually made claim beside as a creditor on the fund in the assignees' hands in Maryland. Then, after resisting their claim upon the New Jersey fund for years, is she in position to urge any equity by reason of the plea of the statute against her?

Upon the acceptance of the deed of assignment by appellees all the property intended to be conveyed thereby immediately vested in them, and the trust instantly took effect.

Seal *v.* Duffy, 4 Barr, 274.
Read *v.* Robinson, 6 W. & S. 329.
Law *v.* Mills, 6 Harris, 185.
Wiener *v.* Davis, Id. 331.
Lewis *v.* Barry, 22 Smith, 18.

And this without recording the deed; for that is only to guard against frauds upon subsequent purchasers without notice. But the Master has found that testatrix had actual notice of the assignment, and therefore she was not injured by the non-recording in New Jersey.

January 7, 1884. THE COURT (after stating the facts, *ut supra*). The bill was not premature, as it was the clear duty of the Court to pursue this fund, restrain its improper conversion, control its investment, and generally to prevent any mal-administration of the trust. Martha McDowell Smith died in the month of February, 1880, and L. H. Smith and B. Wolff, executors of her last will and testament, were substituted as defendants.

The assignment of 22 April, 1874, for the benefit of creditors of George G. Smith was a voluntary conveyance; it was not made *in invitum* or by coercion of law, and being valid, according to its purpose, by the laws of Maryland, it was sufficient of itself to pass the title to the insolvent's personal estate, wheresoever situate; the law of the domicile regulates the transfer of personal property, and the deed, without record, was effective as against the grantor. (Speed *v.* May, 5 Harris, 91; Law *v.* Mills, 6 Harris, 185; Evans *v.* Dunhleberger, Gr. 134; Lewis *v.* Barry, 22 P. F. S. 18.)

The fund in controversy, at the date of the assignment for creditors, was in the control of the executors of Dr. Charles Smith, deceased; where invested does not appear, but the argument proceeds upon the assumption that the legal situs of the property was in Pennsylvania.

But the Act of 3 May, 1855, gives a more extended operation to conveyances of this character; it provides, "whenever any person making an assignment of his or her estate, situate within this Commonwealth, for the benefit of creditors, shall be resident out of this State, such assignment may be recorded within any county, where such estate, real or personal, may be, and take effect from its date."

It cannot be doubted, therefore, that the legal effect of recording the deed of April 22, 1874, in Pennsylvania, in 1878, under this Act, was to add to its force at the common law, and give it full effect from its date; saving the rights to

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"*bona fide* purchasers, mortgagees, or creditors, having a lien thereon before the recording in the same county, and not having had previous actual notice thereof."

As it clearly appears, that Martha McDowell Smith had this previous actual notice, she cannot come within this saving clause; she took no title, therefore, to the share of George G. Smith in this trust fund by the transfer of 5th October, 1874.

The fund had, however, been traced into her hands, and as by her decease since the filing of this bill, the time has arrived for distribution, under the will of Dr. Charles Smith, deceased, it is but just that a decree shall be entered for payment of George G. Smith's share of the trust fund to the assignees for creditors, unless some superior equity intervenes to prevent such a decree.

It is objected, however, that George G. Smith was indebted to his mother, at the date of his general assignment, in a sum equal to, or greater than his share in the fund found in her hands, and, that being a citizen of Pennsylvania, she presented her claims as a creditor, in the proper courts of Maryland, for a distributive share in the assigned estate, when the assignees interposed the bar of the Statute of Limitations of the latter State, and the lapse of a period of three years only from the time the right of action accrued, without suit brought, was there held to be a complete bar against the allowance of her said claims.

The effect of the assignment made by George G. Smith was to withdraw his property in Pennsylvania, where the statutory limitation is six years, from seizure for debts existing there.

It is contended, therefore, that it would be inequitable and unjust to compel her to relinquish the fund in her hand, in order to its removal into a foreign jurisdiction, where her clear rights may thus be disregarded and defeated by the absolute bar of a foreign statute, and that as a Pennsylvania creditor she is entitled to protection against such a result.

In the distribution of the estates of decedents whose domicile was in a foreign State, it is conceded that the right of domestic claimants must be protected here; they must not be put to the expense or danger of following the home fund into foreign jurisdiction; the absence or presence In all such cases the transfer being *in invitum*, by process abroad, it will be regarded only so far as it is not inconsistent with the rights and claims of our own citizens. (Lowry *v.* Hall 2 W. & S. 131.)

But in the case of a voluntary assignment for creditors, no such rule has ever been recognized in this State; on the contrary, as shown by numerous decisions, and by the provisions of the Act of 1855, a widely different policy has been pursued.

If the owner of personal goods or estate in Pennsylvania may, at the place of his domicile in a foreign State, *bona fide*, and for valuable consideration, dispose of the same, receiving and placing the consideration within his own control, and this he may undoubtedly do, he may, certainly, with like effect, convey his estate to the benefit of his creditors here and elsewhere.

As stated by Chief Justice GIBSON, in Lowry *v.* Hall (2 W. & S. 131): "The voluntary transfer of a chattel by the debtor, if not forbidden in other respects by the law at the place of the *situs*, is to be as much regarded there or elsewhere as it would be at the place of the domicile."

Whilst an extra-territorial effect is always denied to an assignment made compulsively, to one voluntarily made, *ex mero motu* by a failing debtor, full effect is always given, not only in Pennsylvania, but in the other States of the Union; a failing debtor has the right to make such legal disposition of his property among his creditors, as he may elect. Mr. Justice STORY, in his Conflict of Laws, sec. 111, says: "It is therefore admitted that a voluntary assignment, by a party, made according to the law of his domicile, will pass the personal estate, whatever may be its locality, abroad as well as at home. The law distinguishes that which results from the exercise of power under the law from that which comes from the free will of the party; the former limited in its effect to the county where the law is in force, whilst the latter is given universal and general operation, under the comity of nations. (Speed *v.* May, *supra;* Dundas *v.* Bowler, 3 McLean, 397; Livermore *v.* Jencks, 21 Howard, 126.)

As Martha McDowell Smith had acquired no lien upon, or proper claim to the trust fund, paid to her by the executors of Dr. Charles Smith, deceased, as against the previous assign-

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Quarter Sessions.

April 2, 1884.

Commonwealth v. Joseph Volz.

Criminal law—Embezzlement by officer of beneficial associations—Treasurer thereof, although a member, is indictable as servant, for embezzlement of money received by him—Form of indictment—Title to property may be laid in the trustees, or the association—Amendment—Omission of descriptive words in the title of the association is amendable.

Sur demurrer to evidence.

The defendant was indicted as "a person in the employ of Hartman Smith and others, trustees of a certain organization commonly known as the Kensington Lodge, No. 2, Sons of Progress, as clerk or servant, and that he did, by virtue of his said employment, and whilst he was so employed as aforesaid, then and there take into his custody, care, and possession, for and in the name and on the account of the said Hartman Smith and others, trustees of said organization" (described as above), national bank notes for $178, and embezzled the same, etc.

It appeared in evidence that the defendant was a member and the treasurer of Kensington Lodge, No. 2, of the Independent Order of Sons of Progress, an unincorporated association; that said lodge was a beneficial society; that the defendant's duty was to receive the money paid in by members as dues, and pay the same out on orders signed by the president and secretary; that he was called on to account by the lodge, and directed to pay the balance in his hands to the trustees of the lodge, and an order was drawn by the president and secretary and presented to him, but he refused to pay, saying he had a dispute with his sureties. The defendant admitted to the trustees that he had received the amount charged, and told them that he had lent it to members of the lodge, and therefore could not pay it. His counsel demurred to the evidence.

Louis Bregy and *Daniel M. M. Collins*, for the defendant.

The lodge, being unincorporated, is a *quasi* partnership, and the defendant, being a member, cannot be held for embezzlement of that of which he is a part owner.

2 Wharton's Amer. Crim. Law, § 1910 (7th ed.).

Treasurers of corporations may be indicted for embezzlement, but treasurers of unincorporated associations cannot be.

Hartman Smith and others, trustees, are not the owners of the money. The lodge is. The name of the order is "Independent Order of Sons of Progress." The indictment charges that the trustees were of the "Sons of Progress." The word independent is omitted.

John L. Kinsey, Assistant District Attorney.

The funds are trust property. The society may employ a servant, and a treasurer is a servant in respect to receiving and accounting for the money. The mistake in the name is amendable.

April 3, 1884. THE COURT. I have had time over-night to examine this matter. The Act of June 20, 1883 (P. L. 132), declares that the funds of unincorporated associations for benevolent, charitable, or beneficial purposes, shall be trust property, that such funds shall not be distributed among the members on dissolution, or be diverted to other purposes. This defendant owned no part of the moneys received by him, in the same sense that a partner does, but he holds it subject to the payment of sick benefits or funeral expenses of the members, on the order of the lodge. He was employed by the lodge as treasurer, and was in that respect a servant of the lodge subject to its order, as much as a stranger would be. That he is a member is no reason why he should retain any part of the money. It is a strain upon the law to hold him to be entitled as a partner, to retain the money received and drive the association to a bill for an account. The country is full of these societies, doing much good among the working people, and it is essential that the relief they afford should come promptly, and not be delayed by suits as between partners. A member of and secretary of an unenrolled society, who withheld money which he received for it, was held guilty of embezzlement, and properly described as the clerk or servant of the trustees, and the money to be properly stated as their property. (2 Wharton's Amer. Crim. Law, § 1938 (6th ed.); Rex *v.* Hall, 1 Moody's Eng. Cr. Cases, 474.) So was a member and secretary and treasurer of a Total Abstinence Tontine Society (Regina *v.* Murphy, 4 Cox's Cr. Cas. 101); a member and secretary of an Odd Fellow's lodge (Regina *v.* Woolley, Id. 251, 255); and a member of the Society of Friends. (Regina *v.* Proud, 1 Leigh & Cave's C. C. 97.) These associations are entitled to the protection of the criminal law against pillage by their officers.

The omission of the word Independent is amendable. This word is descriptive only. The Sons of Progress own the money, and whether they be regular or independent is of no importance in this matter. A charter was refused them for the reason that this word is descriptive merely. (*In re* Sons of Progress, 14 WEEKLY NOTES, 31.)

I shall instruct the jury that they can convict on this indictment.

Opinion by ARNOLD, J. W. H. W.

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Common Pleas—Law.

C. P. No. 1. March 17, 1884.

Nugent v. Wolfe.

Statute of Frauds—Guaranty—A parol promise to indemnify one, if he will go security for a third person, is within the Statute of Frauds—Act of April 22, 1855, § 1.

Rule for a new trial.

The action was assumpsit, by James Nugent against Frank Wolfe, upon a parol promise by the latter to save the plaintiff harmless if the former would enter security for a third party.

The following facts appeared on the trial before BIDDLE, J.: The National Bank of Robena, Ohio, obtained a judgment against Powers & Co., in the Circuit Court of the United States. James Nugent became security for stay of execution, taking the bond of John Powers, one of the firm of defendants, as security. Powers & Co. failed, and Nugent was obliged to pay the judgment. Nugent testified that he was induced to enter security on the defendant's promise to save him harmless. This was contradicted by the defendant. There was some other evidence seeming to support the plaintiff's statement. The jury found for the plaintiff, under the instruction of the Court, that a parol promise of such a nature was binding and valid.

Stover, for the rule.

By the Pennsylvania decisions this case is clearly within the Statute of Frauds.

Allshouse *v.* Ramsay, 6 Wharton, 335.
Shoemaker *v.* King, 4 Wright, 110.
Miller *v.* Long, 9 Id. 350.
Maule *v.* Bucknell, 14 Id. 52.
Hering *v.* Ditman, 8 Phila. R. 307.
Gheen's Estate, 7 WEEKLY NOTES, 66.

The Pennsylvania cases, especially Miller *v.* Long, follow Green *v.* Creswell, and although that case has been since overruled in England, its principles govern our law.

Green *v.* Creswell, 10 A. & E. 460.
Wildes *v.* Dudlow, L. R. 19 Eq. 189.
Biskinger *v.* Darnell, 1 Sm. Ldg. Cas. 490.
Brown on Stat. of Frauds, § 161 *et seq.*

P. F. Rothermel, Jr., contra.

The English cases have been contradictory. The first case (Thomas *v.* Cook) decided that a promise to indemnify was not within the statute. To this opinion the Courts have at last returned, and the question was definitely settled by Vice-Chancellor MALINS.

Thomas *v.* Cook, 8 Barn. & C. 728.
Wildes *v.* Dudlow, L. R. 19 Eq. 198.

After some conflict, this doctrine has been finally adopted in Massachusetts, New York, Maine, New Hampshire, New Jersey, Georgia, Kentucky, Iowa, Indiana, Minnesota, Wisconsin, Vermont, Connecticut, and Michigan.

Aldrich *v.* Ames, 9 Gray, 76.
Perley *v.* Spring, 12 Mass. 297.
Chapin *v.* Lapham, 20 Pick. 467.
Blake *v.* Cole, 22 Pick. 97.
Sanders *v.* Gillespie, 59 New York, 250.
Mallory *v.* Gillett, 21 New York, 412.
Smith *v.* Sayward, 5 Greenleaf (Maine), 504.
Holmes *v.* Knights, 10 New Hampshire, 175.
Cutter *v.* Emery, 37 Id. 567.
Apgar *v.* Hiller, 24 New Jersey Law, 812.
Jones *v.* Shorter, 1 Kelly (Georgia), 294.
Lucas *v.* Chamberlain, 8 B. Monroe (Kentucky), 276.
Mills *v.* Brown, 11 Iowa, 314.
Horn *v.* Bray, 51 Indiana, 555.
Gortz *v.* Foos, 14 Minnesota, 265.
Vogel *v.* Melsus, 31 Wisconsin, 30.
Beaman *v.* Russell, 20 Vermont, 205.
Reed *v.* Holcomb, 31 Connecticut, 360.
Potter *v.* Brown, 35 Michigan, 274.
Chapin *v.* Merrill, 4 Wend. 657.

[BIDDLE, J. The facts are simply these: there was a debt from Powers & Co. to Nugent, and Wolfe promised to pay it.

ALLISON, P. J. A promise that if you will go security I will indemnify you, is equivalent to saying: "If you have to pay it, I will pay you."]

But there was no debt when the promise was made, and its true meaning is, "If the debt has to be paid, I will pay it, not you." This is the ground taken in Aldrich *v.* Ames (*supra*).

The question is new in Pennsylvania, and the Court will, in conformity with the vast weight of authority, decide the case to be without the statute.

C. A. V.

March 22, 1884. THE COURT (after stating the facts). The question is squarely presented, whether a promise by one person to indemnify another, in consideration of the latter's incurring a liability as security for a third, is valid under the first section of the Act of April 26, 1855 (P. L. 308), unless reduced to writing. The statute is copied from the Act of 29 Charles II. cap. 3 (A. D. 1676), and is apparently in force in most, if not all, of our States. The clause in question is, that no action shall be brought "whereby to charge the defendant upon any special promise to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be reduced to writing, and signed by the party to be charged therewith, or some person by him authorized." The statutes being practically identical, the authorities, both English and American, are pertinent to its consideration; but unfortunately they are so numerous and conflicting that it is impossible to deduce any general principle from them. As was said by Judge STRONG, in Maule *v.* Bucknell (14 Wright, 51), "upon no subject, perhaps, has there been more diversity of judicial decision." The truth is, it was for very many years a subject

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of dispute whether the statute did not promote more fraud than it prevented, and as one or other of these views was in the ascendant, the law was construed liberally or strictly. Lord ELDON, in Cooth *v.* Jackson (6 Vesey, 37), says: "I feel all the disinclination which has been lately expressed, and strongly expressed in many cases, to carry on what may be called the struggles of courts of justice to take cases out of the reach of the statute, further than they have been carried."

Fortunately, in Pennsylvania this particular section, the 4th of Charles II., was not adopted until 1855, one hundred and seventy-nine years after it had been in practical operation, and only when our people had become satisfied of its utility. Our rulings, therefore, have been at least uniform. The particular question, however, involved in this case has never been authoritatively decided in this State.

In Wm. Saunders, 211, note *e*, it is said "the question whether each particular case comes within the clause of the statute or not depends not on the consideration of the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." This is undoubtedly the construction of the statute in Pennsylvania. (See Maule *v.* Bucknell, 14 Wright, 52; Townsend *v.* Long, 27 Smith 143; Shoemaker *v.* King. 4 Wright, 107.) The reasoning, therefore, by which a contract such as this is held to be within the statute is, that as soon as the surety signs the bond, the legal implication arises that if he is obliged to pay it, the principal will be bound to pay him. The principal being bound to reimburse the surety, the engagement of the party who has promised to indemnify the surety is collateral to that obligation, and is simply an engagement that if the principal does not repay the surety, he will do so. This, it is contended, is clearly a promise to pay the debt of another.

The view of those who hold that this case is not within the statute is by no means so easily stated or so clear. The latest English case (Wildes *v.* Dudlow, L. R. 19 Eq. 199, MALINS, V. C.) declares that the point is plain upon principle, but states no principle and gives no reason. Mr. Brown, in the last edition (1880) of his work on the Statute of Frauds, says that the American decisions have resulted "in the rejection by the great preponderance of authority of the doctrine of Green *v.* Cresswell, and the adoption of Thomas *v.* Cook—a result reached after much vacillation on the part of courts of the same State, and not, it must be confessed, by reference to any satisfactory ground of principle. Indeed, most of the decisions which reject the doctrine of Green *v.* Cresswell waive altogether the question of principle, and put it as a matter settled by authority that the promise to indemnify "is not within the statute."

The semblance of principle which seems to be most plausible, and is here contended for, is, that while the implied obligation of the principal to repay his surety does exist, yet it is a mere incident of the special contract existing between the surety and his guarantor; that the statute applies only to obligations which exist or may exist, whether any contract may be made by the surety and his guarantor or not; that in this case Wolfe did not promise to be answerable for the debt of Powers & Co. to Nugent, for Powers & Co. owed no debt to Nugent. They became indebted to him long after the promise of Wolfe was made, and the state of affairs was to be taken of the date of the promise. "On this ground," says Mr. Brown (p. 186), "it is believed that the doctrine that the statute does not apply to promises to indemnify may rest; at least none so satisfactory or so consistent with the spirit of the statute is suggested in any of the cases." "But the principal's liability to the surety, and the indemnifier's liability, must relate to the same point of time—the moment when the surety signs the bond—are based on the same consideration, the obligation incurred, and are contingent on the same event—the principal's default." (2 Tenn. Ch. Rep. 452.)

It can make no difference whether the principal, Powers & Co., is already indebted to Nugent, or whether he will become so indebted on Nugent going security. In either case the liability assumed by Nugent is only that Powers & Co. shall discharge their own debt in a twelvemonth, and Powers & Co. are bound in law to indemnify him if they do not. It is therefore evident that the promise to Nugent is only collateral to the legal liability of the principal to indemnify his own surety. And the defendant here is really in the position of surety that Powers & Co. will indemnify Nugent. How does this differ in principle from the very common case of a defendant promising the vendor to see him harmless for any credit that he might hereafter give to a vendee.

There is no debt due at the time of the promise, and there can be no obligation till one is contracted, and the vendee has failed to pay it, and yet it cannot be doubted that this is a guarantee within the Statute of Frauds. (Brown on Frauds, § 163.) As was said in Easter *v.* White (12 Ohio, 230), "Whether we have respect to the language or the object, a reasonable effect can only be given to the statute by holding it to embrace every undertaking or promise to another, to be answerable to him upon any contingency or condition for the debt or damage done to or to become due from a third person to such

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promisee, and thereby becoming surety for such third person to the promisee."

View this case as you may, it is an attempt by a person who has bound himself by a duly executed instrument of writing to be responsible for another, to relieve himself of the liability he has incurred by throwing it upon the defendant by his own oral testimony. If that is not within the letter and spirit of the Act which required that an agreement to answer for the debt or default of another shall be in writing, and recites in the words of its preamble that the Act is "for the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury or subornation of perjury." It is certainly difficult to present a stronger case.

This doctrine is sustained in a very well considered case, Macy *v.* Childress (2 Tenn. Ch. Rep. 442), where the Chancellor subjects the cases to an exhaustive review, and reaches the conclusion "that the obligation of a principal to indemnify his surety, like the obligations of co-sureties to each other, stands upon a principle of equity, and dates from the creation of the relation;" and this being so, he holds the case to be within the Statute of Frauds, the promise to pay the surety being collateral to the implied promise of the principal. The same result is reached by Judge HARE, in his learned and elaborate note to Birkmyr *v.* Darnell (1 Sm. Ldg. Cas. 511). And while Mr. Brown and Mr. Reed—the advance sheets of whose forthcoming work on the Statute of Frauds I have been privileged to see—differ as to the probable weight of American authority, they appear to have no doubt that the principle here announced is the true one. That the plaintiff himself was aware of the necessity of a written guarantee is shown from his having, through the counsel of Powers & Co., obtained a bond of indemnity from a third party, who would have been, without it, liable to reimburse him.

While the doctrine held at the trial of this case has ample authority to support it, we think the true principle is as we have stated, and that this case is within the statute.

Rule absolute.

Opinion by BIDDLE, J.

PEIRCE, J., absent. E. A. B.

C. P. No. 3. March 22, 1884.

Zug v. Robbins.

Affidavit of defence lies. Copy of promissory

Assumpsit on a promissory note of which the following is a copy:—

"$250.00. Dec. 12, 1878.

Thirty days after date I promise to pay to the order of J. B. Yonker two hundred and fifty dollars, at 340 12th St. market, Phila., Pa. Without defalcation for value received. R. O. ROBBINS."

This note contained the following indorsements:—

"J. B. YONKER. Pay to the order of Commercial Nat'l Bank of Penna., for collection, for account of The Salem Nat'l Banking Co., Salem, N. J. BENJ. ACTON, Cashier."

Plaintiff, in the copy of note filed on January 12, 1884, omitted the indorsement as above given; but took judgment on January 26, 1884, for want of an affidavit of defence. On March 14, 1884, defendant, who had appeared January 7, by attorney, obtained a rule to set aside the judgment, all proceedings to stay; pending which plaintiff took the present rule to amend the record by adding the indorsements to the copy of note filed.

William L. Nevin, for rule.

Amendments in furtherance of the interest of justice, which do not introduce a new cause of action should be liberally allowed.

The only restriction placed upon granting amendments is that the cause of action must remain substantially the same.

Trego *v.* Lewis, 58 Pa. St. 463.
Steffy *v.* Carpenter, 37 Pa. St. 41.

To take advantage of a variance in the copy filed, the defendant must move for an inspection.

Kelly *v.* Livingston, 1 WEEKLY NOTES, 95.
Snyder *v.* Richardson, 3 Id. 272.
Richardson *v.* Snyder, 6 Id. 414.

[YERKES, J. Your right to judgment depends on the copy filed; if that is defective, your judgment is gone.]

In Guth *v.* Anderson (3 WEEKLY NOTES, 133), Common Pleas No. 3, allowed an amendment to a promissory note filed, *after* the time had expired for making said amendment, and an affidavit of defence had been filed. After a judgment is entered it is entirely within the discretion of the Court to allow an amendment to be made to the record.

Ordroneaux *v.* Prady, 6 S. & R. 510.

A misnomer is amendable after judgment and execution issued.

Schwartz *v.* Mauer, 2 WEEKLY NOTES, 445.

J. W. Hunsicker, contra.

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WEEKLY NOTES OF CASES.

VOL. XIV.] THURSDAY, APRIL 17, 1884. [No. 19.

Supreme Court.

Jan. '81, 78. March 5, 1884.

Rowe v. Ream.

Mortgage—Notice — Possession—Trust—Constructive trust.

Where a person whose name does not appear in the line of title is in possession of property, actually living thereon under claim of title, a mortgagee is put upon notice of the title under which such person claims.

In a scire facias sur mortgage the terre-tenant defended on the ground that the mortgagor had bought the premises with her money, fraudulently taking title in his name instead of hers, and subsequently making the mortgage in question. It appeared that the terre-tenant had actually entered upon the premises immediately upon the purchase thereof by the mortgagor, and that she was actually residing thereon at the time the mortgage in suit was given:

Held, that this constituted a good defence, as the mortgagee was under the circumstances bound to take notice of the resulting trust in favor of the terre-tenant.

Error to the Common Pleas of Berks County.

Scire facias sur mortgage, by Abiram Ream against Henry Bennethum, with notice to the terre-tenant, Rebecca Rowe. The only defence was an equitable one by the latter.

On the trial, before SASSAMAN, J., the following facts appeared: Andrew Davis was the owner of a certain lot in the city of Reading. On the 21st of May, 1870, he and his wife conveyed the same to the defendant Bennethum, who, on the 29th of July, 1876, gave a mortgage upon it to plaintiff for $600.

The terre-tenant made the following offers of evidence.

(1) That on the 12th day of May, 1870, she furnished the defendant, Henry Bennethum, $300 for the purpose of purchasing a lot of ground for her; that on the 20th day of the same month, the defendant Bennethum, purchased a lot from Andrew Davis for $300, the same being her money. That he took the deed in his own name. That said premises are the property embraced in the mortgage. This for the purpose of showing a resulting trust. Objected to. Offer rejected. (First assignment of error.)

(2) That a house was erected thereon immediately after the purchase for the said Rebecca Rowe; that immediately after the same was completed in August, 1870, Mrs. Rowe took possession and remained in possession as owner of said premises. That the plaintiff knew that said Mrs. Rowe was in such possession at the time this mortgage was given. This, for the purpose of showing a resulting trust to said Rebecca Rowe, and that the plaintiff had notice thereof, by not making inquiry as to the rights of the occupier. Objected to. Offer rejected. (Second assignment of error.)

(3) That the plaintiff and defendant Bennethum are related to each other, and in close friendship, and this for the purpose of showing that he knew of the existing trust as to this property at the time the mortgage was given. Objected to. Offer rejected. (Third assignment of error.)

The Court charged, *inter alia*, as follows: "If such secret equities as that alleged here, the offer of proof of which we felt ourselves constrained to reject, could be set up to defeat recorded titles, we believe that much wrong would be done," and directed the jury to find for the plaintiff. (Fourth and fifth assignments of error.)

Verdict and judgment for plaintiff accordingly. Defendant thereupon took this writ, assigning for error the rejection of her offers of evidence and the portion of the charge of the Court set forth above.

W. H. Livingood, for the plaintiff in error.

The taking of a legal estate after notice of a prior right, makes a person a *mala fide* purchaser.

Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 35.

It is incumbent on one who purchases real estate to ascertain by whom and in what right it is held or occupied.

Sailor *v.* Hertzog, 4 Wharton, 259.

A general possession of land is sufficient notice of the title of the possessor.

Jaques *v.* Weeks, 7 Watts, 261.
Woods *v.* Farnure, 7 Id. 384.
Meehan *v.* Williams, 12 Wright, 241.
McCullough *v.* Cowher, 5 W. & S. 429.
Krider *v.* Lafferty, 1 Wharton, 303.
Jamison *v.* Dimock, 14 Norris, 55.
Hottenstein *v.* Lerch, 12 WEEKLY NOTES, 4.
Walden *v.* Gridley, 36 Ill. 523.
McKecknie *v.* Hoskins, 23 Maine, 230.

The holder of an equity created by deed is in default in not recording his deed, but such is not the case when the equity has its origin in a verbal agreement, or by operation of law or equity, and is therefore insusceptible of being recorded.

Hood *v.* Fahnestock, 1 Barr, 470.

Daniel and *James N. Ermentrout*, for the defendant in error.

The possession of a *cestui que trust* and the exercise by him of acts of ownership are not constructive notice to a purchaser of the legal

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title from the trustee. There should be direct, express, and positive notice.

Hood *v.* Fahnestock, 1 Barr, 470.

Where land is held by a title regular on its face, a mortgagee thereof, or one claiming title under such mortgage, is not liable to be affected by any secret trust or equity if he be without notice thereof.

Sweetzer *v.* Atterbury, 12 WEEKLY NOTES, 285.

The owner of the legal title should have direct, express, and positive notice, otherwise he takes the property discharged of the trust which existed between the original parties.

Scott *v.* Gallagher, 14 S. & R. 333.

Actual notice in this case is nowhere pretended.

March 17, 1884. THE COURT. In passing on the question involved in the assignments of error, we must assume that the defendant below was prepared to prove all the material allegations contained in the offers of evidence that were rejected by the Court. If the proposed testimony was relevant and would have tended to establish a defence to the scire facias, it should have been received. After the plaintiff had made a *primâ facie* case by introducing the mortgage on which the writ issued, the defendant, Mrs. Rowe, proposed to prove in substance that in 1870 she bought and paid for the lot described in the mortgage, and during the year erected a house thereon, which she has ever since continuously occupied in her own right; that the lot was purchased, for her and with her money, by Henry Bennethum, the mortgagor, who acted as her agent in the transaction; but, instead of having the deed made to her, as should have been done, he fraudulently procured a conveyance to himself; this, for the purpose of showing that she was the owner in fee of the mortgaged premises, and that the mortgagor took the security from Bennethum with at least constructive notice of her title.

It is very evident the testimony was relevant, and, if believed by the jury, would have made out a complete defence; but the learned Judge appears to have excluded it on the ground, as stated by him "that purchasers should not be affected by secret trusts, not appearing of record, unless they have positive, direct, and express notice of the trust." In a certain class of cases, which may be regarded as exceptions to the general rule, the correctness of this proposition cannot be questioned, but it is clearly inapplicable to the state of facts which defendant below offered to prove. If, for example, the legal title had originally been in her, and she had offered to prove that she had voluntarily conveyed the lot to Bennethum with a secret understanding between themselves that he should hold the title in trust for her, she would have had no right to show possession for the purpose of affecting the mortgagee with constructive notice of the trust. As is said in Scott *v.* Gallagher (14 S. & R. 332–4), where there has been such previous conveyance by the person in possession, a subsequent purchaser is not bound "to call upon him to inquire whether he has a secret agreement with the owner of the legal title. If there be an agreement, it is the duty of the tenant in possession to spread it upon the records of the county in order to prevent innocent purchasers from being deceived. A. sells a tract of land to B.; B. sells to C.; C. is not bound to call on A. to know whether there is not a secret agreement, adverse to the deed of A. to B. between them. He would be bound only by those agreements which are consistent with his deed, such as a retention of possession or payment of rent." That was a case of express trust, of which there was no record notice, and it represents a class of cases in which possession by the *cestui que trust* without more, is insufficient to affect an otherwise *bona fide* purchaser.

But, the facts upon which plaintiff in error proposed to base her defence were entirely different. She offered to prove a trust resulting from her having paid the purchase-money, and that Bennethum was a trustee *ex maleficio* by reason of his having taken the conveyance to himself in fraud of her rights. She did not appear in the line of the title as a former owner who had conveyed her interest, and hence it was the duty of the mortgagee to ascertain by what right she was in possession. Having neglected to make inquiry he was visited with constructive notice of such facts as would have come to his knowledge in the proper discharge of that duty. Presumably, he would have learned that Bennethum was a trustee *ex maleficio*, and had no right whatever to make the mortgage in question.

Equitable titles, resting in parol, are always more or less insecure, even when the beneficial owner is in actual and exclusive possession; and the general principle undoubtedly is that such possession, when distinct and unequivocal, puts purchasers and mortgagees on inquiry, and thus visits them with notice of the occupant's title. Since Le Neve *v.* Le Neve (2 Leading Ca. Eq. 35), this principle has been recognized in many cases, among which are the following: Billington's Lessee *v.* Welsh (5 Binney, 129–32); Sailor *v.* Hertzog (4 Whart. 259); Woods *v.* Farmere (7 Watts, 382–4); McCullough *v.* Cowher (5 W. & S. 427–9); Patton *v.* Hollidaysburg (4 Wr. 206); Meehan *v.* Williams (12 Id. 238); Jamison *v.* Dimmock *et ux.* (14 Norris, 52–6); Hottenstein *v.* Lerch (12 WEEKLY NOTES, 4). While the principle is differently

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stated in some of these cases, it is substantially the same in all. In Woods *v.* Farmere (*supra*), Chief Justice GIBSON, speaking of the unlimited effect given by the English Courts to possession as an index to title, says: "The duty of inquiring into the foundation of a notorious possession is not a grievous one, and it is soon performed. Why then should a purchaser be suffered to act on probabilities as facts at the risk of any one but himself, when a moment's share of attention would prevent misconception or loss? The doctrine of constructive notice is undoubtedly a sharp one; but it is not more so in regard to a notorious possession than it is in regard to a registry. Nor is it less reasonable; for it certainly evinces as much carelessness to purchase without having viewed the premises, as it does to purchase without having searched the register."

In the language of WOODWARD, P. J., adopted by this Court in McCulloch *v.* Cowher (*supra*): "The possession of land is notice to the world of every title under which the occupant claims it, unless he has put a title on record, inconsistent with his possession. When, as in this case, an individual is in possession under no recorded title, his possession is notice of every title which he can set up to protect himself, sufficient at least to put a purchaser on inquiry." A full discussion of the subject by our brother GREEN may also be found in Hottenstein *v.* Lerch (*supra*).

The constructive notice, spoken of in these cases, is in the nature of evidence of notice, the presumptions of which are so violent that they cannot be controverted. It is that notice which the law imputes to a person without regard to whether he has actual knowledge or not. In other words, when inquiry becomes a duty, the means of knowledge which it affords is regarded as the legal equivalent of actual notice.

As already suggested, there are some exceptions to the general rule, and the learned Judge appears to have been misled by them. We find nothing in the circumstances of this case, however, to take it out of the general principle above stated.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by STERRETT, J. J. H. W.

July, '82, 265. February 13, 1884.

A judgment, although paid in full, may by contract be kept alive to secure a new loan, and parol evidence of such contract is admissible in an action between the parties.

While such a contract is void as to subsequent lien creditors of the debtor, he himself is estopped from denying it.

Error to the Common Pleas of Chester County.

Feigned issue, between Joshua N. Peirce, plaintiff, and Stephen C. Black, defendant, to determine whether a debt of $200, secured by a judgment confessed to the plaintiff by the defendant had or had not been paid.

On the trial, before FUTHEY, P. J., the plaintiff offered in evidence the judgment. The defendant then offered in evidence the receipts of the plaintiff, showing that more than a year before the plaintiff had been paid the amount of the judgment. The plaintiff's counsel then called the plaintiff as a witness in his own behalf, and made the following offer, viz., "to prove that the money had been paid by instalments. When the last payment was made the defendant requested the plaintiff not to satisfy the judgment of record, because he (the defendant) would want to borrow some more money on the judgment, and that it would save expense if satisfaction were not entered. The plaintiff assented to this. After about six months the defendant asked and received from the plaintiff a new loan of $200, agreeing that this new loan should be secured by the same judgment, which had not yet been satisfied of record." Objected to; objection sustained, on the ground that a new loan could not be secured by that judgment, even though the parties so agreed. Exception.

Verdict for defendant by direction of the Court, and judgment entered thereon. Plaintiff thereupon took this writ, assigning for error the rejection of their offer of evidence.

Wm. M. Hayes, for the plaintiff in error.

A judgment is not dead until paid *and satisfied*. A lawful contract legally made may be proven when a proper issue is framed for its trial. It contravenes no principle or policy of the law that a judgment already entered shall be treated by the parties as security for a new loan.

Shenk's Appeal, 9 Casey, 371.
Mitchell *v.* Coombs, 15 Norris, 430.

Alfred P. Reid, for the defendant in error.

The doctrine of estoppel is not applicable.

Miranville *v.* Silverthorn, 12 Wright, 149.
Wright's Appeal, 3 Outerbridge, 433.
Hill *v.* Epley, 7 Casey, 334.

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Rudy's Appeal, 9 WEEKLY NOTES, 308.
Patterson *v.* Forry, 2 Barr, 456.
Umberhauer *v.* Aulenbaugh, 8 Watts, 50; 3 W. & S. 259.

March 10, 1884. THE COURT. We are of opinion that the evidence rejected by the Court below should have been admitted. The object of it was to show that at the time the defendant paid the judgment he requested the plaintiff not to satisfy it; that he wanted to borrow more money on it, and that it would save expense if satisfaction were not entered; that the plaintiff assented to this, and handed the prothonotary's certificate of the entry of the judgment to the defendant, who kept it about six months, then returned it to the plaintiff, and obtained another loan of $200 from him, upon the security of the same judgment.

It is undoubtedly true that as against subsequent lien creditors a mortgage or judgment once paid cannot be kept alive. (Anderson *v.* Neff, 11 S. & R. 208; Craft *v.* Webster, 4 Rawle, 255.) So where a mortgage is given to secure future advances, the agreement to advance must appear on the face of the instrument. (Irwin *v.* Tabb, 17 S. & R. 419.) No question as to subsequent creditors arises in this case; we have only to consider whether such an arrangement is good as between the parties.

We have no doubt that it is competent for the parties to a judgment by their own agreement to change the purposes for which it may be held. Thus, in Shenk's Appeal (9 Casey, 371), where a judgment had been confessed in favor of a firm to secure future advances, it may, on the withdrawal of one of its members, by agreement of the parties, remain a valid security in the hands of the remaining partners. And I am unable to see any reason why in the case of an agreement between a judgment debtor and his creditor, that certain payments shall be applied to the judgment, the parties may not subsequently agree otherwise, and apply the payments to some other account. No one but a subsequent lien creditor can be heard to complain of this. It would be inequitable to allow the debtor to do so after his judgment creditor has acted upon it at his request. Thus in Mitchell *v.* Coombs (15 Norris, 430), when it was attempted to hold a mortgage of $1000 as security for future discounts, after it had been paid by the mortgagor, with an agreement or understanding on his part that it might be so held by the bank, this Court held that it could not be done as against other creditors. At this remark was used by way of illustration, the force of it is obvious.

In the case in hand the defendant did not desire satisfaction of the judgment when it was paid. He intended to keep it alive for the purpose of obtaining a further loan, and in fact did obtain $200 from the plaintiff upon the security of the judgment. While this arrangement is of no legal force as to creditors, it is good between the parties. It was a valid contract between parties capable of contracting, and we are clearly of opinion the defendant is estopped from alleging the contrary. The plaintiff has advanced his money upon the faith of it, and common honesty requires that the defendant shall be held to his agreement.

Mode's Appeal (6 W. & S. 280), and a number of cases cited for the defendant, have no application. They were instances where an attempt had been made to keep a lien alive as against third parties. It is admitted this cannot be done. None of them decides that an agreement to keep a lien alive may not be enforced between the parties, where one of them has advanced his money upon the faith of such agreement.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J.

CLARK, J., absent. C. K. Z.

Jan. '84, 313. February 25, 1884.

Yeager v. Scranton Trust Company and Savings Bank to use of Linen et al.

Corporations—Stockholders—Assignment—Unpaid subscriptions to stock.

Where a corporation has made an assignment for the benefit of its creditors, and the assignees have notified a stockholder to pay the unpaid subscription due on his stock, the action of the assignees is equivalent to a formal assessment by the officers of the bank, and the assignees may recover the amount of such unpaid subscription in an action of assumpsit brought by the corporation to their use.

Error to the Common Pleas of Lackawanna County.

Assumpsit, by the Scranton Trust Company and Savings Bank to the use of James A. Linen and George Fuller, assignees in trust for the benefit of creditors of the said bank, against H. H. Yeager, to recover the balance of an alleged unpaid subscription to the capital stock of said

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was issued to H. H. Yeager, stating therein that it was subject to a further assessment for the unpaid balance of the subscription, the shares being one hundred dollars each. It appeared from the books of the bank, that on the same day ten per cent. was credited to H. H. Yeager, and that the same amount, ten per cent. was credited to all the other stockholders upon the books of the bank. It also appeared in evidence, that Yeager subsequently paid ten per cent. and thirty per cent., making in all fifty per cent. upon the capital stock. H. S. Pierce, the President of the bank, testified that the five shares were part of the original capital stock of the bank, which amounted to $200,000.

On April 12, 1879, the corporation made a general assignment for the benefit of creditors to H. S. Pierce. On June 5, 1880, H. S. Pierce, the assignee, having resigned, the Court of Common Pleas of Lackawanna County appointed George Fuller and James A. Linen in his place to execute the trust contained in the assignment. No new assignment was executed by the corporation to Messrs. Fuller and Linen.

Soon after Messrs. Fuller and Linen entered upon their duties, they made a demand on the stockholders for twenty-five per cent. of the amount then unpaid on each share. Subsequently, in 1880, the board of directors of the bank met and ratified the said call of the assignees.

Subsequently, the assignees, without any resolution or action of the board of directors, made a demand or call for seventy-five per cent. of the amount unpaid on each share of stock.

The following point, *inter alia*, was presented by the defendant:—

(2) Unless a call or assessment was authorized as prescribed in the charter of the company, no recovery can be had in this case. *Answer*. We answer this point as follows: That under the assignment made here by the directors of the bank for the benefit of creditors, all the assets of the bank were transferred to the assignees, with the rights to collect the same, and among these assets were the unpaid subscriptions to the capital stock of the bank. They were transferred to the assignees, and the assignees had the right to make the call, and to bring the action, and if they made the calls, then a party would be liable to pay from the time they made the calls. If they did not make the calls, then he would be liable to pay from the time they brought suit. It is in evidence they made one call on the 25th of March, 1880, and another on the 1st of October, 1880. We, therefore, with this qualification, answer this point in the negative.

The Court charged, *inter alia*, as follows:—

"Original stockholders are liable for the full amount of the stock taken by them. If they have not paid for it, then the assignees may sue to recover the same, in an action like the present. Now, the only question of fact for you, and we, therefore, come to it directly in order to shorten this case, is whether H. H. Yeager, so far as the bank is concerned, was an original taker of the stock of the bank. If he was, then he is liable for fifty per cent. of the stock so taken by him, with interest thereon, as to twenty-five per cent. of it from the 25th day of March, 1880, and as to seventy-five per cent. of it from the 1st day of October, 1880."

Verdict for plaintiff for $301.62, and judgment thereon; thereupon the defendant took this writ, assigning for error, *inter alia*, the answer to the defendant's second point and the portion of the charge as above.

E. N. Willard (*F. W. Gunster* and *A. H. Winton* with him), for the plaintiff in error.

The taker and proprietor of shares is not liable for unpaid instalments without an express promise to pay the same, or a provision in the charter making him so liable.

Canal Co. *v.* Sansom, 1 Binney, 70.
Palmer *v.* The Ridge Mining Co., 10 Casey, 288.
Franks Oil Co. *v.* McCleary, 13 Smith, 317.

We submit that the taker and holder of shares without an express promise in the contract of subscription to pay calls, and in the absence of any provision in the act making him liable to calls is only liable to the forfeiture or sale of his shares provided for in the tenth section of the Trust Company's charter. The third section of the Act of incorporation provides that the stock shall be *paid in as shall be required by the board of directors*. The power thus delegated to the board of directors involved the exercise of judgment and discretion, and could not by them be delegated.

Pierce on Railroads, 75.
Germantown Pa. R. W. Co. *v.* Fitler, 10 Smith, 124.

W. H. Jessup and *I. J. Post*, for defendant in error.

As to the original stockholders, whose title and rights accrue under the charter, there is an implied contract to pay the unpaid instalments, even if the certificate which they caused to be issued to themselves did not contain such a contract; otherwise how can the depositors be protected.

Palmer *v.* Ridge Mining Co., 10 Casey, 290.

The capital stock of a corporation is a trust fund for the protection of creditors, and this extends to the entire stock subscribed, and not merely to the percentage paid in.

Messersmith *v.* Savings Bank, 15 Norris, 440.
Thompson's Liability of Stockholders, § 10.
Wood *v.* Dummer, 3 Mason, 308.

The directors had the right to assign all the property and effects of the bank for the benefit of its creditors.

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Dana *v.* Bank, 5 W. & S. 223.

And this gave to the assignee the title to all the assets of the bank.

March 10, 1884. THE COURT. The jury found, and on very satisfactory evidence, that the plaintiff in error was an original stockholder in the bank. His certificate of stock shows on its face that it was accepted and held subject to the payment of further instalments as called for until the same should be paid in full. The uncontradicted evidence shows that it was necessary to collect the whole of this stock subscription in order to pay the sums due to the depositors of this insolvent corporation.

The general assignment made by the corporation for the benefit of creditors passed all its rights substantially to the assignees. They notified the plaintiff in error to pay the sum due on his subscription several months before this suit was brought. We think this equivalent to a formal assessment by the officers of the bank. All right to manage and control its assets had passed to the assignees.

Judgment affirmed.

PER CURIAM. A. B. W.

Jan. '83, 285. April 23, 1883.

Cooper, Hewitt & Co. v. Butler.

Negligence—Master and servant—Contributory negligence—Railroads.

Where an employé occupies a dual position, and through neglect of duty in one position, an accident occurs to him while serving in the other by which he is injured, the wrong is his, and he cannot recover for injuries sustained by reason thereof.

A. & Co. had an inclined railway, up and down which they ran cars. B. was in the service of the company, being employed to run the cars, and also to inspect the track. B., while running the cars, was injured by an accident occasioned through a defect in the track. In an action by him against the company to recover damages: *Held*, that as the defect was occasioned by B.'s own negligence, he could not recover; and that it was error for the Court to charge that the company was liable if it could have known of the defect by the exercise of reasonable care.

Error to the Common Pleas of Bucks County.

Case, by William Butler against Edward Cooper and Abraham S. Hewitt, trading as Durham Iron Works, Cooper, Hewitt & Co., to recover damages for personal injuries to plaintiff alleged to have been caused by a defect in an elevated tramway owned and operated by the defendants.

On the trial, before WATSON, P. J., it appeared that defendants owned a certain elevated tramway upon which, by means of a stationary engine, coal cars were operated for the transportation of coal from the canal to the stock-house. The descending cars were operated by gravity. On November 24, 1879, certain cars while so descending ran off the track through an alleged defect in the track. Plaintiff was at the time engaged in operating one of said cars and was injured by the accident. There was some evidence to show that it was part of plaintiff's duty to inspect the track from time to time to see that the same was in proper condition.

Defendant submitted, *inter alia*, the following point:—

(17) If the jury believe that the plaintiff's instructions and duties were, whenever there were no coal boats at the wharf to unload, to examine and inspect the cars, the rails and pulleys on the track, and the track generally, in consideration of which he should have pay for full time, and that upon one or more days, or parts of days, there were no coal boats in to be unloaded, during which days, or parts of days, the plaintiff neglected to make such inspection and examination, and the accident happened by reason of a defect unknown to the defendants, but which the plaintiff presumably would have discovered by such examination and inspection, then he is guilty of contributory negligence, and he cannot recover.

Answer. This is true, provided, however, that the defect was not only unknown to the defendants, but was also one which they would not have known by the exercise of ordinary care.

(Sixteenth assignment of error.)

Verdict for plaintiff for $1350, and judgment thereon. Whereupon defendants took this writ, assigning for error, *inter alia*, the answer of the Court to the point submitted as above stated.

A. & J. & B. F. Fackenthall, for plaintiffs error.

When the company hired Butler to watch the track, etc., they had a right to presume he would do it; and if his violation of this duty contributed directly to the accident, he cannot recover.

Mad River R. R. *v.* Barber, 5 Ohio St. 541.

Wood on Master and Servant, § 347, note 1, p. 712.

James F. Lynd and *John L. Du Bois*, for defendant in error.

October 1, 1883. THE COURT. This action was brought by William Butler against Cooper, Hewitt & Co., to recover damages for injuries received by him, on the 24th day of November, 1879, whilst in their employment at the Durham Iron Works in Bucks County. The matter urged in support of the action, is, the negligence of the defendants in not keeping in proper repair a certain elevated tramway, upon which by means of a stationary engine, coal cars were operated in the transportation of coal from the canal to the

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stock-house, for use in the furnace. The tramway was about 1300 feet long, it was inclined, rising about sixty-nine feet in that distance; about 500 feet of it was elevated upon a trestle from ten to twenty feet in height. The cars ran upon an iron rail, spiked upon stringers. The empty cars in returning from the furnace to the canal descended by gravity, and were regulated in their velocity by a brake on the car in charge of the conductor, and by the engineer, who was stationed in a tower, over-looking the entire track, and had control of a brake on a drum.

On the day mentioned two cars, coupled together, were descending the plane, the front one conducted by Stewart Leister, and the rear one by William Butler, the plaintiff, when owing, it is alleged, to a displacement of the rail, they ran off the track and falling some sixteen or seventeen feet. Butler fell with them, and broke his arm at the wrist.

Seventeen errors are assigned to the rulings of the Court, at the trial of the cause, in the Court below. We have examined all of these assignments, with some care, and are of opinion that none of them are sustained excepting the sixteenth, which is to the answer of the Court to the defendant's seventeenth point submitted.

It would appear that the testimony of some of the witnesses, notably that of Stephen Bennett and John Moore, tended to establish the fact that it was the plaintiff's duty, in part, under his employment, from time to time, to examine the track, to report any deficiency, and what repairs, if any, were needed, and that the condition of the track, and its sufficiency, was a matter entrusted to him by the defendants. The following point was therefore submitted, and the court was requested to instruct the jury:—

"17. If the jury believe that the plaintiff's instructions and duties were, whenever there were no coal boats at the wharf to unload, to examine, and inspect the cars, the rails and pulleys on the track, and the track generally, in consideration of which he should have pay for full time, and, that upon one or more days or parts of days there were no coal boats in to be unloaded, during which days, or parts of days, the plaintiff neglected to make such inspection and examination, and the accident happened by reason of a defect unknown to the defendants, but which the plaintiff presumably would have discovered by such examination and inspection, then he is guilty of contributory negligence, and he cannot recover."

The answer of the Court to this point was as fication annexed to the answer. The point was such as should have received a direct, unconditional, and unqualified affirmation. If one of the peculiar and distinctive duties of the plaintiff, under the terms of his employment, was the inspection and examination of the track, for which he was to receive a larger compensation than he otherwise would, his failure to perform that duty was negligence, and in case of injury or loss to the defendants, by reason of a defect which the plaintiff might reasonably have discovered, he would be answerable in damages for his default. A corporation or company, engaged in an extensive and complicated management, must necessarily delegate the performance of specific portions of the work to individuals, and whilst in some cases the corporation or company is responsible for the correct exercise of these duties, by the agents to whom their performance is delegated, yet the responsibility of the agent in case of negligence has never been doubted; indeed it is his negligence imputed to the employer that creates the liability of the latter.

If all the facts assumed in the point were established, the injury resulted from the plaintiff's own default and negligence, in a matter which the company was of necessity obliged to commit to some one, and which was in fact committed to him, and why should he complain of the company when the default was his own?

The Court say this is true, provided, however, "that the defect was not only unknown to the defendants," which the point assumes, "but was also one which they would not have known by the exercise of ordinary care." If the company, by the exercise of ordinary care, might have known of the defect, through other means, how can that excuse the neglect of the plaintiff? The point goes upon the hypothesis that the plaintiff in the full discharge of his duty would also have known the defect, and his ignorance of it, as well as his injury, was the result of his own negligence. If then the company were, under all the circumstances, to be regarded as negligent, the defendant was equally so; the negligence of both contributed to the result, and this would be fatal to the plaintiff's case.

The judgment is reversed, and a *venire facias de novo* is awarded.

Opinion by CLARK, J. H. J. S.

Oct. & Nov. '83, 228. November 12, 1883.

Appeal of Osburn et al., Executors.

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clause of his will he devised and bequeathed a house, furniture, etc., to B. By the second clause he bequeathed $30,000 to C. "in addition to" what he should thereafter give him. By the third clause he directed that his residuary estate should be "equally divided between the heirs of the said B. who might be living at the time of said division and said C., each to share and share alike:"

Held, that the residue should be divided *per stirpes*.

Appeal of Franklin Osburn and D. N. White, executors of the last will of Griswold E. Warner, deceased, from the decree of the Orphans' Court of Allegheny County restraining them from making a *per capita* distribution of the residuary estate of decedent.

The bill or petition of Harry G. McCartney set forth that he is the only heir of Jennie W. McCartney, deceased; that J. W., F. C., Jennie M., Mary, Robert, William, Harry, and Julia Osburn are the children of Henrietta Osburn, now living; that Griswold E. Warner died May 7, 1873, testate, leaving Henrietta Osburn and Harry G. McCartney as his only heirs. That he devised to his daughter Henrietta a house, furniture, etc., estimated by testator as of the value of $30,000, and bequeathed $30,000 to Harry G. McCartney, payable on his arrival at age, and that he arrived at age November 9, 1882, and the same has been paid. That under the third clause of the will the executors determined to make a division of the residuary estate, and intended to divide it into nine parts—one-ninth to each of the children of Henrietta Osburn, and one-ninth to Harry G. McCartney.

The relief prayed for was that the executors be restrained from making any other division than that which would give one undivided half to the children of Henrietta Osburn, and the other undivided half to Harry G. McCartney; and for a construction of the will.

The answer admitted the allegations of the bill, save that respondents do not know that the testator estimated the property devised to Henrietta as of the value of $30,000. It denied that the division proposed by the executors would be inequitable, and alleged that it was in accordance with the will and the expressed intention of the testator.

A replication was filed denying that testator had expressed an intention to divide *per capita*, but evidence being held inadmissible on this point, the case was heard on bill and answer.

Henrietta Osburn, at the time of the death of the testator, had seven children, and one has been born since.

The will of Griswold E. Warner provided, *inter alia*, as follows:—

First . . . I give, devise, and bequeath to my daughter, Henrietta W. Osburn, wife of Franklin Osburn, the house she now occupies in the borough of Sewickley aforesaid, together with one and one half acres of ground attached to the same; also, all the furniture, bedding, library, etc., now in the house I now occupy, or may occupy at the time of my decease.

Secondly. I give, devise, and bequeath to Harry G. McCartney—minor, and only heir of my late daughter Jennie W. McCartney, wife of the late John G. McCartney, deceased, in addition to such other bequests hereinafter made, thirty thousand dollars. . . .

Thirdly. The remainder of my estate, both real and personal, that I may possess at the time of decease, my executors, if they think it advisable to sell any or all of my real estate, they are authorized to do so, and all moneys received from such sales, and all other money that may from time to time come into the hands of my executors, I wish put at interest until there is a final division made of my estate, which I wish to be equally divided between the heirs of the said Henrietta that may be living at the time of said division and the said Harry G. McCartney, each to share and share alike.

Fourth. I would rather prefer not to have a division made of my estate until the youngest child of the said Henrietta arrives at the age of twenty-one years. But, should any of the heirs, after arriving to that age, wish to engage in business, and wish to realize any portion of their interest in said estate, my executors can give them such an amount as they may think proper, and take their individual note or notes, bearing interest to be added thereto, and deducted from their respective portions of said estate, on the final division of the same.

And should any of said heirs aforesaid at the time of the final division of said estate, be considered by my executors to be incompetent or incapacitated, either in mind or body, or from intemperance, to take charge or manage their respective interest in said estate, my executors are hereby requested to pay such, nothing more than the interest annually on their respective portions of said estate, until said incapacity does no longer exist. . . .

The Court, HAWKINS, P. J., entered a decree as prayed for by the bill.

Respondents thereupon took this appeal, assigning for error the entry of the decree.

George Shiras, Jr., and *J. F. Slagle* (*Wylie* with them), for appellants.

That the word "heirs" is to be construed "children" is evident from the fact that the person as whose heirs they are described, was, and is still living; that the bequest is limited to such as may be living at a specified time; and that by a subsequent clause of the will referring to the time of division he uses the word "child" as convertible with the word "heir" in the preceding clause.

Eby *v.* Eby, 5 Barr, 464.
Braden *v.* Cannon, 1 Grant, 65.
Sorver *v.* Berndt, 10 Barr, 213.
Hallewell *v.* Phipps, 2 Whart. 380.
Huss *v.* Stephens, 1 Smith, 287.

Therefore, where there is a simple devise or bequest to a person and the children of another person, they take *per capita* and not *per stirpes*.

2 Jarman on Wills, p. 194.
McNeilledge *v.* Galbraith, 8 S. & R. 46.
McNeilledge *v.* Barclay, 11 S. & R. 103.
Hill *v.* Bowers, 120 Mass. 135.
Nichols *v.* Denny, 37 Miss. 59.

The words "to be equally divided between," "share and share alike," "each," unless restrained by a clearly expressed intention to the contrary, have always been held to indicate a *per capita* division.

Bender's Appeal, 3 Grant, 212.

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Farmer *v.* Kimball, 46 N. H. 439.
Gross's Estate, 10 Barr, 362.
Huston *v.* Crook, 38 Ohio St. 328.
Minter's Appeal, 4 Wright, 115.

If the will be construed as claimed by the appellee, the full meaning would have been expressed by the words "divided between," and the use of the words "equally," "each to share and share alike," mere surplusage.

The legatees are in equal degree of relationship to the testator.

Baskin's Appeal, 3 Barr, 304.
Fissel's Appeal, 3 Casey, 55.
Gring's Appeal, 7 Id. 292.
Minter's Appeal, 4 Wright, 111.
Risk's Appeal, 2 Smith, 269.
Young's Appeal, 2 Nor. 59.

They are described by their relation to a living ancestor.

Risk's Appeal, *supra.*
Stowe *v.* Ward, 3 Hawks, 604.
Blackler *v.* Webb, 2 P. Wms. 383.
Collins *v.* Hoxie, 9 Paige, 81.

They are all classed together in other clauses of the will; in the provision that the executors may advance money to enable any one to engage in business; to withhold the share of any one incapacitated to manage it; postponing the share of each until the youngest Osburn child arrives at age; and in the fact that the executors are authorized to make a division to all in words which indicate but one division, and that among all.

The Court erred in applying the rule, "that by a devise or bequest to a person and the children of another person, they take *per capita* and not *per stirpes*, but that this construction will yield to a very faint glimpse of a contrary intention in the context," to every case of a *per capita* division, as if such distribution was under the special disfavor of the Courts, and however clearly indicated by the words of the bequest, was to be set aside, if by the most careful scrutiny other language could be found, which was capable of other construction. On the contrary, the *per capita* rule is favored, as is evidenced by the provisions of the statute, and the many cases in which it is said to be presumed.

Bender's Appeal, 3 Grant, 210.
Witmer *v.* Ebersole, 5 Barr, 458.
Dible's Appeal, 32 Smith, 279.
Bittner's Appeal, 3 WEEKLY NOTES, 70.

D. T. Watson, for appellee.

The first and second clauses of the will show an intention to equalize Mrs. Osburn and Harry G. McCartney. Harry is named, the bequest to him is present and direct. No one of Mrs. Osburn's children is anywhere named in the will; no one of them is the beneficiary of any direct, present bequest or devise. Obviously, therefore, Harry was not looked upon by the testator as being in the same class as the Osburn children.

The third clause refers to the two prior ones. It is the disposition of the remainder of his estate, given to the "heirs of the said Henrietta," *i. e.*, the one mentioned in paragraph one; and to "the said Harry G. McCartney," *i. e.*, "minor and only heir of my late daughter, Jennie W. McCartney," named in paragraph two. Here are two classes: the heirs of Henrietta, the one, and Jennie's "only heir," the other, each given an equal share—the one-half.

Moreover, the legacy to the Osburn heirs is contingent.

Lamb *v.* Lamb, 8 Watts, 186.

But the legacy to McCartney is vested.

Provenchere's Appeal, 17 Smith, 466.
Seibert's Appeal, 1 Harris, 502.

It is significant that there are two classes of legacies and two classes of persons to whom they are to go.

Treating this devise and bequest to the "heirs" of Mrs. Osburn as vested, there is no limitation over of McCartney's interest on his death; whether he lives or dies, he or his heirs take his share. But only such of the Osburn children as are alive at the time of division can take; therefore, on the death of any one of them, his or her interest goes to and increases the interest of surviving Osburn children, but not that of McCartney. This has always been held to control the construction of the will.

Archer *v.* Legg, 31 Beavan, 192.
Clark *v.* Lynch, 46 Barbour, 83.

Great reliance is placed upon the words "equally to be divided," "each to share and share alike." But it is obvious that if to the words "equally to be divided" you add the other words in the will, "between," and remember the copulative conjunction "and" is used to connect the classes, you have a strong leaning to a division in classes.

Lachland *v.* Downer, 11 B. Monroe, 32.
Lyon *v.* Acker, 33 Conn. 222.
Witmer *v.* Ebersole, 5 Barr, 458.
Baskin's Appeal, 3 Barr, 304.

January 7, 1884. THE COURT. This contention arises as to the manner in which the residuary estate of Griswold E. Warner, deceased, shall be distributed. That is, whether it shall be made among those entitled to share therein, according to the *per capita* or the *per stirpes* rule?

At the time of the death of the testator he left one daughter, Mrs. Henrietta Osburn, who then had seven children. (She has given birth to one since.) And Harry G. McCartney, the son of a deceased daughter. All the grandchildren were under the age of twenty-one years.

The residuary estate is disposed of under the third paragraph of the will, but the division thereof was not intended to be made until some years after the death of the testator. In the next paragraph he declares: "I would rather prefer not to have a division made of my estate until

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the youngest child of the said Henrietta arrives at the age of twenty-one years." The third paragraph authorizes his executors, if they think it advisable, to sell his real estate, and the money received therefrom and from all other sources, he says, "I wish put at interest until there is a final division made of my estate, which I wish to be equally divided between the heirs of the said Henrietta that may be living at the time of said division, and the said Harry G. McCartney, each to share and share alike." It will be observed, standing by itself alone, this clause makes no reference to the relationship which any of the devisees bear to the testator. Referring to the first paragraph, we see he therein devised to his daughter, Henrietta W. Osburn, the house she then occupied, together with one and one-half acres of ground attached thereto; and also, all the furniture, bedding, library, etc., in the house which the testator then occupied, or might occupy at the time of his decease. In the second paragraph, he gave to "Harry G. McCartney, minor, and only heir of my late daughter, Jennie W. McCartney, . . . deceased, in addition to such other bequests hereinafter made, thirty thousand dollars, which my executors are requested to pay over to him, the said Harry, when he arrives at the age of twenty-one years, together with interest on the same," to be paid yearly, or so much thereof as may be required for his support and education, and the residue thereof to be put at interest for his benefit.

Thus, it appears the testator makes one general division in the objects of his bounty. To his only surviving daughter he gives certain property specified. To the only heir of his deceased daughter a specific sum of money. This heir is mentioned by name. In the specific devise to Henrietta no reference is made to her heirs or to her children. The foundation of the *per capita* rule of distribution rests in a large measure on the presumption that when the beneficiaries are in equal degrees of relationship to the testator, his affection for each is equal, and, therefore, he will desire to benefit each equally. In these two clauses the testator wholly ignores the children of Henrietta as effectually as if they had not existed. So far all presumption of affection towards her children, or a desire to make them his beneficiaries, is clearly rebutted.

It is contended by the appellants that the general rule is: when a devise or bequest is made to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, that they all take *per capita*.

The rule is so declared in 2 Jar. on Wills, 756; but on the next page it is said, "This mode of construction will yield to a very faint glimpse of a different intention in the context." Conceding the correctness of this general rule, which may so easily be set aside, let us return to the language of the third paragraph. There is no direction therein that the estate be divided between the *children* of Henrietta, but between her "heirs" that may be living at the time of said division. It is true, the fourth paragraph does indicate, in speaking of the time of division, that children and heirs of Henrietta are for that purpose referred to as the same persons, yet in the devising clause of the previous paragraph the word "heirs," in its most general sense, is used. No language therein contained indicates that it means children or issue only of Henrietta. It is broad enough to apply to all her heirs who may be living at the time the division shall be made.

Still further conceding that the testator may have meant children of Henrietta, yet he refers to them as a class only. No names nor sex are mentioned. They are her heirs or children, as a class, all representing her, and deriving their shares as her heirs, and presumably no greater share than she would otherwise have taken. Moreover, this devise or bequest is to Harry G. McCartney by name, and not merely as his grandson. The gift to him is absolute. It is not contingent that he be living when the division shall be made. It vested in him at once; the possession thereof only was postponed. To adopt the *per capita* rule contended for would strike down the absolute devise of one-half the estate to Harry, and cause his share to increase or diminish as the number of the children of Henrietta might increase by birth or decrease by death. Such a result as this was clearly not intended by the testator, and finds no warrant in any of the language used. Conceding, then, the correctness of the rule urged by the appellants, that language somewhat similar has often been held to presumptively distribute the estate *per capita*, yet a careful consideration of these words and of the manifest intent and spirit of the whole will, convinces us that such was not the intention of the testator. There is much more than "a very faint glimpse of a different intention." The evidence that a *per stirpes* distribution was intended clearly preponderates.

We do not think the conclusion at which we have arrived is weakened by the expression, "each to share and share alike." There was to be but one division. It was to divide the fund between the heirs of Henrietta of the one part, and Harry of the other part. In this division each class was to share and share alike; Harry was to have one share, and all the heirs of Henrietta the other share. The division was to be "between" the two classes.

Admitting the general rule of law to be as stated by the appellants, and ruled by the authorities cited by them, yet they do not rule this

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case. The first great rule in the interpretation of a will is to seek for the intention of the testator. When that intention can be ascertained from the will itself, and is inconsistent with the artificial rule pressed by the appellants, the testator's intention must prevail. In the view we take it is unnecessary to refer *seriatim* to the authorities cited by the appellants; due effect may be given to them, and our conclusions stand.

It is rather difficult under the authorities to indicate any fixed line between language which shall establish a *per capita* distribution on one side and a *per stirpes* distribution on the other. That in the present case the whole will sufficiently shows the testator intended a *per stirpes* distribution we are well satisfied.

This conclusion is sustained by Lackland *v.* Downer (11 B. Monroe, 82); Walker *v.* Griffin's Heirs (11 Whea. 375); Alder *v.* Beall, 11 Gill & Johnson, 123); Baskin's Appeal (3 Barr, 304); Minter's Appeal (4 Wright, 111); Risk's Appeal (2 P. F. Smith, 269); Young's Appeal (2 Norris, 59). The application of these authorities to the facts before us is in no wise impaired by Dible's Estate (32 P. F. Smith, 279). We see no error in the decree.

Decree affirmed, and appeal dismissed at the costs of the appellants.

Opinion by MERCUR, C. J.

GREEN, J., absent. G. P. H.

Quarter Sessions.

March 29, 1884.

Contested Election of J. L. Grim to Common Council.

Petitioner's claim to withdraw signature from petition—Leave to do so refused.

Motion for rule on behalf of some of the petitioners to show cause why they should not be allowed to withdraw their names from the petition.

Charles Henry Jones, for the motion, presented an affidavit of several of the petitioners, setting forth that they had signed the petition without reading, and without being aware of its purpose.

THE COURT (HARE and MITCHELL, JJ.) said there were serious objections to allowing the motion. The filing of a petition to contest an election return was the commencement of a litigation of a very serious kind, in which the public had important interests and rights. The petition was required to be signed by a large number of electors, and sworn to by a part of them. Men should not lightly be permitted to stultify themselves by coming forward to say they did not know what they were doing when they signed an instrument of that gravity.

In addition, the statute required the signing by twenty-five electors as a formal prerequisite, and if enough of those signing should be permitted to withdraw after the statutory time for filing a petition had expired, the jurisdiction might be endangered, and the public rights sacrificed. Such a course would offer too many opportunities for fraud and collusion.

Motion refused.

Common Pleas—Equity.

C. P. No. 1. March 11, 1884.

Riegel v. Riegel.

Equity — Injunction — Circuity of action—A principal cannot enjoin his creditor from proceeding against the surety merely because he himself has a good defence.

Sur demurrer to bill.

This was a bill in equity, filed by Stephen Riegel, to enjoin a creditor from proving his claim against the estates of John and Jacob Riegel in the Orphans' Court.

The bill set forth that in 1867 Jacob Riegel lent Stephen Riegel the sum of $23,000 payable on demand, with interest at 10 per cent. That after several years the interest was reduced to 8 per cent., and finally in 1878 due-bills were given for the said amount. One by Stephen and Jacob for $11,500, and one by Stephen and Joseph for the like amount, the interest being reduced to 6 per cent. At the same time Stephen gave security to the firm of Riegel, Scott & Co., of which Jacob and Joseph were members, to save them harmless from the debt.

The bill further set forth that the interest was regularly paid at the several rates mentioned, which together with a payment of $3000 on account had fully discharged the entire indebtedness, and that the estates of Jacob and Joseph being now before the Orphans' Court for settlement the holder of the due-bills was seeking to enforce his claim against the same.

The bill prayed an injunction to restrain the creditor from such proceedings.

Defendant demurred.

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Hagert, for demurrer.

This is simply the case of a principal who asks the Court to enjoin a creditor from proceeding against a surety because he has a good defence. The Court will not do this.

Budd, contra.

The Court will interfere to prevent circuity of action. There is the additional reason in this case for interference, that if the injunction is refused the securities which are fast depreciating in value will become worthless.

THE COURT. All that the complainant can claim, is that by possibility, or probability say, he may have to stand another suit. This is not such circuity of action as requires the interference of equity.

Demurrer sustained.

Oral opinion by ALLISON, P. J. E. A. B.

C. P. No. 4. April 28, 1883.

Bridesburg Manufacturing Co. v. Lehigh Valley Iron Co. et al.

Equity—Practice—Examiner—Enlargement of power of—In a proper case the power of an examiner may be so enlarged as to enable him to pass upon questions of admission or exclusion of evidence.

Rule to show cause why Alfred P. Balliet, a witness, should not answer certain questions asked on cross-examination; and to show cause why power should not be conferred on the Examiner hereafter to determine whether or not questions asked witnesses should be answered, and to determine the admission or exclusion of evidence upon objection.

This was a proceeding in equity which had been referred to an Examiner (C. Stuart Patterson, Esq.). At a meeting before him one Alfred P. Balliet, was produced as a witness by the defendants, and during his cross-examination was instructed by the defendants' counsel not to answer a certain question put to him by the counsel for the plaintiff. The Examiner thereupon, at the request of the plaintiff, made an interlocutory report of the testimony taken and the proceedings before him, and the above rule was taken by the plaintiff.

C. P. No. 4. April 8, 1882.

Wittmer v. Bauer.

Partition in equity—Practice—Allotment—When decree of Court is sufficient without deeds from Master.

Sur exceptions to Master's report in partition.

A bill for partition was filed by three plaintiffs against one defendant.

A decree was made by the Court which required the Master to report "what assurances and conveyances, if any, are, in his opinion, necessary to be executed." The property, which was the subject of the bill, consisted of four houses. The Master (W. Herbert Washington, Esq.) divided the property into four purparts, each containing a house; three of the houses received an equal valuation, and owelty was charged upon the fourth. Each party having been allotted a house, requested the Master to execute to him a deed for his purpart.

This the Master declined to do, and reported as follows: "The decree of a court of equity, like the judgment of a court of common law, binds the parties, and the partition, by virtue of that decree, will stand firm and stable forever. This partition is between parties who are all *sui juris*, and in whom is already vested, as tenants in common, the complete, legal, and equitable title. The Master has carefully considered §§ 2 and 3 of the Act of March 14, 1857 (P. D. 595), and their judicial construction in Griffith *v.* Phillips (3 Gr. 381). In this case, the ground, although new, was thoroughly explored. The opinion of the Master (Mr. Eli K. Price) was sustained by the Supreme Court; it was approved by Mr. Justice SHARSWOOD, in Gratz *v.* Lex (4 Brewster, 292), and was followed in several unreported cases of partition in equity of which the Master has had the benefit of an examination. The final decree . . . will sufficiently vest the title to the purparts in the parties to whom they are respectively allotted. The Master is, therefore, of the opinion that no assurances or conveyances are necessary to carry this partition into effect; but he recommends that, upon the filing of his final report, showing payment of owelty and expenses, a decree be made specifically awarding the several purparts by metes and bounds to the several parties in accordance with the allotment of the Master."

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Common Pleas—Law.

C. P. No. 1. Jan. 19, 1884.

Scott v. Hilgert, Defendant, and the Pennsylvania Sugar Refining Company, Garnishees.

Foreign attachment—The action does not lie against an absconding debtor—What constitutes a non-resident—Burden of proving non-residence is on the attaching creditor—On a motion to dissolve, the Court will not grant a fetgned issue to test the place of residence.

Sur motion of garnishees, to quash the writ of foreign attachment.

This was a foreign attachment against an absconding debtor. The depositions showed the following facts: Charles M. Hilgert, the defendant, after committing numerous forgeries, "absconded from the place of his usual abode" on the night of July 31, 1882, which had, theretofore, been the city of Philadelphia. Certain letters, since received from him, indicate that he first went to New York, that on or about February, 6, 1883, he was in Mexico, on May 1st in British Honduras, on June 14 and August 27, 1883, in Guatemala. Since the last mentioned date no tidings have been received of him. He had resided in this city at No. 2214 Green Street, with his wife and a child under five years of age. On September 8, 1882, his wife delivered up the house to the owner, and went to live with her mother and brother, where she died Jan. 13, 1883. The child still lives with and is supported by its grandmother and uncle.

Immediately after the defendant's disappearance, and at various times since, until January 15, 1883, a number of writs were issued against him, to all of which the sheriff returned served on Charles M. Hilgert, by leaving them at his dwelling-house with an adult member of his family.

The present writ was issued March 27, 1883.

Hannis, for the motion.

The writ of foreign attachment only lies against the real and personal property of a person not residing within this Commonwealth, and not being within the county in which such writ shall issue, at the time of the issuing thereof.

1 Purd. Dig., 716, § 2.

It being admitted that Hilgert was a resident of Philadelphia, and it being shown that writs were served at his dwelling as late as January 13, 1883, the burden is thrown upon the attaching creditors to show that he had actually and intentionally abandoned his domicile here and acquired a new domicile out of this State.

White *v.* Brown, 1 Wall. C. C. R. 264.
Story on Conflict of Laws, sec. 47.
Reed's Appeal, 21 P. F. Smith, 378.
Fuller *v.* Bryan, 8 Harris, 144.
Pfoutz *v.* Comford, 12 Casey, 420.

An absconding debtor, who has left his place of residence within the Commonwealth, is not liable to foreign attachment.

Barnet's Case, 1 Dallas, 152.
Shipman *v.* Woodbury, 2 Miles, 67.
Fuller *v.* Bryan, 8 Harris, 144.
Hentz *v.* Asahl, 1 WEEKLY NOTES, 282.
Kennedy *v.* Bailie, 3 Yeates, 55.

The law never intended to give a creditor the two remedies of domestic attachment and foreign attachment at the same time; their dissimilarity shows this—the one being for the benefit of all creditors, the other for the attaching creditor alone.

Barnet's Case, 1 Dallas, 152.
Kennedy *v.* Bailie, 3 Yeates, 55.

A writ of foreign attachment will not lie against a debtor who has but recently departed from his domicile within the county.

Lewis *v.* Rounsavelle, Dist. Ct. Phila., Sept. 1818, MS., cited in 3 Brightly's Dig. (Pa.) 2959.

A judgment creditor has the right to intervene and raise the question whether the defendant is liable to foreign attachment.

Pfoutz *v.* Comford, 12 Casey, 420.
Reed's Appeal, 21 P. F. Smith, 378.

So has a purchaser of the thing attached, even though purchased after the attachment had issued.

Frost *v.* Holmes, 11 WEEKLY NOTES, 442.

A. Sydney Biddle and *J. Rodman Paul*, contra.

This being a motion to quash the writ, which, on its face, is regular, the burden is on the garnishees to establish that, in a legal sense, the defendant was residing within the Commonwealth when the writ was issued.

Perrine *v.* Evans, 35 N. J. (Law) 222.

The sheriff's returns to other writs, even if admissible, prove nothing, when it is in evidence that Mrs. Hilgert gave up her husband's house on September 8, 1882, and went to live in another house.

It is important to observe the distinction between domicile and residence. It is not necessary for the purposes of this argument to show that Hilgert has lost his domicile in Pennsylvania and acquired a new one elsewhere.

Drake on Attachment, secs. 63 *a*, 58.
In re Alexander Thompson, 1 Wend. 44.
Frost *v.* Brisbin, 19 Id. 11.
Haggart *v.* Morgan, 5 N. Y. 422.
Weber *v.* Weitling, 3 C. E. Green (N. J.) 441.
Farrow *v.* Barker, 3 B. Monroe (Ky), 217.
M'Collem *v.* White, 23 Ind. 43.
Spalding *v.* Sims, 4 Metc. (Ky.) 285.
Burill *v.* Jewett, 2 Rob. (N. Y. Sup. St.) 701.
Clark *v.* Ward, 12 Gratt. 440.
Dorsey *v.* Kyle, 30 Md. 512.
Wolf *v.* McGavock, 23 Wis. 516.
Wheeler *v.* Cobb, 75 N. C. 21.

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Perrine *v.* Evans, 35 N. J. (Law) 221.
Stout *v.* Leonard, 37 Id. 492.
Nailor *v.* French, 4 Yeates, 241.
Taney's Appeal, 9 WEEKLY NOTES, 564.
Fuller *v.* Bryan, 8 Harris, 144.

The true test of residence or non-residence under the attachment laws is whether the defendant continues to have such a fixed abode within the State as to render him liable to service of process. If his dwelling-house and abode has been entirely abandoned or destroyed, and he has left the State without any intention of returning, he is to be considered a non-resident within the purview of the Act, and this, although his legal domicile for purposes of succession, citizenship, etc., may still remain in the State where suit is brought, and although no new domicile may have been acquired elsewhere. Although not necessary for the decision of this case, we believe that the authorities sustain the position that the defendant has actually lost his domicile in this State and acquired a new one in Guatemala.

Guier *v.* O'Daniel, 1 Binney, 349, note.
Nailor *v.* French, 4 Yeates, 241.
Hindman's Appeal, 4 Norris, 466.

But if this Court should be of opinion that the defendant was a resident of this State at the date of issuing the writ, we ask for a feigned issue to determine this point, as otherwise the plaintiff loses his remedy without being able to review the judgment in the Supreme Court.

Miller *v.* Spreeher, 2 Yeates, 162.
Brown *v.* Ridgway, 10 Barr, 42.
Lewis *v.* Wallick, 3 S. & R. 410.
Shortz *v.* Quigley, 1 Binney, 226.

C. A. V.

February 2, 1884. THE COURT. Hilgert is well known in this community as an absconding debtor. He has probably disappeared so as possibly not to return. The attempt here was to reach his effects by foreign attachment instead of by domestic attachment, it being alleged that he has no residence here, and that he is not in the Commonwealth. The circumstances are such as to bring the case under the domestic attachment proceeding. Though the distinction between domicile and residence was urged with great ingenuity by the learned counsel, and supported by numerous authorities from this and other States, yet we think that, under the law of Pennsylvania, it is clear that foreign attachment does not lie.

It was further urged by the counsel for plaintiff that if the judgment of the Court should be adverse to the attachment, an issue should be granted to determine whether or not the defendant was a non-resident within the meaning of the Foreign Attachment Act; as, otherwise, there would be no way to have the judgment of this Court reviewed by the Supreme Court. Without expressing any opinion on this point, we see no reason why this case should not be determined as other cases are determined by the evidence submitted to us and our judgment on it.

Rule absolute.

Oral opinion by PEIRCE, J. J. H. W.

C. P. No. 1. March 10, 1884.

Baily et al. v. King.

Married women—Under the Act of April 3, 1872, P. L. 35, securing to married women their separate earnings, a married woman is liable for goods sold to her in the course of her business, upon her individual credit.

Rule for judgment on case stated.

Rose L. King, the defendant, by a petition to the Court of Common Pleas No. 4, in 1875, availed herself of the benefit of the Act of April 3, 1872, relative to the separate earnings of married women, which petition is duly recorded.

The said defendant then engaged in general merchandise business in her own name, she being a married woman, and her husband then and still residing with her.

In 1881 the plaintiffs sold her goods on her individual credit and delivered them at her store, having charged them to her individually. Suit is here brought for a balance still due upon said purchase.

If the Court be of opinion that the defendant is liable then judgment to be entered for the plaintiffs.

John Sparhawk, Jr., for the rule.

Any married woman with or without reason may avail herself of the benefit of this Act.

Bovard *v.* Ketterling, 12 WEEKLY NOTES, 345.

A. F. Custis, contra.

THE COURT. Judgment upon the case stated for plaintiffs. J. H. W.

C. P. No. 2. March 10, 1884.

Lokes v. Lokes.

Divorce—Jurisdiction—Subpœna refused where respondent has never been a citizen or resident, and is not within the jurisdiction.

In divorce.

The libel set forth: "That the libellant and respondent were lawfully joined in marriage on the 3d day of July, 1873, at Nottingham in England, and from and after that time they lived together and cohabited in the relation of husband and wife.

"That at the time said marriage was contracted the libellant was a citizen of England, and resided at Nottingham aforesaid, and the re-

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spondent was a citizen of the same place; that immediately after their said marriage the said libellant and respondent resided together at Nottingham aforesaid. That the present residence of the libellant is at No. 1734 Woodstock Street, in the city of Philadelphia, in the State of Pennsylvania, and that he has been a citizen of the State of Pennsylvania and has resided therein for the period of one whole year previous to the filing of this libel; and that the present residence of the respondent is Nottingham, England, etc., etc."

W. H. Redheffer, for libellant.

THE COURT. Subpœna refused, as the libel shows that the respondent is not, and never has been, within the jurisdiction of the Court.

J. D. B., JR.

C. P. No. 2. March 17, 1884.

Fow v. Roberts.

Nuisance—Landlord and tenant—The former is not liable where a nuisance to a neighbor results from the mode of use and not from the nature or construction of the premises.

Rule to show cause why nonsuit should not be taken off.

Case for nuisance.

The evidence showed that plaintiff and defendant were owners of adjoining premises, and on defendant's was a privy well from which on several occasions there had been percolations through plaintiff's cellar wall, resulting in damage and annoyance by the smell, etc. Plaintiff gave in evidence the ordinance of the city of Philadelphia of November 4, 1858, and there was testimony tending to show that this well was within the prohibited distance from the party wall (though its exact distance did not appear). It appeared, however, from the same evidence that this well had been built long before the passage of the ordinance. It also appeared that the nuisance complained of was not constant, but only when the well was allowed to become full beyond a certain height, and had at once ceased on the well being cleaned out; and that the premises had not been in possession of the defendant but had been occupied by a tenant during all the time of the acts complained of.

On this evidence MITCHELL, J., being of opinion that it clearly appeared that the nuisance arose solely from the mode of use, and not from the construction of the privy, held that the landlord out of possession was not liable, and entered a nonsuit.

John H. Fow and *Edw. A. Anderson*, for the rule.

A privy, the filth of which leaks into an adjoining property, is a nuisance *per se* without regard to the question of negligence.

Jacobs *v.* Worrell, 15 Leg. Int. 139.
Shuster *v.* City, 3 Phila. 228.
Ball *v.* Nye, 99 Mass. 582.
Sanderson *v.* Coal Co., 5 Norris, 401.

One who demises his property containing a nuisance, and in the natural use of said property the nuisance will continue, is liable for such continuance, he having his rent as a consideration of the nuisance.

Roswell *v.* Prior, 12 Mod. 635–1; 1 Ld. Raymond, 713.
King *v.* Pealey, 1 Ad. & Ellis, 822.
Owings *v.* Jones, 9 Maryland, 109.
House *v.* Metcalf, 27 Conn. 631.
Clancy *v.* Byrne, 56 N. Y. 129.
Helig *v.* Jordan, 53 Indiana, 21.
Fish *v.* Dodge, 4 Denio, 317.

A landlord is liable for the damage occasioned by a filthy or defective privy, although the premises be in the possession of the tenants.

King *v.* Pealey, *supra*.
Scheerer *v.* Dickson, 7 Phila. 472.
Wood on Nuisance, 866.
Smith *v.* Humbert, 2 Kerr, N. B. 602.
Portland *v.* Richardson, 54 Maine, 46.

F. B. Vogel, contra.

It must be conceded that privies are not nuisances *per se*. An *occupier* who uses premises demised to him so as to create a nuisance is, of course, always responsible for the consequences of his wrongful act.

Addison on Torts (Wood's ed.), p. 247.

A tenant is liable for his own neglect, irrespective of any contract between him and the landlord.

Bears *v.* Ambler, 9 Pa. St. 193.
Early *v.* Ashworth & Coates, 41 Leg. Int., Jan. 18, 1884, p. 24.
Wharton on Negligence, § 17, and cases cited.
Cheetham *v.* Hampson, 4 Term Rep. 318.
Coupland *v.* Hardingham, 3 Campbell, N. P. 398.
City of Lowell *v.* Spaulding, 4 Cushing, 277.
Fisher *v.* Thirkell, 21 Mich. 1.
Grier *v.* Sampson, 3 Casey, 183.

There is no power to annex civil liability to the violation of an ordinance.

Phillips *v.* Allen, 5 Wright, 481.
Butler's App., 23 P. F. Smith, 448.
Phila. and Reading R. R. Co. *v.* Ervin, 89 Pa. St. 71.
Same *v.* Boyer, 97 Pa. St. 102.

March 17. THE COURT. Rule discharged.

P. W. M.

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Orphans' Court.

December 18, 1883.

Muller's Estate.

Decedent's estate—Lease—Unexpired term—Assignment of, by parol—Liability on—Privity of estate—An assignee of an unexpired term, who moves out without the lessor's consent, is only liable for rent up to the time that the premises were re-rented, and therefore cannot be held for difference of rent paid by the new tenant and that called for by the original lease.

Sur exceptions to adjudication.

At the audit of the account of Catherine Muller, executrix under the will of Henry Muller, the decedent, a claim was presented by Clara Fagan; the facts of which, before the Auditing Judge (PENROSE, J.), appeared to be as follows:—

On August 15, 1877, the premises 3224 Market Street, were leased by Mrs. Fagan's agent to John Maguire for three years, with privilege of renewal for two years. November 1, 1878, Maguire, with the consent of the lessor, made a parol transfer or assignment to Muller, the decedent.

The premises were occupied by the decedent, or one Marchand, until about February 10, 1881, when Marchand moved out, and the keys were sent to the office of Mrs. Fagan's agent, and hung on the door-knob, the office being closed. The rent was paid in full to February 15, 1881, by the decedent, who after that date did not occupy the premises, either in person, or by lessee or agent.

On August 1, 1881, the premises were rented by the claimant, to one Levy, at thirty dollars a month, and to this date from February 15, 1881, the claim was for seventy dollars a month, the full amount stipulated by the original lease, and for the balance of the time, viz., to August 15, 1882, for forty dollars a month, being the difference between the original amount (seventy dollars per month) and that (thirty dollars per month) paid by the new tenant.

This, for the reasons which are set out in the opinion of the Court, *infra*, the Auditing Judge refused, but allowed a portion of the claim, viz., from February 15, 1881, to August 1, 1881, at which last date the premises were re-rented to accordance with the Statute of Frauds, a defence to an action for the consideration on the ground of such want of compliance is so contrary to every proper idea of justice, that Courts, to prevent the statute from being made the instrument of fraud, will exercise their astuteness to defeat rather than to sustain it. Hence part performance, or performance of a parol contract for the sale of lands to an extent that renders it impossible to restore the original position of the parties, will take the case out of the statute; parol leases for more than three years will be treated not as mere leases at will, but as leases from year to year (McDowell *v.* Simpson, 3 Watts, 129; Pugh *v.* Good, 3 W. & S. 56); and the word "void," as used in the statute, will generally be understood as meaning "voidable," and therefore capable of being made unavoidable by ratification. (Pearsoll *v.* Chapin, 3 Wright, 9; Gross on Landlord and Tenant, p. 55, note.)

In the present case, the lease, which was for three years with privilege of renewal for two more years, was assigned by parol to the decedent, with the assent of the lessor, during the original term, which expired August 15, 1880. He held the premises for the balance of the term, and then, long after its expiration—viz., in February, 1881, in the middle of a current year, the rent having been paid monthly in the mean time—moved out without the consent of the lessor. The premises remained vacant until August 1, 1881, when they were rented to a new tenant at a reduced rent. The adjudication held the decedent liable simply by reason of privity of estate until this new renting; and the demand of the lessor for the difference between the rent of the new tenant and that called for by the assigned lease, until the end of the renewed term, was refused.

If there was any mistake in this, it was one of which the estate of the decedent has no right to complain. If the assignment was void, not merely voidable and made efficacious by the acts of the parties, the privilege of renewal fell at the expiration of the original term. The relation of landlord and tenant continued, notwithstanding, and was fully recognized by both parties, the rent paid being the same as that mentioned by the lease. Having no rights under the written lease, the decedent by thus holding over became, by his *own* contract or parol agreement, a tenant

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first lease, is well established. (Phillips *v.* Monges, 4 Whart. 226; Diller *v.* Roberts, 13 S. & R. 60.) Such tenancy is binding no less upon the tenant than the landlord. It is very clear that the lessor could not have dispossessed the decedent during the current year, and it is no less clear, conversely, that the latter could not, during the same time, terminate his own liability.

Exceptions dismissed, and adjudication confirmed.

Opinion by PENROSE, J.

[*Cf.* Reaney *v.* Fanessy, *ante*, p. 91.]

W. L. S.

Feb. 18, 1884.

Watson's Estate.

Gift of personalty to a wife "for the support and maintenance of herself," with a bequest of certain sums after her death, "should such amounts be remaining," held to be an absolute gift to the wife.

Sur exceptions to adjudication.

John R. Watson died October 25, 1871, leaving a will, which was duly proved, and letters testamentary thereon were granted to Sarah Watson, his widow, and Thomas Winsmore. His estate was thus disposed of by his will.

"*Second.* I give and bequeath unto my beloved wife, Sarah Watson, all my estate, real, personal, and mixed, whatsoever and wheresoever situated, to have, hold, use, occupy, and enjoy the same for and during all the time of her natural life, for the support and maintenance of herself."

"*Fourth.* I give and bequeath at the death of my beloved wife, Sarah Watson, should such amounts be remaining after her decease as follows, to wit: To my nephew (should he be living) John Riley Bennett, son of Riley and Elizabeth Bennett, of Sussex County, State of Delaware, the sum of five hundred dollars. . . . . To Frank B. Robinson, son of the late Burton and Sarah S. Robinson, the sum of five hundred dollars."

The widow, Sarah Watson, died on April 8, 1882, leaving a will, of which she appointed Thomas Winsmore and Robert J. Winsmore, executors, and in which she gave a number of legacies. At the audit of the account of her executors, the claims of John Riley Bennett and Frank B. Robinson, legatees under the will of John R. Watson, deceased, were presented and allowed by the Auditing Judge (PENROSE, J.).

To this allowance and award exceptions were filed by the accountants.

John F. Lewis (with him *Charles Gibbons*, support and maintenance of herself." She is not named as trustee, and the legal significance of these words taken in connection with the clause "should such amounts be remaining after her decease," is that a power of disposition was given over the principal.

Hambright's Appeal, 2 Grant, 320.
Cox *v.* Rogers, 27 Sm. 160.
Straub's Appeal, 1 Barr, 89.
German *v.* German, 3 Casey, 118.
Church *v.* Disbrow, 2 Sm. 219.
Grove's Estate, 8 Sm. 432.

The auditor of the account of the executors under the will of John R. Watson, filed April 11, 1874, awarded the whole personalty to Sarah Watson, *without restriction;* and the exceptions filed thereto were dismissed, and the adjudication confirmed.

All the other bequests depend upon the words: "*Fourth.* I give and bequeath at the death of my beloved wife Sarah Watson, *should such amounts be remaining* after her decease, as follows, to wit." The condition precedent is that such amounts be *remaining* after her decease, otherwise the express intention of the testator will be contravened.

Straub's Appeal, *supra.*
Green's Appeal, 6 Wr. 25.

When it is considered that the testator professed an intention to dispose of his whole estate, the implication seems clear that the widow's representatives were not to be held accountable for anything beyond the articles left at her death.

German *v.* German, *supra.*

Walton Pennewill, for claimants.

The bequest to the widow of John R. Watson, was a life estate.

Fox's Appeal, 11 WEEKLY NOTES, 236.

March 1, 1884. THE COURT. The decision in Fox's Appeal (3 Out. 382) can have no controlling effect upon the interpretation which is to be given to the will before us, because the gift in that case may be clearly distinguished from the present bequest. It was of all the real and personal estate to the wife, "she at no time to give or bequeath any portion of said estate out of my family, as at her decease I wish my estate which remains to go to my nephews and nieces." The Court held that "I wish" was as mandatory as "I will," and thereby withheld the case from the list of decisions, of which Hambright's Appeal (2 Gr. 320), Pennock's Estate (8 Har. 268), and Presbyterian Church *v.* Disbrow (2 P. F. S. 219), are examples, in which merely precatory words as to the disposition of the residue of an

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was passed upon, and there was nothing on the record to show that the widow had not retained the whole of the personalty. But here the fund is personal estate, and the gift over is only of a surplus, the meaning of which word was ascertained in Pennock's Estate (*supra*). This is plain from the clause declaring that the bequest was for the support and maintenance of the wife, and especially from the direction that the mother of the testator "shall be provided with all her wearing apparel during her natural life, and her funeral expenses shall be fully paid." At the death of the widow certain pecuniary legacies were bequeathed, provided "such amounts be remaining." Grouping these three provisions together—for the support and maintenance of the wife, the clothing and funeral expenses of the mother, both assessed upon the wife's portion, and the payment of legacies at the wife's death, if the surplus should warrant it—the inference is irresistible that the widow had power to encroach upon the principal. This solution was reached in Straub's Appeal (1 Barr, 86), which reflects the facts of this case as in a mirror. There the testator gave to his wife all his estate, real and personal, to be held by her during life, she to provide thereout for testator's son. At her death he directed that all his real estate and his *remaining* personal property should be sold and divided. It was held that the widow took the whole of the personal estate, and that only what remained of the principal would go to the children. So in German *v.* German (3 Cas. 116) the wife was bequeathed the choice of keeping, during her life or widowhood, all such personal property as she should think proper, and the executor was directed, after her death, to sell and divide such property as should be then left. The Court decided that security could not be required from the widow for the protection of parties in remainder. (See Green's Appeal, 6 Wr. 25.) McCauley's Appeal (12 Nor. 102), cited by the Auditing Judge, is entirely in harmony with these views. The power given to the widow to appropriate to her own use such of the personal estate of the husband as she chose, did not imply a power of disposition by will, and hence could not apply to the proceeds of a policy of life insurance which only accrued at her death. Following the reasoning of these cases, we conclude that the widow was not restricted to the income of the testator's estate, and that the legatees could take only the surplus which remained after her user of the principal. Upon the latter point the evidence submitted at the audit showed that the principal of the estate left by her husband had been partially absorbed in the maintenance of the widow.

The exceptions are sustained, and the decree of distribution is amended accordingly.

Opinion by ASHMAN, J. W. C. S.

February 19, 1884.

Garrett's Estate.

Decedent's estate—Widow's claim for exemption—When widow is non compos mentis, application can be made through her committee.

Sur exceptions to widow's claim for exemption.

The following exceptions were filed by William Rudolph Smith, executor of Charles Garrett, the testator, and Samuel Garrett, his son, to the petition of Alexander Krail, committee of Julianna Garrett, a lunatic, for widow's exemption.

(1) Because the said committee has already elected to take against the will of Charles Garrett, the testator, and his ward is amply provided for by said election. (2) Because the spirit and intention of the Act of April 14, 1851, under which these proceedings are taken, does not contemplate any such application on the part of a committee of a lunatic, especially when the amount already received from the decedent's estate is more than sufficient for the maintenance of his ward; and (3) because such application on the part of a committee is not authorized by law.

H. Townsend Grace, for the exceptants.

J. De F. Junkin, for the committee of the widow.

March 1, 1884. THE COURT. The Acts of Assembly which confer upon the widow of a decedent her right to exemption, are not dependent for their operation upon the necessities of the claimant. She may have unlimited means of her own; her husband's will may make the most ample provision for her support; but whether he die testate or intestate, solvent or insolvent, rich or poor, is immaterial. What the Act of April 14, 1851, says is: "The widow or the children of *any* decedent dying within this Commonwealth, testate or intestate, may retain," etc. etc. etc.

The only question to be considered, therefore, is: Can the application for exemption, where the widow is *non compos mentis*, be made by her committee? Upon this point there can be little doubt; for, while it may be that in the case before us there are other means of support, cases must occur in which there will not be, and then if the application must be a personal one, a lunatic widow may be left a charge upon the public. All of the analogies are in favor of permitting the committee to claim on her behalf. He is her representative and curator, just as a guardian is of the minors placed under his care; and that the latter may claim for his wards has never been doubted, though the Acts make mention of him no more than they do of a committee.

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So, it is well settled, the committee, having obtained the permission of the Court of Common Pleas, may elect for the widow to take under or against the will of her husband. (Kennedy *v.* Johnston, 15 Smith, 451.) That is a case of election purely (Crozier's Appeal, 9 Norris, 384), while here there is an absolute right of property, given by statute and dependent only upon being asked for; and, in the present case, the propriety of its demand has been already decreed by the Court having jurisdiction over the acts of the committee.

Exceptions dismissed, and exemption granted as prayed for.

Opinion by PENROSE, J.

W. L. S.

February 19, 1884.

Bagwill's Estate.

Petition for partition—An allegation in the answer that the premises are held adversely, is not sufficient where the fact is not admitted in the petition—It is only upon the report of an Examiner, that the Court can determine whether or not the party should be put to an action of ejectment—Practice.

Sur petition for partition of real estate, and rules to vacate appointment of Examiner, and dismiss petition.

Jane Bagwill presented a petition which prayed for a partition of the real estate of her husband, Edward Bagwill, the decedent, to which an answer was filed by Isaiah Bagwill, her husband's nephew, which alleged adverse possession of the realty.

Harold Goodwin, for the rule.

Francis E. Brewster, for the widow.

March 8, 1884. THE COURT. In McMasters *v.* Carothers (1 Barr, 325), ROGERS, J., says, citing Law *v.* Patterson (1 Watts & S. 184): "When, therefore, it appears on a petition for a division of an intestate's estate, that the intestate did not die seised, but that the premises are in the possession of another, claiming to hold adversely, it is the duty of the Orphans' Court to refuse the prayer of the petitioner, and put the party to an action of ejectment to recover the possession." But these facts, unless admitted, must be made to appear from proper testimony or other evidence. When shown, "the Court will not undertake to examine the validity of the title [illegible]" present proof of facts tending to show the truth of the allegations contained in the answer, and from which it can be determined whether the Court has jurisdiction to entertain the petition. As it is now, there is simply a denial of the right to the partition, without evidence to support it. By this it is not intended, as was urged at the argument to try the title of the parties to the property in question, but to place the Court in possession of such facts as will enable us to act intelligently. We will be in such position upon a report from the Examiner, as to the result of the testimony before him.

The rule to vacate the appointment of the Examiner is discharged.

Opinion by HANNA, P. J. W. L. S.

January 23, 1884.

McMahon's Estate.

Guardian and ward—A guardian who makes a settlement with his ward immediately upon his coming of age does so at his own peril—Ward entitled to account from guardian even after settlement made.

Sur petition for citation to file an account, answer, and proofs.

When the petitioner was eight years of age, his father died, leaving a will, wherein he appointed the respondent guardian. Petitioner lived with and was clothed by his guardian, and for a time sent to school; but at an early age he was taken from school and made bartender in a saloon belonging to the respondent. Soon after the decease of the father, the respondent recovered a claim amounting to one thousand dollars. When the petitioner became of age, on June 23, 1881, he desired to leave the respondent and asked for a settlement, which was made July 2, 1881, within two weeks after he attained his majority, at which time the respondent induced him to take his place of business, No. 206 Callowhill Street, at the value of $350, gave him $200 in cash, and paid his counsel $50 for services. The petitioner subsequently found that the place of business was not worth $100. At the time of this settlement, the petitioner gave to the respondent a release, upon which the respondent relied to relieve him from filing an account.

Jerome Carty, for petitioner, cited—

Say's Executors *v.* Barnes, 4 S. & R. 114.

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March 1, 1884. THE COURT. After a careful examination of the testimony, we think petitioner entitled to a settlement of his estate under the inspection of the Court. A guardian who undertakes, even at the request and solicitation of his late ward, to make what he considered a settlement with his ward, immediately upon his or her arrival at lawful age, does so at his peril. And a receipt in full, or a release under seal by the ward, under circumstances from which it may be inferred he or she is either influenced by the relation to the guardian or ignorant of the management or condition of his or her estate, is of but slight value as against the request of the ward for a settlement of the estate according to law. As said by TILGHMAN, C. J., in Say's Executors *v.* Barnes (4 S. & R. 112), "settlements made soon after coming of age, and especially before the ward is in possession of his estate, are always viewed by the Courts with a watchful and even a jealous eye." And KENNEDY, J., in Luken's Appeal (7 W. & S. 48), condemns the practice of guardians settling with their wards after they become of age, taking receipts in full, or releases, without filing an account for the examination or approval of the Orphans' Court, although he does say, that if the ward "chooses, after he has arrived at full age, to make a settlement with his guardian without the intervention of the Court, and, after having received the amount agreed to be coming to him, to give an acquittance or release to his guardian, he ought not to trouble the Court or his guardian either, afterward, without pointing out some mistake or error in the settlement, or showing that a fraud has been practised on him by his guardian, whereby he is prejudiced." And in Kinter's Appeal (12 P. F. Smith, 318), where an account had been filed and confirmed, and a release given by the ward, PEARSON, J., in the Court below, granted a review of the account, which was affirmed by the Supreme Court, Justice SHARSWOOD saying, "the same reasons for jealousy exist even when the mere form of a settlement in Court has been gone through." See also Stanley's Appeal (8 Barr, 433), and Marr's Appeal (28 P. F. Smith, 66), where Justice MERCUR, in referring to these cases, says: "It is not now to be questioned that a guardian may within a reasonable time be release by the ward, the guardian is discharged by the Court upon the petition of the late ward, presented by counsel, such decree for discharge cannot be vacated, and the guardian compelled to account, without proof of some specific act of fraud in obtaining it, and of some injury occasioned thereby. (Marr's Appeal, *supra*).

Here we have the case of a guardian *in loco parentis*, his ward a member of his family during at least ten years, taking him from school, and when fifteen years of age placing him behind the bar in his tippling house, paying him no wages for his labor, and within two weeks after his ward attained his majority induces him to become the purchaser of one of his two taverns, the rent for which was three months in arrear, and the stock and fixtures of inconsiderable value, furnishes no account nor statement of the moneys received for his ward more than ten years previously, takes him to the office of his attorney, who prepares the bill of sale, receipt in full and release, pays the expenses of the transaction out of the moneys he informs his late ward to be due him, and finally hands to him the balance, less the purchase-money for the good-will and fixtures of the tavern. The late minor now requests an account from his former guardian. While it may be, as alleged by the guardian, that the sale of the tavern and the payment of the money to the ward was wholly at his request and solicitation, made in good faith and with a desire to avoid costs and expenses, yet such a transaction, and at a time when the ward was still subject to the restraint and influence of one to whom he occupied during so many years the relation, not merely of a child, but of a dependent and servant, ignorant of his rights, and anxious to obtain money he knew belonged to him at his majority, called for more than ordinary prudence, carefulness and candor on the part of the guardian. We think the petitioner entitled to know the amount of his estate, and its care and management by his guardian, and to ascertain by judicial investigation whether the balance paid him justly represented the indebtedness of his guardian. Nor should such investigation be precluded by the receipt and release executed by him under the circumstances of this case. The respondent is accordingly ordered to file an account, upon the examination of which, it is perhaps

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, APRIL 24, 1884.* [No. 20.

Supreme Court.

ORDER OF COURT.

Filed April 21, 1884.

It is ordered that in addition to the paper-books which by Rule 28 of this Court are required to be filed with the Prothonotary, two copies shall be filed for the use of the Reporter of Pennypacker's Reports, this order to extend to each of the districts and to be certified to the Prothonotary thereof.

Oct. '83, 138. November 7, 1883.

Jones's Appeal.

Statutory dower—Apportionment—Release by widow of part of land charged—Does not operate to release the whole.

Although a widow's statutory dower is in the nature of a rent-charge, yet it is not a rent-charge, and the strict and harsh incident thereof, to wit, that a release of a part of the land bound operates as a release of the whole, will not be applied to a dower interest.

The division by the tenant of the fee of land bound by a dower interest, though the widow expressly assent thereto, will not work an apportionment of her dower.

And when, as in this case, she seeks to recover only a proportionate share of her land out of the land not released, her release does not operate to the injury of those owning the remaining portions, and their liability will not be changed.

Appeal of Thomas M. Jones, from a decree of the Orphans' Court of Allegheny County, decreeing the payment of $2052, arrearages of dower out of land of appellant, *inter alios*.

The petition of Maria McFarland, widow of John McFarland, filed March 31, 1883, averred that arrearages of dower were due her out of purpart No. 1, in the partition of her deceased husband's estate; and that said arrearages were payable out of certain portions of said purpart not released from her dower, and prayed for the payment of the same out of the purpart, or such portion thereof as was not released therefrom, the same being owned by Thomas M. Jones and others.

Thomas M. Jones answered, that petitioner by releases assented to sales of certain land in said purpart, and that she released certain lots therein from the payment of her dower, and that he was advised and believed this worked an apportionment of her dower, so that his land was only liable for its just and fair proportion, which he had always been willing to pay, etc. Afterwards he obtained leave to amend his answer, and set out more specifically the releases before referred to; and further, that he was advised and believed said releases divested and extinguished the entire dower charged on the purpart; but that if it was not so divested it should be collected out of the lots of land in the inverse order of their sale.

It appeared from the answers that said purpart was allotted to Sarah D. McFarland, one of the daughters of petitioner, and her deceased husband, in partition proceedings of the Orphans' Court, at No. 4 of June Term, 1867; that afterwards the allottee and her husband divided the purpart into lots, and mortgaged lot No. 1, the land in this case; that this lot was sold under the mortgage to appellant's vendor; that afterwards, and prior to the proceedings in this case, appellee filed her petition for payment of dower, and made all purchasers of land in the purpart defendants, and it was so proceeded in that the Orphans' Court decreed that the dower interest could not be apportioned without the consent of the widow, and that lot No. 1 was jointly liable with the others for arrearages; that the decree in that case was made in September, 1880, and a sheriff's sale under it was made in June, 1883, so that the lots sold thereby were divested of all dower arrearages up to the date of the sale; that the sale of lot No. 1 under the mortgage was in 1877, and as all liens upon it were divested thereby, it was not sold under the decree of 1880, but, it was now claimed, was bound for arrearages of dower accruing since its sale in 1877; that from the decree of 1880 Thomas M. Jones, who had prior thereto become the purchaser of lot No. 1, appealed, and upon a question of estoppel raised in the record, this Court reversed that decree. (Appeal of Plumer *et al.*, 11 WEEKLY NOTES, 144; S. C., 1 Pennypacker, 383.) Other arrearages being now due Mrs. McFarland filed this petition. At that time the decree in the appeal of Samuel Plumer, *supra*, had not been executed. The case was heard on petition and answers. The Court below sustained the petition, and decreed that the sum of $2052, being arrearages of dower and interest thereon, be paid to petitioner out of purpart No. 1, excepting thereout such lots as petitioner had released, and that respondent pay the costs of this proceeding, etc.

Thomas M. Jones thereupon took this appeal, assigning for error: (1) Decreeing that said sum should be paid out of said purpart; (2) Deciding that petitioner's releases did not extinguish her entire dower interest; (3) Deciding that said releases of lots described in a certain plan did

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not operate as an adoption of said plan by the releasor to work an apportionment of dower among the lots of said plan; (4) Not decreeing an apportionment of dower; (5) Deciding there was no privity between petitioner and respondent, and, therefore, there could be no estoppel.

John D. McKennan, for the appellant.

The tendency in Pennsylvania to facilitate the circulation of real estate, by modifying common law dower is shown by the Acts of 1705, and March 23, 1764. The Act of April 19, 1794, (3 Smith's Laws, 151) superseded all former laws on the subject, and is the one under which the partition in this case was made. The Act of March 29, 1832, does not affect the Act of 1794; it only defines the quantity of the widow's dower interest.

Dower under the Act of 1794 is an interest issuing out of land, in all respects of the nature of a rent charge. It is a corporeal hereditament.

Shaupe *v.* Shaupe, 12 S & R. 12.
Miller *v.* Leidig, 3 W. & S. 458.
Thomas *v.* Simpson, 3 Barr, 70.

A rent-charge was an entire sum charged on the whole of the land, and issuing out of every part of it. Any act of the grantee or owner of the rent, which interfered with the intention to charge it on all and every part of the land bound, or any act which impaired its integrity, was an entire extinguishment of the whole rent.

Gilbert on Rents, pp. 152 *et seq.*
Coke on Littleton, Secs. 222, 148 a.
Ingersoll *v.* Sergeant, 1 Wh. 352.

The theory of the entirety and indivisability of a rent charge is applied to dower in Shouffler *v.* Coover (1 W. & S. 400). If the releases of Mrs. McFarland have not extinguished her dower, they should at least work an apportionment, and each lot should pay its proportionate share. When land subject to a rent-charge has been divided by the tenants, and the grantee of the charge releases one of the parts, or receives from the tenant of each part his proportionate share of the rent, this shows his assent to the division and works apportionment.

Van Rensselaer *v.* Chadwick, 22 N. Y. 32; S. C., 24 Barb. 333.
Farley *v.* Craig, 6 Halsted, 262.
Nellis *v.* Lathrop, 22 Wend. 121.
Van Rensselaer *v.* Bradley, 3 Denio, 135; S. C., 5 Id. 454.
Cuthbert *v.* Kuhn, 3 Wharton, 365.

If the dower of appellee is not apportionable, it should be collected from the lots in the inverse order of their sale.

Raynor *v.* Raynor, 21 Hun, 36.

Not only would an apportionment meet the purpose of all the legislation on the subject of dower, but it should be made on the ground of public policy. This case shows the confusion which may arise in the absence of such a rule.

Of the cases cited by counsel for appellee, Medlar *v.* Aulenbach (2 P. & W. 358), decides that a Court cannot divest dower at pleasure by the substitution of another security. In Reigart *v.* Ellmaker (14 S. & R. 121), the land was divided into several parcels and each valued. The dower as to each was therefore complete, and had no relation to any other parcel, or the charge thereon. All the decision means is that the release of one of these distinct from the charge does not effect that on another and wholly different one.

D. D. Bruce (*Negley & Shields* with him), for the appellees, cited—

Act March 29, 1832, Purd. 437, pl. 158.
Medlar *v.* Aulenbach, 2 P. & W. 358.
Turner *v.* Hauser, 1 Watts, 420.
Miller *v.* Leidig, 3 W. & S. 458.
Mansell's Estate, 1 Parsons, 367.
Reigart *v.* Ellmaker, 14 S. & R. 121.
Crawford *v.* Crawford, 2 Watts, 339.
Shouffler *v.* Coover, 1 W. & S. 400.
Voegtly *v.* R. R. Co., 2 Grant, 243.
Kenege *v.* Elliott, 9 Watts, 258.
Wallace *v.* Harmstad, 8 Wright, 492.
Soley's Estate, 10 WEEKLY NOTES, 67.

In England a rent charge was extinguished by a release of a portion of the land bound only through the operation of the statute *quia emptores terrarum*. But that statute was never a part of the law of Pennsylvania, and rent-charge and rent-service stand here on an equality of a common right of distress, and a release of a part of the land would only extinguish a proprotionate part of the rent.

Ingersoll *v.* Sergeant, 1 Wh. 346.

The owners of the land are strangers to the widow, and can claim no rights or privileges from her, because no privity of contract exists between them. When they purchased they knew the dower existed thereon, and they took the land *cum onere*. There can be no estoppel against her, for by no words or conduct on her part has the widow induced the appellant to take. On the contrary, he purchased when the parties were in the midst of the first trial, and he intervened then, and set up this plea of estoppel, which was then decided against him. That is conclusive against him.

Peterson *v.* Lothrop, 10 Casey, 223.

To collect the dower from the land in the inverse order of its sale would not help appellant, because the lots other than his were sold under the first decree, and they are discharged under the first decree. Nor can any injury enure to him from the widow's releases, because under Ingersoll *v.* Sergeant (*supra*) each release of a part of the land works an extinguishment of a proportionate part of the rent. But apportionment would work great inconvenience to the widow, and instead of permitting her to settle her right in one, would drive her to many ac-

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tions. Goods of a stranger upon the land are liable for her arrearages.

Lewis's Appeal, 16 Smith, 312.
Murphy *v.* Borland, 11 Norris, 86.

January 7, 1884. THE COURT. The widow of John McFarland was no party to the action of his daughter and her husband in cutting the purpart allotted to the daughter into lots, and in selling it off in parcels: there was no agreement for apportionment between the widow and any of the purchasers. Such releases as she chose to make to some of the purchasers were contracts between her and them alone, and conferred no rights upon other purchasers, of whom the respondent was one. No act or declaration of the widow was even alleged as operative with the appellant in making his purchase. The case has no element of estoppel in it as against the appellee, and hence the argument based upon that theory is unavailing.

But we are asked to take from the widow her well-defined and carefully protected statutory right to her annual interest, by an implication that she extinguished the whole of her annuity, charged upon all the purpart, because she released a portion of it, and in doing so released a part of the land charged. No decision to that effect has been cited, nor, we apprehend, can any such be found.

In support of this implied extinguishment it is said that the interest of a widow in her deceased husband's real estate is in the nature of a rent-charge, and we are referred to a *dictum* of GIBSON, J., in Shaupe *v.* Shaupe (12 S. & R. on page 12), to that effect. While it may be that the interest of a widow is in the nature of a rent-charge it certainly is not a rent-charge in fact, and there is therefore no legal necessity for holding that it is affected with the very strict and harsh incident of a rent-charge, that a release of a part of the land charged operates as a release of the whole. Under the Act of 29th March, 1832, sec. 41 (Purd. 437, pl. 158), the annual interest of the share of the widow may be recovered "by distress or otherwise, as rents in this Commonwealth are recoverable." The right of recovery by distress has been many times affirmed by this Court, and in Shouffler *v.* Coover (1 W. & S. 400), it was held that if land subject to a widow's annuity be divided into several parts by the heir who takes it at the valuation in convey the same so divided, to different persons, and by doing so to apportion the annuity among them, so that a separate distress may be made on each for his proportion thereof. I take it that he cannot bind the annuitant to observe any apportionment which he may attempt to make in this way; nor yet can she avail herself of it, even if she were willing to do so." In Reigart *v.* Ellmaker (14 S. & R. 121), it was held that where several distinct parcels of real property are taken at a valuation by one of the heirs of a decedent, and a recognizance is entered into in the Orphans' Court to secure the proportions of the other heirs, a release of one of those parcels from the lien of the recognizance, does not operate as a release of the whole.

We are unable to see any reason for holding that an apportionment of the dower has been worked, by anything done either by the widow or by the tenant of the fee. There is absolutely nothing to show that either of them ever contemplated such a thing. Certainly the mere act of the tenant in dividing the land into parcels cannot have such effect.

Even if the widow had expressly assented to such a division, her annuity would not thereby have been apportioned. Much less would such a conclusion be tolerable, where she has given no express assent, nor made any agreement for such an arrangement. Her release of a part of the land, however, from the lien of the annuity held by her, could not operate to the injury of those owning the remainder of the land. Their liability is not changed. In her petition she only asks for a decree for the proportionate part of the dower due after deducting the part released.

In this we see nothing wrong. It has been twice allowed by the Court below, and in both cases, correctly as we think.

Decree affirmed at the cost of the appellant.
Opinion by GREEN, J. W. S. P.

Oct. '83, 93. October 30, 1883.

Connor v. Simpson.

Contract—Agreement to refer differences to an arbiter—Binding on parties—Duty of arbiter to decide questions of law as well as of fact—When award bad for uncertainty.

Where a contract contains a submission to a designated

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of the contract price shall be retained by one of the parties upon certain contingencies is to be treated as a penalty or as liquidated damages, he must decide that question.

When the arbiter does not so decide, but awards one sum upon one construction of said clause, and another sum if another construction "should properly be held," the award is bad as uncertain and indefinite, and as driving the parties to a different tribunal for the settlement of differences which they had contracted should be finally determined in one of their own choosing.

Error to the Common Pleas No. 1, of Allegheny County.

Debt, by Thomas P. Simpson against James H. Connor, upon an award to recover $752.

The defendant was a contractor under and by articles of agreement with the plaintiff, to grade a portion of a certain railroad bed. Defendant entered upon the work, and, after proceeding in it for some time, withdrew from it, for what reason did not appear. The articles of agreement between the parties contained these clauses:—

8th. It is further agreed that payment shall be made monthly, on or before the 15th day of each month, as the work progresses, on the certificate of the chief engineer, based upon his current estimates of the amount of work done, calculated at relative prices. And it is also further mutually agreed that from each and every current estimate there shall be retained 10 per cent. of the amount of such estimate as security for the faithful performance of this contract, which — per cent. is to be forfeited by the party of the first part [defendant] to the party of the second part [plaintiff], in case the work is not fully completed by the time, and in the manner herein provided for, and which is mutually agreed upon as liquidated damages for the non-performance by the party of the first part of any of the undertakings on his part herein contained.

12th. It is further mutually agreed that if the party of the first part shall refuse or unreasonably neglect to remedy any imperfections in the work when required by the engineer, ... then the chief engineer shall have the right to, and may, declare this contract void, and the amount retained by the party of the second part as security for the completion of work, shall be forfeited to the said party of the second part, as liquidated damages for the non-fulfilment of this contract. . . . .

14th. It is hereby mutually agreed that the chief engineer of said Pittsburgh and Chicago Railway Company shall be, and he is hereby appointed, a common arbiter, to whom all and every question of difference between the parties growing out of this contract shall be referred, and whose decision shall be final and binding upon both parties.

After the defendant had suspended work, the plaintiff called upon the chief engineer of the railway company to act as arbiter under the contract, who, consenting, fixed a time and place of hearing, and notified the parties thereof. At the hearing the parties appeared, the defendant by his counsel protesting in writing against the arbiter's jurisdiction. Afterwards, the arbiter made an award, which, after reciting introductory facts, was as follows:—

That there is due to Thomas P. Simpson from James H. Connor the sum of one hundred and thirty-one dollars and seventy-one cents ($131.71), with interest from October 5, 1881, being of opinion that the words "liquidated damages" in the 8th section of said contract, are to be strictly construed; but as I am not a lawyer I do not wish to pass upon a legal question of that nature. I, therefore, further award and find that if the ten per cent. to be retained as security, etc., should properly be held as a "penalty" and not as "liquidated damages," that there is due from James H. Connor to Thomas P. Simpson the sum of seven hundred and fifty-two dollars and five cents ($752.05).

Defendant, in his affidavit of defence, averred, *inter alia*, (1) that the contracts were rescinded by plaintiff, who, without sufficient cause or excuse, took the work out of defendant's hands, and refused to allow defendant to complete his contract, and that plaintiff was largely indebted to him for such work, and had no right to damages as allowed by the arbiter; (4) that the award was unwarranted by the evidence adduced by the plaintiff, which clearly and unmistakably showed that defendant was stopped in his work by an agent of plaintiff without cause or excuse; (5) that the award is void for duplicity and uncertainty in this, that it awards plaintiff in one case $131.71, and in the other $752.05.

Upon a rule taken for judgment for want of a sufficient affidavit of defence, the Court entered judgment for plaintiff for $752.05 with interest and costs of arbitration. Defendant thereupon took this writ, assigning for error the entering of the judgment.

J. S. Ferguson, for plaintiff in error.

According to the claim of our adversary, the controversy grew out of Connor's refusal to complete the contract. The arbiter was only to pass upon questions growing out of the contract. But that which grows out of it must be something connected with its performance, not something arising from its non-performance.

But assuming the jurisdiction, the award is not valid, for it is neither certain nor final. These are essential qualities to support an award.

Gonsales *v.* Deavens, 2 Yeates, 539.
Spalding *v.* Irish, 4 S. & R. 322.

The referee had no power to make a special finding of facts, and submit the law to the Court.

Sutton *v.* Horn, 7 S. & R. 228.

An uncertain and indefinite award is void.

Etnier *v.* Shope, 7 Wright, 110.
Stanley *v.* Southwood, 9 Id. 189.

W. K. Jennings, for defendant in error.

Any question to solve which the contract would have to be shown would arise out of it, and when shown it would oust the jurisdiction of every other court than that named in it.

Monongahela Navigation Co. *v.* Fenlon, 4 W. & S. 205.
Reynolds *v.* Caldwell, 1 Smith, 298.
O'Reilly *v.* Kearns, 2 Id. 214.

The award is not objectionable in form.

Thornton *v.* Carson, 7 Cranch, 597.

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January 7, 1884. THE COURT. The controlling question in this case is, whether the instrument of writing dated July 12, 1881, signed by Delos E. Culver as an arbiter, and purporting to be an award, is sufficient to sustain the present action. The submission was prospective, but it was special, and was to the arbitrament of a person designated; it was founded on a valuable consideration, and was binding on the parties.

The matters in controversy were clearly within the jurisdiction of the arbiter, as according to the submission, "all and every question of difference between them growing out of the contract," was to him referred, and his decision thereon was final, both parties to be bound thereby. The controversy grew directly out of the contract. Connor stopped the work, whether at his own suggestion or by inducement of Simpson is not here important, as that question was one for the arbiter. Simpson, alleging that by Connor's default he had incurred a greater expense than would have accrued under the contract, claimed compensation for the injury. If it were not for the obligation of the contract, no such claim could be made, and when made, it must stand or fall under the agreement of the parties; rights which accrue from non-performance are as much the outgrowth of the contract as those which accrue from performance.

Assuming, therefore, the jurisdiction of the arbiter, we oust every other jurisdiction over the same subject matter, until the arbiter has been discharged, either by the rendition of an award according to the submission, or otherwise. The arbiter, accepting his office, made what purports to be an award. Does it possess the qualities and requisites of one? We think it does not.

The reference was of all and every question of difference "between the parties growing out of the contract" questions of law, as well as questions of fact, the decision of the arbiter to be "final." The submission, therefore, embraced the questions of difference between the parties, as to the construction of the contract. Whether ten per cent. of the amount of each estimate retained by Simpson, was to be treated as stipulated damages, or as a penalty, merely, was therefore for the arbiter's decision. This question he has, however, not decided; he indicates pretty clearly that he has an opinion on the subject, and perhaps intimates what that opinion is; but he says "I do not wish to pass upon a legal question of that nature," and he does not pass upon it.

His award is in the alternative, and there is no proper tribunal to which the pending question submitted by the arbiter can be referred, until his jurisdiction is determined; the parties intended to be obliged only by what the arbiter himself declared to be his award. The question of difference is undetermined; the award is not final; it is uncertain and indefinite. What would constitute a sufficient tender of performance on the part of the defendant; or what breaches could be assigned in formal pleadings on the part of the plaintiff? The breach is itself the cause of action, and unless that be assigned the defendant may demur. According to the theory of the plaintiff below, the parties are necessarily driven to the courts, to ascertain what the award is, and a resort to the legal tribunals was precisely what the parties were seeking to avoid. An award at the common law is in the nature of a judgment; and ought to be wholly decisive "for if it doth not determine the matter it becomes the cause of a new controversy." (Bac. Abr., title, Arbitration and Award, p. 218.) The case of Sutton *v.* Horn (7 S. & R. 228) was a reference under the Act of 1705. Chief Justice TILGHMAN delivering the opinion of the Court, says: "This award is wanting in an essential quality; it is not final, but instead of deciding the matter in dispute refers the decision to the Court. This was contrary to the intent of the parties, who submitted the decision not to the Court but to the referees. No award should be approved by the Court, but one which is in itself a perfect award. The plaintiff's counsel have endeavored to support this award, by comparing it to a special verdict; they say that judgment is to be entered on it, as on a verdict, and therefore judgment may be entered as on a special verdict, which finds the facts and refers the law to the Court. But this is not the true construction of the Act of Assembly; by which it was not intended to alter the nature of an award; the award must be good *per se* in order to authorize the Court to enter judgment on it."

Although the award here spoken of under the Act of 1705, had the effect of a verdict, and when judgment was entered thereon supported an execution, all that is said in reference to its essential requisites is applicable to an award at the common law; for the judgment, if any be entered in this case, must be upon the award; it must, therefore, be certain and final, in order that it may be of itself sufficient to support an action to compel performance. (Gratz *v.* Gratz, 4 Rawle, 438; Etnier *v.* Shope, 7 Wr. 110; Stanley *v.* Southwood, 45 Penn. St. 189.)

We are of opinion, therefore, that the Court erred in entering judgment for want of a sufficient affidavit of defence, and the judgment is reversed.

Opinion by CLARK, J.

TRUNKEY, J., absent. W. S. P.

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Jan. '83, 293. February 15, 1884.

MacMackin & Young v. Timmins.

Contract—Terms of; to be reduced to writing—Failure to do so—Work done upon expectation of the consummation of an agreement—Liability of defendant for.

A., who was a Roman Catholic priest, entered into negotiations with B. and C., organ builders, for the construction of an organ for his church. The preliminaries of the contract were apparently agreed upon after several interviews. At the outset, the defendant asked for a written agreement, and throughout the interviews constantly insisted upon it. At one of the interviews the defendant authorized the plaintiffs to go on with the building of the organ, and at the same time demanded a written agreement. None of the agreements were satisfactory to the defendant, each containing something he alleged he had not agreed to, and finally he broke off further attempts at an agreement. B. and C. thereupon brought suit for breach of contract:

Held, by a divided Court (affirming the judgment of the Court below), that there was no binding contract between the parties, it being the clear intention of the defendant that he should not be bound until all the terms of the contract were reduced to writing and signed by the parties, and that the defendant was not liable for work done on the expectation or hope on the part of the plaintiff that such an agreement would be consummated.

Error to the Common Pleas of Delaware County.

Assumpsit, by B. MacMackin and W. H. Young, trading as MacMackin & Young, against James Timmins.

Plea, non-assumpsit.

On the trial, before CLAYTON, P. J., the following facts appeared: On April 14, 1882, the plaintiffs, who are organ builders in the city of Wilmington, Delaware, met the defendant, who is the pastor of St. Michael's Roman Catholic Church in the city of Chester. The defendant wanted an organ for his church, the cost of which was not to exceed $4000, and which was to be finished on the 29th of the following September. Several interviews took place between the parties, and several specifications of different kinds of organs were presented to the defendant. After considering these specifications, he said he did not think that any other than the *C* specification, which was for an organ costing about $4000, would suit him. The defendant replied, "Yes, go on with the building of it." Then followed some conversation about a specification and a written agreement, which the defendant said he thought he ought to have. This the plaintiff agreed to draw up and submit soon. The defendant then returned to Chester, and the plaintiffs at once went to work upon the organ. The agreement was accordingly drawn up and submitted on May 24th to the defendant, who, after reading it, refused to sign it because the terms of payment were cash, and time was not given as he expected. The plaintiff then consented to take the agreement home with him for correction. On the same day the defendant wrote, inclosing a form of agreement, which he said would cover all his wishes. In reply to this the plaintiffs wrote that they were at work upon the instrument, and that one of the firm would bring up the contract.

On June 1st the defendant went to Wilmington and wanted to make the plaintiffs liable in a penalty of $1000 in case the organ was not finished by September 29, and further said, before leaving, that he wanted the D specification, which was for a cheaper organ. On June 2d the plaintiff went to Chester for the purpose of settling on the specification, because, should the work longer go on, they could not change without great expense. After some conversation, the plaintiff agreed to change to the D specification and build the organ for $4000, the defendant saying, "Don't let the delay on account of these preliminaries interfere with the progress of the organ. I want it positively by the 29th. There is no hurry about the agreement, but I feel I ought to have one." The plaintiffs said that they were willing to take his word, and that they had hitherto taken the word of Roman Catholic priests as being as good as their bonds. To which the defendant replied, "You need not flatter me. I want a written agreement." In another conversation with one of the plaintiffs, who had said that after a specified time he could not change, the defendant said, "I want you to understand that the fact that I may change my mind need not delay the work. But if it goes so far that a change cannot be made, why then go on and I will stand by the specification." On June 8th the plaintiff called and submitted

subsequently on motion refused to take off, CLAYTON, P. J., delivering the following opinion:—

"It is very clear to my mind that no binding contract was ever made between those parties. The plaintiffs were willing to take the word of the priest, but he declined to be flattered into taking their word. When they expressed themselves as willing to go on without the written agreement, and that they thought the word of a priest as good as his bond, his reply was, 'You need not flatter me; I want a written agreement.' I have no doubt the plaintiffs thought they had secured the contract for the organ, and that they would have no difficulty in drawing up the terms of the agreement in writing, but when they undertook to put their supposed understanding in writing, they found there were many important matters upon which the minds of the contracting parties had not met. There can be but little, if any, doubt that the defendant did not consider himself bound until the papers should be signed. When he said, 'Go on with the work; I must have the organ by September 29th, or not at all,' he meant, if they could agree upon all the terms of the contract and have them reduced to writing and signed, they might, at their own risk, go on with the work, but he must have a written agreement. They saw proper to take the risk, and, as no such contract was ever reduced to writing, the defendant is not liable for the work done on the hope that such an agreement would be consummated.

"The case of Brown *v.* Finney (3 P. F. S. 373), and Maitland *v.* Wilcox (17 Pa. St. R. 231), are authorities for this view.

"I think the clear intention on the part of the defendant was, that he should not he bound until all the terms of the contract were settled, and reduced to writing and signed by the parties. Such a contract could not become binding on either party until signed. If he should, for no sufficient reason, refuse to sign it when tendered to him, the defendant might be liable, but that is not the present case.

"The motion to take off the nonsuit is refused."

Plaintiffs thereupon took this writ, assigning for error the refusal of the Court to take off the nonsuit.

Ward R. Bliss and *George B. Lindsay*, for plaintiffs in error.

The evidence shows that the terms of the contract were substantially agreed upon. The specification of the kind of organ, the time of finishing it, the penalty for not finishing it within the stipulated time, and the terms of payment under the contract were fixed upon. But no work was done until the defendant said, "Yes, go on with the building of the organ." Then there was the *aggregatio mentium* requisite to make the contract valid. The matters in controversy were purely immaterial. The question here is where parties enter into a verbal contract, and it is agreed that the terms of the contract shall be reduced to writing, but without ever reducing them to writing, both parties go on under the contract, the one directing and the other performing the work, is there a binding contract. Where the acts and declarations of the parties show that they intended the agreement to be in operation before execution, and without regard to the writing, they are bound.

Maitland *v.* Wilcox, 5 Harris, 234.

If a contract is entered into, and the terms agreed upon, and it is understood that it shall be reduced to writing, and the parties perform the agreement, or one of them without the objection of the other, enters upon the performance of the contract, the contract, unless of the character required by the statute to be in writing, will be as binding as if reduced to writing as agreed upon.

Miller *v.* McManis, 57 Ill. 126.
Paige *v.* Fullerton Woollen Co., 27 Vt. 485.
Riggins *v.* R. R. Co., 73 Mo. 598.
Montagu *v.* Weil, 30 La. Ann. Part I. 50.
Fredericks *v.* Fasnacht, 30 La. Ann. Part I. 117.
Peck *v.* Miller, 39 Mich. 594.
Smith *v.* Hughes, L. R. (6 Q. B.) 597.

There is a complete *aggregatio mentium* within the principle in—

Campbell *v.* City of Philadelphia, 10 WEEKLY NOTES, 221.

The written agreement was merely incidental to the contract, which the defendant wanted for the purpose of filing among the records of the church.

V. Gilpin Robinson, J. O. McGeoghegan, and *Crawford & Dallas*, for defendants in error.

The question here is, was there a contract? The defendant repeatedly insisted that there should be a written agreement, which the evidence shows was to be an essential part of the contract. The words, "Go on with the building of the organ," meant no more than settle the details and let us go to work as soon as possible. If the plaintiff went to work he did so at his own risk. If the reasonable interpretation of an alleged offer and acceptance shows that something material, as between the contracting parties, is left to be afterwards arranged, and the mind of the defendant never assented to all the terms proposed, never was at one with the mind of the plaintiff, there would be no agreement between him and the plaintiff, for breach of which an action would be maintainable—

Wistar's Appeal, 30 Sm. 495.

A mere expectation such as this, is clearly distinguishable from a contract. There are two controlling principles, either of which are applicable here. (1) Without reference to a reser-

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vation or to a written agreement, if upon a substantial matter, as to terms, price, etc., the minds of the parties to the contract do not agree, there is no contract, and (2) if upon every term of the contract their minds do agree, if either party stipulates for a written specification, in the absence of a written agreement there is no contract.

Here the evidence shows there was no agreement at any time. Even if there is an agreement on all subjects of the contract, if one of the parties say there is something still to be done, there is no contract.

Brown *v.* Finney, 3 Sm. 378.
Maitland *v.* Wilcox, 5 Harris, 232.

February 25, 1884. THE COURT. This judgment is affirmed by a divided Court.

PER CURIAM.

Jan. '84, 214. February 7, 1884.

Erie Dime Savings and Loan Co. v. Vincent.

Executors and administrators—Real estate—Decedents' estates — Orphans' Court—Act of March 29, 1832—Act of June 16, 1836.

An action on the case will not lie by a creditor against an executrix of a decedent for a failure on the part of the latter to exercise promptly a discretionary power to sell real estate given her in the will, whereby injury accrues to the plaintiff.

The fact that the whole residuary estate in such case is devised and bequeathed to the executrix does not vary or enlarge her liability.

The Orphans' Court has full jurisdiction and sole authority to hold the executrix of a decedent to account for the performance of a testamentary trust vested in her to sell real estate.

Error to the Common Pleas of Erie County.

Case, by the Erie Dime Savings Company against Anna M. McNulty (formerly Parsons), executrix of James W. Parsons, deceased, for negligence and malfeasance in the discharge of her duties as executrix. After suit brought the defendant died, and her executor, John P. Vincent, was substituted as a party defendant.

On the trial (the case being tried without a jury) BROWN, P. J., found the following facts:—

The defendant's testatrix was the widow of Jas. W. Parsons, who died in January, 1873, in the city of Erie, known as the Malt House property, which was incumbered with a mortgage, in favor of the Keystone National Bank of Erie, for the sum of $20,000, with interest from September 24, 1869, and which was the first lien. It was also incumbered by a judgment in favor of the Erie Dime Savings and Loan Company for the sum of $13,653.26, which judgment was second in the order of the liens, and following which were divers mechanics' liens.

Parsons had no real estate other than the Malt House property.

By his will his executrix was empowered to sell the Malt House property, to make the necessary deeds to convey the same, and to fix, in her discretion and judgment, terms of sale.

Had the executrix sold the property, as she had the opportunity to do soon after the granting of letters testamentary, sufficient funds would have been realized to pay the mortgage of the Keystone Bank, and the whole, or, at the least, several thousand dollars on the judgment of the Erie Dime Savings and Loan Company, but the executrix refused to exercise the power of sale contained in the will. She also took defence to the mortgage of the Keystone National Bank, and to proceedings on the judgment in favor of the Erie Dime Savings and Loan Company, the effect of which was so to delay a judicial sale of the before mentioned real estate that when such sale was made, viz., in 1877, the plaintiff realized much less than would have been realized had the sale been made soon after the issuing of letters testamentary.

Pending the delay occasioned by the refusal of Mrs. Parsons to sell under the power contained in the will and by the defences and obstacles interposed, especially to the proceedings on the mortgage of the Keystone Bank, Mrs. Parsons, as residuary devisee, was in the receipt of the rentals of the Malt House property, aggregating several thousand dollars. Although she may have had a motive for her delay, and although her personal interest was thereby promoted, there is nothing in the evidence that satisfies the Court that she was acting otherwise than upon the conviction that the interest of all parties interested would be promoted by delay. She acted under the advice of counsel.

As early as April, 1873, it "satisfactorily appeared" to Mrs. Parsons, executrix, that the personal estate of her deceased husband was wholly insufficient to pay his debts; the deficiency being somewhat in excess of thirty

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sell under the Act of Assembly for the payment of debts. By the delay not only did the real estate when sold upon execution in 1877 bring less than could have been realized in 1873, but by the accumulation of interest on the prior lien of the Keystone Bank, and the entry of two municipal claims in favor of the city of Erie for the construction of pavement and sewer (which by law took precedence of the other liens) the Erie Dime Savings and Loan Company received from the proceeds of the Malt House property several thousand dollars less than it would have received had the sale been consummated in the summer of 1873. The plaintiff brings this suit and claims to recover damages for the loss sustained.

From the facts thus found the Court decided that the refusal of the defendant to exercise the discretion given her by the will did not give a cause of action. Judgment was therefore entered for the defendant.

Plaintiff thereupon took this writ, assigning for error the entering of judgment for the defendant.

Henry Souther (*E. L. Whittelsey* with him), for plaintiff in error.

Mrs. Parsons was trustee for the creditors, and bound to act for their interest.

Scott, Intestate Law, 549.
Wood's Estate, 1 Ashmead, 314.
Robinett's App., 12 Cas. 188.

The trustee cannot postpone the sale arbitrarily for an indefinite period, even if the power is "to sell at such time and in such manner as he shall think fit."

Perry on Trusts, 771.
Walker *v.* Shore, 19 Vesey, 391.
Hawkins *v.* Chappell, 1 Atk. 623.
Act Feb. 24, 1834, s. 20, Pur. Dig. 427.
Walker's App., 1 Grant, 431.

It is no excuse that she acted under the advice of counsel.

Weiting *v.* Nissley, 1 Harris, 650.
Gilbert's App., 28 Smith, 266.
Smith's Est., 14 WEEKLY NOTES, 93.

It being a universal principle that he who injures another by neglecting to do his duty, is liable to compensate the injury, it follows that if an executor omit to sell property when it ought to be sold, whereby a loss occurs, he is liable.

Railroad Co. *v.* Hughes, 1 Jones, 145.
Perry on Trusts, sec. 845.
Calhoun's Est., 6 Watts, 188.
2 Redfield on Wills, 395.
2 Addison on Torts, 1,130.

John P. Vincent, P. P., for defendant in error.

The facts as found by the Court, do not make out any "unfaithfulness to her trust," nor any "wasting, mismanaging, or jeopardizing of the estate."

Parson's App., 1 Nor. 465.

The Court will not allow the plaintiff to gain in the Common Pleas what could not have been accomplished in the Orphans' Court, which, in this case, was the proper tribunal.

Dundas's App., 14 Smith, 325.
Finney's App., 1 Wright, 323.

The English authorities cited in support of plaintiff's second point cannot stand in Pennsylvania since the decision in Parsons's Appeal.

George W. Biddle, in reply.

Neglect of duty by an executor will render him *personally* liable in a common law suit; moreover the Orphans' Court could have no jurisdiction.

Torr's Est., 2 Rawle, 250.
Moulson's Est., 1 Brewster, 296.
Robinson's Est., 12 Phila. R. 170.
McBride's App., 22 Smith, 484.
Ryan's Est., 35 Leg. Int. 431.
Myer's Est., 9 Phila. R. 310.

The judgment of the Court in Parsons's Appeal, does not preclude the plaintiffs from pursuing this action; because (1) that case was decided principally upon the ground that the persons seeking to remove the executrix had been guilty of laches in asserting their claims, and (2) a very important item of injury to the plaintiff accrued subsequently to that case.

The learned Judge below finds the facts substantially with the plaintiff; but he *infers* from them that there was no malicious or selfish motive on the part of the executrix. Such a *deduction* from facts, being the result of reasoning, is subject to revision in this Court.

Babcock *v.* Day, Leg. Int., Feb. 1, 1884, p. 45.

February 25, 1884. THE COURT. This is an action on the case against the defendant as executor of Mrs. McNulty, formerly Parsons, for her negligence and malfeasance as executrix of the last will and testament of James W. Parsons, deceased. The main ground of complaint is that she did not, within a reasonable time after his death, as surviving executrix of his estate, sell his real estate and apply the proceeds on judgment liens on the property, of which the plaintiff held one.

The will of Mr. Parsons declared: "I also authorize and empower my executor and executrix to sell my Malt House property, and any and all other real estate, of which I may or shall die seised or possessed, and make all needed deeds to grant and convey the same, and to fix at their discretion and judgment terms of sale, prices and purchasers."

After a specific bequest of personal estate, he gave all the residue of his property to his wife, and named her as executrix. By reason of her alleged unreasonable delay in making sale of the real estate, the plaintiff in error and others, creditors of her deceased husband, applied to the

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Orphans' Court to remove her as executrix. The decree of that Court came before us for review in Parsons's Appeal (1 Norris, 465). The questions there ruled bear directly on those presented in the present case.

It was held that, in case of undue delay in the sale of the real estate of a decedent, the proper remedy for a lien creditor to enforce a sale, was under the Act of 29 March, 1832, by petition to the Orphans' Court; and that delay in making sale for the payment of debts by an executrix, who had discretionary power of sale under the will, furnishes no just cause for her removal.

In the present case the plaintiff seeks to recover on substantially the same facts that were shown in the case cited. If the plaintiff has any remedy for alleged misfeasance or negligence of Mrs. Parsons, as executrix of her husband's will in the care and management of his estate, the proper place to seek that remedy is in the Orphans' Court. The power given and the trust committed to her are both *virtute officii*. The trust is not given to her by name, but as executrix. Then not only has the Orphans' Court full power to charge and surcharge her for dereliction of duty as such executrix, but it has sole jurisdiction of the testamentary trust imposed upon her (Innes's Estate, 4 Whart. 184; Brown's Appeal, 2 Jones, 333; Wapple's Appeal, 24 P. F. S. 100.) There and there only is her liability under the trust to be settled and determined. The ground on which the plaintiff seeks to maintain this action arises from the facts that it was a creditor of the testator, and that she, as his executrix, did not properly discharge her duty and trust, but was derelict therein, and mismanaged the estate to the injury of his creditors, of whom the plaintiff was one.

Section 2, of the Act of 29 March, 1832, declares the Orphans' Court "to be a court of record with all the qualities and incidents of a court of record at common law." Section 19 of the Act of 16 June, 1836 (Purd. Dig., 1104, pl. 8), declares "the jurisdiction of the several Orphans' Courts shall extend to and embrace," *inter alia*, "all cases within their respective counties wherein executors, administrators, guardians, or trustees may be possessed of or in any way accountable for any real or personal estate of a decedent."

These Acts and the enlarged powers and jurisdiction given to the Orphans' Court, make the case of Torr's Estate (2 Rawle, 250) and kindred early authorities, based on the then limited powers of the Court, inapplicable now. While it has not the general jurisdiction of a Court of Equity, yet within the sphere of its jurisdiction, it is essentially such in its proceedings and in its decrees. (Culbertson's Appeal, 26 P. F. S. 145.)

Although Mrs. Parsons was the residuary devisee, yet that fact does not aid the plaintiff. The claim to recover does not rest on any breach of her personal agreement to sell the property. No sale which she could have made as devisee would have divested the liens, or passed a title of any value to the purchaser. It was by virtue of the trust and her power as executrix that a sale by her would have aided the plaintiff. It is only by her delaying so to sell that any creditor of her husband's estate was injured.

It follows there was no error in entering judgment in favor of the defendant.

Judgment affirmed.

Opinion by MERCUR, C. J. E. A. B.

Jan. '83, 334. February 6, 1884.

Apple v. County of Crawford.

Constitutional law—Constitution of Pennsylvania, Art. III. Sect. 13—Sheriffs—Act of April, 11, 1856—Act of March 5, 1858—Act of April 8, 1867—Act of June 4, 1879.

Where it is the official duty of a sheriff to board the prisoners in the county jail, the sum secured to him by law as compensation for this service is an "emolument" within the meaning of the Constitution of Pennsylvania, Article III. Section 13, which cannot be increased or diminished during his term of office.

Where at the beginning of a sheriff's term of office his compensation for boarding prisoners in the county jail is fixed by law at a certain rate per diem, the law cannot be so altered during the sheriff's term of office as to make his compensation for said service rest in the discretion of a majority of the Judges of the Court of Quarter Sessions.

Error to the Common Pleas of Crawford County.

Case stated, wherein Andrew G. Apple was plaintiff and the county of Crawford defendant. The following facts appeared from the case stated:

Andrew G. Apple was duly elected sheriff of Crawford County, in November, 1878, and entered upon the duties of his office on the 6th day of January, 1879. He performed the duties of said office in said county for the years 1879, 1880, and 1881, being his full term.

By the provisions of the Act of April 8, 1867 (P. L. 909), the county of Crawford was required to pay the sheriff the sum of fifty cents per day for boarding each prisoner or other person confined in the jail of said county. By the provisions of the Act of June 4, 1879 (P. L. 82), the Act of 1867 was repealed. For the year 1879 the county paid to the sheriff fifty cents per day for all persons confined in jail as required by the Act. For the year 1880 the defendant

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paid the plaintiff $1896.07, at the rate of $2.50 per week, that being the rate fixed by the Court of Quarter Sessions of said county prior to the passage of the Act of 1867, under the provisions of the Act of March 5, 1858 (P. L. 70), and for 1881 the defendant paid the plaintiff the sum of $1351.42, being at the same rate, $2.50 per week.

If the plaintiff was entitled to receive from the defendant for boarding prisoners in the county jail the sum of fifty cents per day, for each prisoner for the years 1880 and 1881, then there was due the plaintiff for the year 1880 the sum of $758.93, on which interest was claimed from January 1, 1881, and for the year 1881 the sum of $540.50, on which interest was claimed from January 1, 1882. If the Court was of the opinion that the plaintiff was entitled to the sum of fifty cents per day for the boarding of prisoners for the years 1880 and 1881, then judgment was to be entered for the plaintiff in the sum of $1412.01, which included interest to January 1, 1883. Otherwise judgment was to be entered for defendant.

The Court, CHURCH, P. J., entered judgment for the defendant on the case stated; whereupon the plaintiff took this writ, assigning for error the entering of judgment in favor of the defendant.

W. R. Bole (with whom was *H. L. Richmond, Jr.*), for plaintiff in error.

The price fixed by law at the time the plaintiff became sheriff of Crawford County, for the discharge of his various duties, including the boarding of prisoners confined in the jail, was, we contend, the salary and emoluments that he was entitled to receive during his term. This compensation, however made up, constituted his salary and the emoluments of his office, and cannot be increased or diminished during his term of office.

James W. Smith, for defendant in error.

The sheriff was a mere disbursing agent, a trustee of the funds, to invest them in the food for the prisoners. The Court regulated the amount according to the price of food products, and having regard to a proper prison fare. Manifestly it would be a breach of duty on the part of the sheriff to starve the prisoners that he might pocket the allowance. And it is submitted that the appropriation of any part of said allowance to his own profit would differ only in degree from the appropriation of the whole, and would be equally a breach of duty.

Restrictions upon legislation are not to be extended by implication, and the Legislature has power to abolish an office during the term of the holder.

Donohugh *v.* Roberts, 11 WEEKLY NOTES, 186.

In order to justify a Court in pronouncing an Act of the Legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. Where there is any doubt it should be resolved in favor of the constitutionality of the Act.

Commonwealth *ex rel.* Wolf *v.* Butler, 3 Out. 535.

February 18, 1884. THE COURT. The plaintiff, Apple, was elected sheriff of Crawford County in November, 1878, and entered upon the duties of his office on the 6th of January, 1879. He served his full term of three years, 1879, 1880, and 1881, performing the duties of his office during the entire period. It was one of the duties of his office to board the prisoners of the county. The compensation to be paid for the performance of this duty was regulated from time to time by Acts of Assembly, passed for that purpose. Thus, by Act of 11th April, 1856 (P. L. 314), it was enacted that the compensation should be fixed by the Court of Quarter Sessions of the respective counties. By the Act of 5th March, 1858 (P. L. 70), the Act of 1856 was repealed as to the counties of Erie and Crawford, and it was provided that the compensation should be fixed by a majority of the Judges of the Court of Quarter Sessions, provided it should not exceed two dollars and fifty cents per week. By Act of 8th April, 1867 (P. L. 909), it was enacted that from and after the passage of this Act the County Commissioners of Crawford County shall pay to the sheriff of said county the sum of fifty cents per day for boarding each prisoner or other person confined in the jail of said county. This was the law in force when Sheriff Apple was elected, and under it he was paid according to its terms for the boarding of prisoners during the year 1879. By an Act passed June 4, 1879, the Act of 1867 was repealed, and this restored the Act of 1858, under which the county paid the sheriff two dollars and fifty cents per week for each prisoner during the years 1880 and 1881. The difference between that sum and three dollars per week is claimed in the present proceeding. The question arising is whether the compensation fixed by the law of 1867 was such an emolument of the plaintiff's office of sheriff as that it could not be diminished by the law of 1879, which was passed during his term. We think it was. Section 13 of Article III. of the Constitution provides that "No law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment." That the sheriff is a public officer coming within the operation of this constitutional provision cannot be doubted. The boarding of the prisoners was certainly one of his official duties imposed upon him by law. For the performance of this duty he was entitled to receive a compensation which was definitely

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fixed by law at the time of his election. While this compensation could hardly be called a salary, it seems to us that it is included within the larger and broader term "emolument." In Webster's Unabridged Dictionary, the word "emolument" is thus defined: "The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain; public or private." We think the word imports more than the word salary or fees, and because it is contained in the Constitution in addition to the word "salary," we ought to give it the meaning which it bears in ordinary acceptation. By the definition above given it imports any perquisite, advantage, profit, or gain arising from the possession of an office. The service which it compensates is official service, and is compulsory. If the amount fixed be an insignificant sum it would constitute a serious objection to an acceptance of the office, whereas if it be sufficient to afford a moderate profit, it would constitute an inducement to the citizen to accept the office. It enters, therefore, probably quite as much as salary or fees into the considerations which determine the acceptance or rejection of the official position to which it is annexed. Why should it not be protected as well as salary or fees? If the amount of this compensation is to be determined at the mere arbitrary discretion of the Judges of the Quarter Sessions, they may make the amount so low as to entail pecuniary loss upon the official, and thus deprive him of all benefit of his office. So far as the constitutional protection is concerned, we can see no difference between this portion of the profit of the office and that which is represented by the salary or fees which belong to it. We are of opinion, therefore, that the plaintiff was entitled to a continuance of the same compensation which he agreed to receive by accepting the office of sheriff, as it was fixed by law at the time of his election, and that the law of 1879 is inapplicable to his case.

The judgment of the Court below is reversed, and judgment is now entered in favor of the plaintiff on the case stated, for $1412.01, with interest thereon from January 1, 1883, and costs.

Opinion by GREEN, J. H. P.

Jan. '82, 399. February 19, 1883.

Winton v. Freeman.

Fraud—Judgment note—Consideration—Estoppel.

Where an insolvent debtor in fraud of his creditors assigns his property to a third person, taking from him judgment notes for the value thereof, and subsequently assigns one of said judgment notes as collateral security to a creditor who has knowledge of the fraud, the maker of such note cannot set up the fraud as a defence in an action brought against him by the creditor thereon.

The mutual fraud of the parties constituted sufficient consideration in the above case for the note in suit.

Error to the Common Pleas of Lackawanna County.

Judgment was entered on a judgment note against Oscar F. Freeman, in favor of W. W. Winton for $2500. Subsequently a rule to show cause why judgment should not be opened, was made absolute, and an issue was awarded to test the validity of the judgment.

On the trial, before HANDLEY, P. J., the following facts appeared: In 1877, C. W. Freeman, a jeweller, of Scranton, was insolvent. With intent to defraud his creditors, he transferred the stock in his store to the defendant, Oscar F. Freeman, and took from him four judgment notes of $2500 each. The Second National Bank of Scranton was one of C. W. Freeman's creditor, and, to protect it, he assigned one of the said judgment notes as collateral security to W. W. Winton, the president of said bank. Said note was entered of record, and the judgment obtained thereon was afterwards marked to the use of said bank. Evidence was introduced by the defence, but contradicted by the plaintiff, to show that said Winton had knowledge of the intended fraud upon creditors at the time he received the said note.

The Court charged the jury, *inter alia*, as follows: "But, as I have already said to you, if you find from the evidence in this case that Oscar F. Freeman did actually state why this sale was made, or why the note was given, and the purpose of it, and in this way brought home knowledge to the officers of the Second National Bank, and they, after obtaining that knowledge, accepted this note, then they became a party to the fraud, and hence they cannot collect this note."

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fraudulent transaction. He who commits fraud will not be relieved from the consequences of his acts.

Hershey *v.* Weiting, 14 Wright, 244.
Evans *v.* Dravo, 12 Harris, 63.
Blystone *v.* Blystone, 1 Smith, 374.
Hendrickson *v.* Evans, 1 Casey, 444.

F. L. Hitchcock (*Ward* and *Horn* with him), for defendant in error.

If the original transaction was fraudulent as alleged, the bank was in *pari delicto*, having full knowledge of all the circumstances.

Montefiori *v.* Montefiori, 1 Wm. Bl. 363.
2 Schouler on Personal Property, pp. 643–645.
Tracy *v.* Talmage, 14 N. Y. 162.

No consideration was given by the original parties for the note, therefore there can be no recovery.

Bay *v.* Coddington, 5 Johnson's Ch. R. 54.
Selden *v.* Neemes, 7 Wright, 421.
Bronson *v.* Silverman, 27 Smith, 94.
Stalkee *v.* McDonald, Redfield & Bigelow Lead. Cas., Bills and Notes, 169.
Kirkpatrick *v.* Muirhead, 4 Harris, 123.
Petrie *v.* Clark, 11 S. & R. 377.
Walker *v.* Geisse, 4 Wharton, 258.
Depeau *v.* Waddington, 6 Id. 220.
Ayres *v.* Wattson, 7 Smith, 360.
Bank of Mt. Pleasant's App., 33 Leg. Int. 453.
Wolf *v.* Finks, 1 Barr, 435.
Brown *v.* Jackson, 2 Wash. C. C. R. 24.
Parker *v.* U. S., 1 Peters C. C. R. 262.

March 26, 1883. THE COURT. This was an issue in the Court below to test the validity of a judgment entered upon a note given by Oscar F. Freeman, defendant in error, to C. W. Freeman, and by the latter assigned to W. W. Winton for the Second National Bank of Scranton. The bank claimed to hold it as collateral for the indebtedness of C. W. Freeman.

The note was one of a series of four notes of $2500 each, and it was not denied that they were collusively given to hinder and delay the creditors of C. W. Freeman. After the note in controversy had been transferred to the bank, the two Freemans became alarmed at the possible consequences of the fraud, and, as far as was in their power, traded back, to use their own expression, and three of the notes were surrendered to Oscar F. Freeman. The bank, however, did not surrender the note in controversy, and the defendant applied to and obtained a rule in the Court below to open the judgment, and this issue was framed to try the question of its validity. The jury, under the rulings of the Court, returned a verdict for the defendant.

It is settled by numerous authorities, that there is no more binding consideration known to the law than the mutual fraud of the parties. The books are full of cases where a party to the fraud has sought relief in the Courts from the consequences of his unlawful act, but the decisions have been uniformly adverse to such applications. It is not the province of the law to help a rogue out of his toils. The rule is to leave the parties where it finds them, giving no relief and no countenance to contracts made in violation of statutes. (Hershey *v.* Weiting, 14 Wright, 240; Evans *v.* Dravo, 12 Harris, 62.) It follows that the defendant would have no defence to this note as against C. W. Freeman, the obligee or payee. The learned Judge of the Court below, however, was of opinion, and so instructed the jury, that if the bank had knowledge of the fraud and afterwards took the note, it became a party to the fraud and could not recover. The fallacy of this ruling is obvious. The note is good as between the parties, for the reason that the maker cannot set up his fraud as a defence. If he cannot set it up against the payee, neither can he set it up against the bank, and the inquiry whether the bank had knowledge of the fraud was wholly irrelevant.

Nor does the question of a failure of consideration arise in the case. There never was any *bona fide* consideration given for these notes. The transaction was a fraud, the object of which was to hinder and delay the creditors of C. W. Freeman. There never was a delivery, actual or constructive, of the goods for which the notes were supposed to be given, nor was it intended that there should be. Had there been no fraud, the failure of consideration could have been inquired into. But just here the law steps in and says that the intended fraud is a binding consideration, and that, although Oscar F. Freeman received no benefit whatever for the note, he cannot be allowed to impeach it on that ground. This may seem hard, but it is just. The rule is founded upon the highest considerations of public policy, and must be sternly enforced in order to keep men honest.

If the bank had agreed to the rescission of the arrangement between the Freemans and had cancelled or surrendered the note the case would have been different. But it did neither. There was no evidence to submit to the jury that it surrendered the note as agreed upon a sufficient consideration to do so. The jury should have been instructed to find a verdict for the plaintiff.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J.

GREEN and CLARK, JJ., absent. H. J. S.

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Common Pleas—Law.

C. P. No. 3. March 24, 1884.

Johnston v. Given et al.

Conspiracy to imprison—Lunacy—Finding of an inquest—Evidence in a collateral proceeding to contradict the finding—Confirmation of the inquest by subsequent petition for restoration and decree—Petition by alleged lunatic after discharge from an asylum—Effect of such petition.

Sur rule to take off nonsuit, and for a new trial.

Case, by Amelia G. Johnston against Robert A. Given, M.D., Jacob M. Gemmill, M.D., Paul Graff, and Rebecca I. V. Graff, for conspiracy to imprison the plaintiff in an asylum for the insane.

Upon the trial, before YERKES, J., the following facts appeared: In October, 1865, the plaintiff was confined by her husband, now deceased, and her sister, Rebecca I. V. Graff, and Paul Graff, in the private insane asylum of Dr. Robert A. Given. This action was taken on the advice and with the aid of Dr. Jacob M. Gemmill. The plaintiff was discharged in October, 1866. In February, 1867, she was placed in the Pennsylvania Hospital for the insane. In 1868, her husband died, leaving an estate. In July of that year, at the instance of the plaintiff's mother, proceedings in lunacy were commenced, and the inquisition returned was "that at the time of taking this inquisition (August 3, 1868), Amelia Johnston is a lunatic, and hath been so for about four years past, and that she has no lucid intervals." This finding was not traversed. In 1869 the plaintiff was discharged, and in 1874, she petitioned the Court to supersede the commission of lunacy. The petition set forth, *inter alia*, the following:—

Your petitioner further says she is of sound mind, memory, and understanding; is entirely able, and does conduct herself with personal safety to herself, and is fully capable to manage, conduct, and dispose of her own affairs.

Your petitioner therefore prays your Honorable Court, that the inquisition and report of the commissioners filed as aforesaid, together with the approval and confirmation thereof by the Court, and the appointment of James Trimble committee of the person and estate of petitioner, and all proceedings relating thereto, be

"And now, to wit, March 20, A. D. 1880, on motion of John H. Colton, Esq., attorney for the said Amelia G. Johnston, the said report of Robert N. Wilson, Esq., Master, is confirmed absolutely; and, upon consideration of the petition of the said Amelia G. Johnston, filed February 14, A. D. 1874, setting forth that she is restored to a sound state of mind, the Court having taken proofs of the facts, and being satisfied of the truth of the allegations in the said petition, do order that the commission issued in this case, and the appointment of the committee, and all proceedings relating thereto, be altogether superseded and determined."

At the trial, after the plaintiff's own evidence had closed, the counsel for plaintiff gave in evidence without objection, the record of the proceedings in lunacy taken in 1868, and the finding of the jury as above. He then offered in evidence depositions of witnesses to prove that in 1865 and 1867 the plaintiff was of sound mind. Counsel for defendants objected to the testimony because it contradicted the finding of the inquest, and objected to any testimony as to plaintiff's mental condition during the period included in the finding of the jury of inquest and the decree of the Court confirming the same. Objection sustained.

Counsel for defendants then moved for a nonsuit, which was granted, and nonsuit entered. Whereupon the plaintiff having obtained this rule filed, *inter alia*, the following reason:—

The learned Judge erred in rejecting the plaintiff's offer of evidence to show that the condition of the mind and body of the plaintiff at the time when she was imprisoned by the defendants, did not justify their restraint of her liberty.

Robert H. McGrath, *Wayne MacVeagh*, and *Wm. S. Lane* showed cause.

It is submitted that the decree of the Court upon the finding of the jury of inquest, that the plaintiff was a lunatic in 1868, and had been so since 1864, is conclusive until reversed or set aside by traverse, and the plaintiff is precluded from denying its correctness in this proceeding.

Said record and decree is the plaintiff's own evidence. It is a solemn judgment of the Court that she was a lunatic from 1864 to 1868, and remains uncontradicted. It has not been traversed nor set aside. The plaintiff has admitted its correctness by alleging in her subsequent proceedings that she has been restored to reason, and is estopped from denying its conclusiveness.

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tracts made during its continuance (sect. 65). The original judgment, therefore, stands without reversal, and has the same validity, and is as conclusive against the plaintiff for the periods mentioned as any other judgment against her would be.

It is a rule now universally recognized that a judicial judgment may not be collaterally attacked except for fraud.

Wilson *v.* Gaston, 11 Norris, 215.

Decrees of the Orphans' Court are as conclusive as judgments at law.

Herr *v.* Herr, 5 Barr, 428.

So are decrees in equity.

Westcott *v.* Edmunds, 68 Penn. St. 34.
Hunter's Private Road, 46 Penn. St. 250.
Taylor *v.* Cornelius, 60 Penn. 187.

So is an award of arbitrators unappealed from.

Lamb *v.* Miller, 18 Penn. St. 450.

We believe no case can be found in which the record of an inquest under a commission of lunacy has been permitted to be contradicted by parol evidence in a collateral suit.

This decree of insanity is set up by the plaintiff herself; she cannot contradict her own testimony, and she is estopped from denying the correctness of the finding by her subsequent admission under oath that she has been restored to a sound state of mind.

Gordinier's Appeal, 8 Norris, 528.

John H. Colton (*W. W. Weigley*, and *Benjamin Harris Brewster* with him), for the rule.

It seems to be settled by the authorities that an inquisition finding that a party is a lunatic, even when not superseded, is only *prima facie* evidence of insanity; and merely changes the presumption of the law in favor of sanity.

Noel *v.* Karper, 3 P. F. Smith, 97.
1 Wharton's Law of Evidence, s. 403.
Willis *v.* Willis, 2 Jones, 159.
McGinnis *v.* The Commonwealth, 24 P. F. S. 248.
Klohs *v.* Klohs, 11 P. F. Smith, 245.
Miskey's Appeal, 40 Leg. Int. 414.
Starkie on Evidence (9th ed.), 379, 406.
Hutchinson *v.* Sandt, 4 Rawle, 234.
Sill *v.* McKnight, 7 W. & S. 244.
Rogers *v.* Walker, 6 Barr, 371.
In re Gangwere's Estate, 2 Harris, 417.
Titlow *v.* Titlow, 4 P. F. Smith, 216.
Leckey *v.* Cunningham, 6 P. F. Smith, 371.
Lancaster County Bank *v.* Moore, 28 P. F. Smith, 407.
Estate of Charles Dyre (O. C.), 35 Leg. Int. 446.
In re Estate of Amelia G. Johnston (C. P. No. 3), 8 WEEKLY NOTES, 439.
Bowman *et al.* *v.* Van Baum *et al.*, 14 WEEKLY NOTES, 185.

Even if the plaintiff had been insane—even if it had been dangerous to suffer her to be at large, the defendants would have had no right to confine her, as they did, in the madhouse of the defendant Given from October 29, 1865, to October 11, 1866, and the Pennsylvania Hospital for the Insane from February 26, 1867, until July 25, 1868, without taking any measures for a legal ascertainment of her mental condition, without attempting to obtain the sanction of any Court. and without a compliance with any of the requirements of the law.

Colby *v.* Jackson, 12 New Hampshire Rep. 526.

Eo die. THE COURT. Since the alleged lunatic has affirmed the proceedings by which she has been confined, she cannot now be allowed to recover damages from those who procured her confinement.

Rule discharged. A. B. W.

C. P. No. 3. March 5, 1884.

Freeman v. Brunswick.

Executors—Individual liability of one of two executors upon a contract made by him on behalf of the estate—Auctioneer's charges and commissions—Measure of damages.

Sur motion by defendant for a new trial.

Assumpsit, by plaintiffs, who are auctioneers, against one of the executors of Sussman Blumenthal, deceased, to recover cost of advertising and commissions for the sale of decedent's real estate.

On the trial, before FINLETTER, J., plaintiffs gave evidence that there were two executors of the estate, Brunswick, the defendant, and one Bacharach; that at Brunswick's request the property was advertised for sale at public auction, at a limit of $6000. Brunswick asked plaintiff what would be the rate, and he told him $15 for advertising and one *per cent.* commission in case of sale. The property was advertised for sale, but was sold by the executors privately for $6000, prior to the day of sale named in plaintiff's advertisements.

Defendant, in order to show the value of plaintiff's services, and the measure of compensation therefor, offered to prove that while they ostensibly charge one *per cent.*, yet one-half *per cent.* is what they consider a sufficient compensation for their own services, the other half *per cent.* being appropriated by them to feeing the parties by whom the business has been placed in their hands. This offer the Court refused.

Defendant asked the Court to instruct the jury "that the defendant Brunswick is not liable under the evidence as an individual contractor, he having been executor jointly with another, and such fact being well known to, and in the view of, the plaintiffs when the bargain was made." *Refused.*

The jury found for the plaintiffs for the full amount claimed, and thereupon defendant moved

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for a new trial, assigning as reasons therefor, *inter alia*, the rejection of the offer of evidence and refusal of his point stated above.

Mayer Sulzberger, for the motion.

The plaintiffs' understanding of the contract was that it was made between themselves on the one part, and the two executors for the estate of Blumenthal on the other. They recognized it as such by printing the names of both executors on their advertising posters. The private sale of the houses by the executors involves no breach of contract. There is always existing the right of the owner to sell his own property.

[FINLETTER, J. Freeman testified that the sale resulted from what he did in advertising, and it was so left to the jury. The breach complained of is not that you sold the houses, but that you did not pay.]

Freeman's testimony was merely an argument that because he advertised, the houses were sold. He did not attempt to show any relation between himself, or his advertisement, and the purchaser.

It was error not to permit us to show that the customary value of such services as plaintiffs rendered, even when they accomplish a sale, was but one-half per cent, not one per cent. as claimed.

[FINLETTER, J. The fact that plaintiffs and others similarly occupied were in the habit of dividing commissions with persons who brought them business, would be no evidence to the jury of the value of their services. Lawyers and physicians frequently furnish gratuitous aid and advice, yet that fact would be no evidence upon which to base the value of similar services when charged for.]

C. A. V.

March 7, 1884. THE COURT. Rule refused.

A. M. B.

C. P. No. 4. March 29, 1884.

Nichols v. Brown & Co.

Affidavit of defence—Promissory note—Fraudulent circulation—Onus of proving that plaintiff is holder for value without notice—Note in firm's name issued in violation of agreement between partners.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, by Nichols, claiming to be a *bona fide* holder for value without notice, on two promissory notes signed by the firm of Wm. H. Brown & Co.

The affidavit of defence made by Jos. D. Conrow, partner of Wm. H. Brown, set forth that he was a special partner in the firm of Wm. H. Brown & Co., and that the plaintiff had actual notice of the fact; that Wm. H. Brown had covenanted, by the articles of agreement, not to issue or indorse any notes in the firm name; that the firm never received any value or proceeds from said notes, but that they were issued fraudulently and without any consideration whatever with the intention that the proceeds should be divided between Brown and the payee.

F. Swayne, for the rule.

Averments in an affidavit of defence that the note was made in violation of agreements are not sufficient to prevent judgment.

Bardsley *v.* Delp, 7 Norris, 420.

S. M. Walls, contra.

THE COURT. The fact averred in the affidavit throws the burden of proof upon the holder.

Rule discharged.

Per THAYER, P. J. S. H. T.

C. P. No. 3. February 2, 1884.

Stokes, Thompson & Co. v. Schlecht.

Attachment under the Act of March 17, 1869—What is fraudulent concealment—Threat of defendant to have a judgment entered up against him—Entry of such judgment—Loss upon sale under it.

Sur rule to dissolve attachment under the Act of March 17, 1869 (P. L. 8).

The depositions showed that the defendant, being in business difficulties, offered to settle with his creditors at fifty cents on the dollar on an indebtedness of $14,000. At the time he made this offer he told his creditors that in case they did not accept his proposition, he would have a judgment for $5000 against him entered up, and they might not get anything. His offer was refused. Judgment was entered up, and on the sale under it the stock brought $4000.

Ledyard showed cause.

The defendant's own admissions show that there is a fraudulent concealment of property. If he could afford to offer 50 per cent., and afterwards the property which was sold brought but $4000, there was a disappearance of $3000.

[LUDLOW, P. J. A mere threat to confess judgment if the creditors did not accept his terms was not sufficient to show fraud.]

[YERKES, J. There must be fraud in concealing property. Not merely in hindering and delaying creditors. You must here show something more than a mere confession and sale.]

This was a threat, and it amounted to a fraud.

Farley (*Archer* with him), for the rule.

Eo die. THE COURT. Rule absolute.

A. B. W.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, MAY 1, 1884.* [No. 21.

Supreme Court.

July, '83, 70. February 6, 1884.

Campbell v. Maple's Administrator.

Statute of Limitations—Attorney and client.

The claim of an attorney for professional services rendered in an action pending at the death of the client, becomes due at such time, and consequently the Statute of Limitations commences to run from that date.

The statute will not operate as a bar in proceedings in the Orphans' Court for the distribution of a decedent's estate. This is not so in actions at law. In the latter case it acts on the remedy and takes away the right of action unless suit is brought within the time limited by the statute; but it does not extinguish the debt, nor affect the trust created for its payment as long as the trust subsists.

Error to the Common Pleas of Fayette County.

Debt, by Edward Campbell, Esq., against Thomas H. Higinbotham, administrator of Robert Maple, deceased, to recover $125 for professional services rendered the decedent. The facts of the case as stated in the charge of the Court below (WILLSON, P. J.), were as follows:—

"This is an action brought by Edward Campbell against the administrator of Robert Maple, deceased, to recover for legal services rendered Mr. Maple in his lifetime. It appears from the evidence that Robert Maple died in February, 1872, and it further appears that this suit was not brought until May, 1881, a period of nine years after the death of Robert Maple, and under the view that we take of the law we instruct you that this suit was brought too late, and that the plaintiff therefore is not entitled to recover, and your verdict will be for the defendant."

Additional facts are stated in the opinion of the Supreme Court.

Verdict and judgment for defendant. The plaintiff thereupon took this writ, assigning for error the charge of the Court.

Edward Campbell, P. P. (with whom were *Morrow & Hertzog*).

The connection of the plaintiff in error with the case did not terminate until he delivered the papers connected with it to Mr. Higinbotham, the administrator of Maple, on the 14th of June, 1880, taking his receipt for them. The plaintiff in error had a right to accept that as the act of a person in authority in the place of Robert Maple, deceased, and to regard the contract for services begun in September, 1869, and continuing through the whole intervening time without interruption, as ending then. That his right to demand and sue for the balance in full of his compensation accrued then, and not until then, he thinks the following cases establish:—

Thompson *v.* Boyle, 35 Leg. Int. 243.
Freeman *v.* Shreve, 35 Leg Int. 164.
Mosgrove *v.* Golden, 40 Leg. Int. 201.
Stanton *v.* Embrey, 3 Otto, 557.

R. H. Lindsey, for defendant in error.

Under the familiar principle that the Statute of Limitations begins to run when the right of action is complete, it would seem clear that the Court below was right in directing the jury to find a verdict for the defendant in this case. That the plaintiff's only claim is for services rendered to Robert Maple in his lifetime is plain, not only from the evidence, but also from the form of the action. He would have no right to maintain an action against Mr. Higinbotham as administrator, except upon some contract, undertaking, or default of the intestate. If his claim is for services rendered upon any express or implied promises of the administrator, then the action should have been against T. H. Higinbotham, personally.

Grier *v.* Huston, 8 S. & R. 402.
Beeson *v.* McNabb, 2 Barr, 422.

The relation of attorney and client, therefore, having ceased to exist upon the death of Robert Maple, February 16, 1872, the statute immediately began to run, and all claims based on that relationship, not sued on before February 17, 1878, were barred by the Statute of Limitations.

February 25, 1884. THE COURT. The only question raised by the assignment of error is whether plaintiff's claim, in the nature of a *quantum meruit* for professional services rendered at the instance of Robert Maple, defendant's intestate, was barred by the Statute of Limitations. It appeared that in September, 1869, Maple retained plaintiff as his attorney, to defend an action of ejectment brought against him for a tract of land in Greene County, and paid him a retaining fee of $25. There is no evidence of any special contract in relation to the services to be performed, or the compensation to be paid therefor; nor does it appear that there was anything in the nature of a continuing contract, or undertaking coupled with such an interest as would extend it beyond the joint lives of the parties. The only contract relation between them was such as ordinarily exists between attorney and client, and hence, it ended with the death of the defendant's intestate, and might have been terminated before that event at the pleasure of either party.

The plaintiff, in connection with other counsel with whom he was associated, immediately took charge of the case and prepared the defence. It

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was brought to trial in 1871, and, after a protracted contest of several days, the jury failed to agree and were discharged. The case was afterwards continued from time to time, and is still pending and undetermined. In February, 1872, Robert Maple died, and defendant became one of his administrators. The writ of ejectment did not abate by reason of Maple's death. His inheritable interest in the land, if he had any, descended to his heirs-at-law, and they, if next in interest, might have been substituted as defendants according to the provisions of the Act of 1807 (Purd. 37, pl. 1). His administrators were not the persons next in interest, nor was it their duty, as his personal representatives, to defend the suit; and it does not appear that any substitution was ever made.

There is no question as to the meritorious character of plaintiff's claim. The services rendered by him to defendant's intestate were clearly shown to have been worth all that was claimed; but suit was not commenced until May, 1881, nearly nine years after the decease of Robert Maple, and the administrator has seen fit to interpose the Statute of Limitations. Under the facts and circumstances disclosed by the testimony, the learned Judge committed no error in charging the jury "that the suit was brought too late, and therefore the plaintiff is not entitled to recover." While it is true that in proceedings for the distribution of a deceased debtor's estate in the Orphans' Court, the statute is no bar to the claims of his creditors, it is otherwise in suits at law. In such actions, the death of the debtor does not, as a general rule, suspend the running of the statute, and hence his personal representatives may successfully interpose the bar of the statute in all cases to which it is applicable, and in which the cause of action accrued more than six years before the commencement of suit. (McClintock's Appeal, 5 Casey, 360; McCandless' Estate, 11 P. F. Smith, 9, and Campbell *v.* Fleming, 13 Id. 242.) The reason why the statute is pleadable in the latter and not in the former class of cases, is that it acts on the remedy and takes away the right of action, unless suit is brought within the time limited for its commencement, but it does not extinguish the debt, nor affect a trust created for its payment, as long as the trust subsists. In the case before us, the plaintiff's claim was undoubtedly barred by the statute, and the evidence is wholly insufficient to take the case out of its operation. The contract relation existing between plaintiff and defendant's intestate, was terminated by the death of the latter, and thereupon he had a right to demand a reasonable compensation for the services theretofore rendered.

Judgment affirmed.

Opinion by STERRETT, J. H. P.

Jan. '84, 147. February 4, 1884.

Wheeler v. Kidder.

Deed—Delivery—Fee simple—Gift from parent to child.

Where a parent purchases real estate and has the deed executed to a child no presumption of a resulting trust in himself arises.

A. purchased real estate and had the deed from the grantor drawn so as to pass the absolute title to his daughter B. with the reservation of the use of the premises to himself during the minority of B:

Held, that the delivery of this deed to A. was sufficient to pass the fee to B.

Held, further, that the gift to B. was the money paid for the land, and when the deed was executed and delivered to A. an estate passed to B. which could not be subsequently divested by a sale under a judgment against A., there being no evidence that A. intended to defraud his creditors by taking title in his daughter's name.

Error to the Common Pleas of Erie County.

Ejectment, by Caroline E. Wheeler against W. F. Kidder and Christiana Kidder for a tract of land in Union Township, Erie County.

On the trial, before GALBRAITH, P. J., the following facts appeared:—

On the 24th of November, 1864, E. M. Wheeler, who at the time resided with his family upon one of his farms in Crawford County, purchased for the sum of $2000 from Clark Shaver, for his daughter, Caroline E. Wheeler, then only six years of age, a farm of about eighty-five acres, situate in the county of Erie. The deed was executed and delivered on the 26th day of November, 1864. It was a warranty deed, and ran to "Caroline E. Wheeler, her heirs and assigns," with this provision, viz: "with the use of the said premises to E. M. Wheeler during the minority of the said Caroline E. Wheeler."

The deed was delivered by Shaver to E. M. Wheeler, and was retained by him until some time in July, 1879 (which was about four months after his daughter Caroline became of age), when it was delivered by him to a brother of Caroline, and was placed on record August 15, 1879. When the deed was executed it was read by the scrivener, J. D. Minniss, under the direction of E. M. Wheeler, as being executed to the said E. M. Wheeler.

Late in the fall of 1865, E. M. Wheeler made some heavy investments in oil territory at Pithole, which proved very disastrous, and he became financially embarrassed. On the 12th day of January, 1866, he borrowed of Gideon Mosier, a banker at Meadville, Pa., the sum of $8000, giving a judgment-note for the same. This judgment was afterwards entered up, and the farm in question was sold to Gideon Mosier on

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proceedings had thereunder. By various subsequent conveyances it came into the possession of W. F. Kidder. The evidence showed that E. M. Wheeler in November, 1864, when he purchased the farm in question, was in debt, but perfectly solvent. Caroline E. Wheeler testified that she never saw the deed until July, 1879.

The plaintiff presented, *inter alia*, the following point:—

"The delivery of the deed to E. M. Wheeler, on November 24, 1864, his daughter, the vendee, being at that time only six years old, was a sufficient delivery in law to her, he being her natural guardian and trustee."

Answer. This point is refused, as inapplicable to a case where the controversy is between creditors or the vendee of a purchaser at sheriff's sale and the intended beneficiary, the daughter, however it might be as between the father and the daughter on the question of the alleged delivery for her benefit.

The Court charged, *inter alia*, "Now you are instructed as a matter of law, that no title passed to the plaintiff by this transaction; that the taking of the deed in the name of the daughter, the father still taking and holding the possession of the property, and holding the deed, gave no title to her, and it was an unconsummated gift. There was no possession in her, and no handing or delivering of the deed to her, and no putting it upon record."

Verdict for defendant and judgment thereon. The plaintiff thereupon took this writ, assigning for error, *inter alia*, the refusal of his point and the charge of the Court as above.

L. S. Norton, for plaintiff in error.

Where a relationship exists, such as between a husband and wife, parent and child, or guardian and ward, a gift from the former to the latter need not be actually delivered to the latter, but may even be retained in the possession of the grantor, and yet be a valid and executed gift to the grantee.

Ray *v.* Simmons, 15 Am. Law Reg. 701.
Hillebrant *v.* Brewer, 6 Texas, 45.
Kerrigan *v* Rautigan, 43 Conn. 17.
Crawford's Appeal, 11 Smith, 52.
Foster *v.* Roberts, 34 Legal Intel. 96.
Malone's Appeal, 38 Leg. Intel. 303.
Newton *v.* Bealer, 41 Iowa, 334.
Bryan *v.* Wash, 2 Gilman, 557.

A deed takes effect from the time of its first delivery without regard to the time when it actually comes into the hands of the grantee, or even if it never does.

Benson and *Brainard* and *W. R. Bole*, for defendants in error.

E. M. Wheeler having purchased and paid for the land, though Caroline's name was put in the deed, there was a resulting trust to himself.

Jackson *v.* Matsdorf, 11 Johnson, 91.
Collins *v.* Collins, 2 Grant, 117.
Miller *v.* Hartle, 3 Smith, 108.
Harris *v.* Richey, 6 Smith, 395.
Moore *v.* Small, 7 Harris, 461.

February 18, 1884. THE COURT. The learned Judge of the Court below took this case and all the questions of fact involved in it from the jury, and directed a verdict for the defendant, upon the one ground that there was no delivery of the deed for the land in question to the plaintiff, and therefore she never had any title. We are of opinion that this was error. The deed conveyed the fee simple of the land to this plaintiff. She was then a child six years of age. The deed was executed on November 26, 1864, and passed the absolute title to Caroline E. Wheeler with this reservation, viz: "with the use of the said premises to E. M. Wheeler during the minority of the said Caroline E. Wheeler." This gave an estate to E. M. Wheeler, the father, in the land, during the minority of Caroline his daughter. The whole title of the grantor was divested, and no portion of it did or could return to him. He delivered the deed on the day of its execution to E. M. Wheeler, who was practically one of the grantees having an interest under the conveyance. He was entitled by virtue of that interest to the possession of the land during the minority of his daughter, and to the custody of the deed. Without doubt here was a complete and perfect delivery of the deed so far as the grantor was concerned. We are unable to understand what additional delivery was necessary in order to perfect the title of the daughter. The title of the father was but a paper title, and the same paper which gave him his title gave title also to the daughter. There is no question of any creditor's rights involved here, in this aspect of the case. The father's possession would lead to inquiry, and inquiry would at once reveal the nature of his interest and the daughter's title at the same time. As between the father and the daughter there was no necessity for any further delivery of the deed. He had paid the money for the land, and as it was for the benefit of a child no presumption of a resulting trust arose. Having an interest in the land under the deed he could receive and hold possession of the deed for both, and his possession of the instrument was also her possession. We cannot regard the transaction as inchoate as between the father and daughter. It was completed entirely when the land was conveyed by the execution and delivery of the deed. Had the title been made in fee simple to the father, and had he then executed a transfer to his daughter, there would be force in the position that a further act, by delivery, or at least, by putting on record, such transfer, would be necessary to complete the daughter's title. But here everything was done which was necessary to be done

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in order to vest the fee simple title of the grantor in the daughter; surely, the father could not divest the title of his daughter by any act of his. His gift was of the money which paid for the land, and when it was paid the gift was consummated and irrevocable. How then could he become clothed with his daughter's fee-simple estate? Not by way of resulting trust because that would not arise upon a mere presumption, as in the case of a stranger. Not by adverse possession, because the possession was not adverse but in accordance with the title. Not upon the theory of an unconsummated gift, because the father never owned the land, and never assumed to convey it, and there was no such thing as an incomplete conveyance in the case. His gift was of money and that was completed. In the present state of the record no question of fraud upon the creditors of the father arises, and hence nothing can be said on that subject. All the assignments except the first are sustained.

Judgment reversed and new *venire* awarded.

Opinion by GREEN, J. A. B. W.

Jan. '83, 318. February 14, 1884.

Patrick's Appeal.

Mortgage, assignment of part of—Distribution of proceeds of mortgaged premises—Errors and appeals—Costs, when exceptions to, must be taken.

Where a mortgagee assigns part of the mortgage debt, and the proceeds of the property bound thereby at a sale under the mortgage are insufficient to pay the claims of both the assignor and the assignee, the fund will be divided between them *pro rata*.

All exceptions to the amount of costs paid out of a fund realized from a sheriff's sale, must be taken before the Auditor or in the Court below. The question cannot be raised for the first time on appeal to the Supreme Court.

Appeal of W. W. Patrick, from a decree of the Common Pleas of Somerset County, dismissing the exceptions to, and confirming the report of an Auditor appointed to distribute a fund produced by a sale under a mortgage of the property of John D. Roddy and Hiram Findlay.

The facts, as they appeared before the Auditor, were as follows: On March 23, 1865, Daniel Koons sold a tract of land in Somerset County to John D. Roddy and Hiram Findlay for a consideration of $3150. One thousand dollars was paid in cash, and a mortgage was executed for the balance to be paid in three equal annual instalments. By the terms of this mortgage, which was duly recorded, the land was the only security for the mortgage. Only $919 had been paid on this mortgage in 1872, when John Huhl, attorney for Koons, assigned for value on the record $1000 of this mortgage to M. Sauner & Co. The latter subsequently, on September 1, 1875, assigned the said $1000 with interest from April 1, 1872, to W. W. Patrick, who paid full value for the same.

On February 8, 1879, Koons issued a sci. fa. on the mortgage, ignoring Patrick's claims entirely. Subsequently the Court, on motion of Patrick's attorney, ordered that Patrick be joined as plaintiff without prejudice to the right of the parties. An affidavit of defence was filed by the mortgagor against Koons's claim, and after trial a verdict was rendered in favor of Patrick for $1529.33, and in favor of Koons for $921.14. Judgment was subsequently entered thereon.

A levari facias was issued, and the land sold to W. W. Patrick for $1516, which sum the sheriff paid into Court for distribution.

The Auditor appointed to distribute the fund, after the payment of the costs, divided the fund *pro rata* among the two judgment creditors. Exceptions were filed, *inter alia*, as follows:—

(4) "In not giving priority to Patrick's portion of the mortgage over that of Koons in the distribution of the fund."

The exceptions to the report of the Auditor were overruled, and the report confirmed by the Court. Thereupon Patrick took this appeal, assigning for error the action of the Court in refusing to sustain the above exception, and in allowing $198.50 costs to be taken out of the fund.

E. Cooper Shapley (*W. H. Koontz* and *John D. Roddy* with him), for the appellant.

The assignment of a mortgage is an assignment not only of the claim against the mortgagor, but of all securities which the assignor holds against the mortgagor or other parties for the same debt.

Phillips *v.* Bank of Lewistown, 6 Harris, 401.
Morris *v.* McCulloch, 2 Norris, 34.
Brice's Appeal, 14 Norris, 145.
3 Pomeroy's Equity, 186.

Where a debtor by agreement with a creditor sets apart a fixed portion of a specific fund in the hands, or to come into the hands of another person, such creditor has a first claim in the nature of a lien, which a Court of Equity will enforce.

Ketchum *v.* St. Lewis, 11 Otto, 306.

The Auditor allowed costs to the amount of $198.50 to be paid out of the fund; when the greater part of the costs arose from Koons's resistance to our having the record amended.

[MERCUR, C. J. I do not see that any exception was taken to amount of costs before the Auditor or in the Court below.]

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Valentine Hay (*J. H. Uhl* with him), for appellee.

An assignment of a debt passes all the assignor's remedies, but that is not the result where there is an assignment of a part of a debt only.

Donley *v.* Hays, 17 S. & R. 400.
Mohler's Appeal, 5 Barr, 418.
Perry's Appeal, 10 Har. 43.
Hancock's Appeal, 10 Casey, 155.
Moore's Appeal, 11 Norris, 309.

The costs all accrued in the one suit which was for the benefit of the appellant as well as the appellee; moreover, any objection to the allowance of these costs should have been raised before the case was brought to this Court.

February 25, 1884. THE COURT. On the facts found by the Auditor there is no error in this decree of distribution. The rule is well settled that when fractional parts of the same mortgage debt, or of a judgment lien, are successively assigned to different persons, and the proceeds of the property bound thereby are insufficient to pay all of them, they take *pro rata*. Those first assigned are not entitled to priority of payment. (Moore's Appeal, 11 Norris, 309.) We discover nothing in the facts of the present case to prevent the application of that rule. No question was raised before the Auditor, nor in the Court below, in regard to the amount of costs entitled to be paid out of the fund. It is too late to raise it here, and the evidence furnished is insufficient to consider it intelligently.

Decree affirmed, and appeal dismissed at the costs of the appellant.

PER CURIAM.

CLARK, J., absent. W. M. S., JR.

Pennsylvania R. R. Co. v. City of Pittsburgh.

Pennsylvania Company v. Same.

Citizens' Passenger Railway Company v. Same.

These cases are reported *ante*, page 268. The following dissenting opinion by GREEN, J., in which PAXSON, J., concurred, was filed January 7, 1884:—

bank and tow-path of an incorporated canal are not taxable as land or real estate under the Acts of 15th April, 1834, and 29th April, 1844, nor are the toll-houses and collectors' offices belonging to the canal and incident thereto. The express words of the Act of 1834 declare that "real estate, viz., all houses, lands, lots of ground," etc. etc., should be subject to taxation. The Act of 1844, § 32, declared that "all real estate, to wit, houses, lands, lots of ground, . . . and all other real estate not exempt by law from taxation," should be assessed and subject to taxation for all State and county purposes. In considering the application of this language in the case above cited, KENNEDY, J., on p. 337, said: "But if the lock-houses and collectors' offices attached to the canal belonging to the plaintiffs in error are to be considered as constituent parts of the canal, or necessarily incident thereto, it will be very difficult, if not impossible, fairly to show that they are embraced within the list of enumerated articles above. If the lock-houses and collectors' offices be necessarily incident to the canal, of which I think there is no doubt, they cannot well be considered as either lands, houses, or lots of ground, according to the true meaning of the Acts recited, and a fair interpretation thereof."

The same doctrine was applied in Navigation Co. *v.* Commissioners (1 Jones, 202), to the case of a toll-house which was also occupied as a residence by the collector. ROGERS, J., on p. 204, in speaking of the house and this use of it, said, "It is nevertheless a constituent part of the canal, necessarily incident thereto, within the meaning of the decisions already cited." On p. 205 he says: "No person was ever so absurd as to suppose that a canal passing through several counties was the subject of taxation for county purposes. This was conceded, and as the canal itself was not liable to assessment as a whole, it was thought that a component part came within the same category; that the incident followed the principal; that part was of the same nature with the whole. Besides, that there was no design to tax canals under the general denomination of lands, houses, and other real estate, also appears from this; that they are not classed as real estate, but are treated by the Legislature as a species of personal property. They are not taxed as real estate, but their corporate franchise,

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franchise, holding that the former are to be regarded as a part of the franchise or principal structure, while the latter retain their character as real estate in the proper sense of that term. Water stations, depots, offices, oil houses, places to hold cars, and such buildings and places as may fairly be deemed necessary and indispensable to the construction of the road, were held to be free from taxation as "real estate," or "houses," or "lands," for the reasons given in the previous decisions.

In Railroad *v.* Sabin (2 Cas. 242), we held that the machine-shops, foundries, freight, and passenger houses of a railroad company were not subject to taxation under the Acts of 1834 and 1844, because they were used to carry on the business of the company, and the expense of their erection was charged to the cost of construction, and represented in part the stock, which was subjected to taxation. In West Chester Gas Co. *v.* Chester County (6 Cas. 232), the doctrine was extended to the necessary works of a gas company. This decision was followed in Coatesville Gas Co. *v.* County of Chester (1 Out. 476), as to the lot and buildings erected thereon for the necessary purposes of the company. On p. 481, the present Chief Justice, delivering the opinion of the Court, said: "As we have already shown, this lot constitutes a part of the stock of the corporation which already pays a tax thereon to the Commonwealth, and the owners of the stock pay taxes thereon to the county." After reviewing the leading cases, he says: "The principle which appears to be recognized is that the public works of a corporation, used as such, with their necessary appurtenances, shall be exempt from taxation as land, but be subject to it in another form, and that a gas company so far partakes of the nature of a corporation for public purposes as to be subject to the same rule."

The practical meaning of this proposition is that the indispensable works of a public corporation are a part of its corporate franchise, and therefore taxable as stock, which is personal property, and hence cannot be regarded as real estate in any form. This is the express ground upon which the whole doctrine is based in the opinion of this Court in the case of Northampton County *v.* Lehigh Coal and Nav. Co. (25 P. F. S. 461). It was there held that neither the Act of April 8th, 1873, repealing all laws exempting real estate from taxation, nor the Constitution of 1874, made any change in the course of judicial decisions upon the construction of the general laws. On p. 464 SHARSWOOD, J., says: "There is nothing in the provision that all taxes shall be real estate within the classification of the tax laws, and that land, necessary to the franchise of a railroad corporation, is a part of such franchise, and not real estate subject to local taxation under the existing laws." In my judgment this is the only true ground upon which the decisions holding the indispensable structures of corporations of a public character to be free from taxation as real estate, can be rested. In point of fact, the passenger station of a railroad company is a "house," and the ground upon which it is erected is "land," no matter what purposes they may be used for. But when they constitute part of a railroad, while they are still in fact a house and land or "real estate," they have in legal contemplation entered into, and become a part of, the railroad itself, the whole of which is represented by the capital stock. This stock is the legal manifestation of the corporate franchise, which is the right to build, maintain, and conduct a railroad. The indispensable structures, therefore, have, by the character of their use, absolutely lost their quality of "real estate," and are not at all defined or included, in an Act of legislation which uses that term or mode of designation only. In the entire course of the decisions of this Court, not a solitary case has been found in which this rule has been departed from. With absolute and unbroken uniformity we have always held that this class of structures is not taxable even under Acts which make *all* real estate, and *all* houses, lands, and lots of ground subjects of taxation. It must certainly be conceded that the generality of this mode of designation permits no distinction as to the use or ownership of the real estate, the houses, the lands, or lots of ground, which are declared to be subjects of taxation by the supreme taxing power. Not a fragment of utterance can be found in the Acts of 1799, 1834, or 1844, in the least degree indicative of a legislative intent that "real estate," "houses," "lands," or "lots of ground," if they belong to a railroad company, and are indispensable to its use, are not to be taxed. The reason why they cannot be taxed under those Acts is because they are personal estate, and therefore not included within the enumeration of taxable subjects. Now this rule, which declares such structures to be personal estate, is no part of the statutory law of the State. It is the law altogether outside and independently of any statute. It has become the law by the decisions of this Court, and will remain the law, after the decision of the present case, as it has always been before. It is not founded upon any idea of a legislative intent to exempt, but upon a totally different

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In the present case it is proposed to disregard this law. The subjects of taxation are all of them structures which are indispensable to the exercise of the corporate franchise and therefore personal property. The legislation which, it is claimed subjects this personal property to taxation is the third section of the Act of January 4, 1859, P. L. 828, authorizing the city of Pittsburgh to raise additional revenue. It is in the following words:—

"Section 3. That all real estate situated in said city owned or possessed by any railroad company, shall be and is hereby made subject to taxation for city purposes the same as other real estate in said city."

It will certainly not be claimed that there is the slightest attempt here to change the general law of the State, that the necessary works of railroad companies are personal estate. It cannot be claimed that there is any declaration that for the purposes of this Act, the necessary works of railroad companies within the city of Pittsburgh shall be treated as real estate. There is no provision that such works of those companies shall be taxable.

There is no ambiguity in the language of the Act. It means just what it says, that the real estate of railroad companies within the city is to be taxed for city purposes. Whatever real estate such companies possess within the limits designated, is taxable under the Act. The terms of the Act are fully satisfied, and apparently there is nothing to be determined by construction or interpretation. Yet it is perfectly manifest that if the works and structures in question are to be taxed at all, it can only be done by construction. Considered affirmatively, and by force of its plain words, there is not the slightest expression in the section of any intent to tax personal estate, or to change the law of the State which declares these works and structures to be personal estate, or to declare that law suspended as to the property of railroad companies in the city of Pittsburgh. How then are these structures to be made taxable under this Act? It was decided by the Court below, and is contended on behalf of the city, that unless this Act is held to apply to the works in question, it is useless and meaningless, because the real estate of the city is taxable for city purposes by other laws, and under those laws the real estate of the railroad companies is taxable independently of this Act. In order then to give meaning and effect to the Act, it is proposed to extend it to the works and structures in question, in contravention of the existing and undoubted law of the State which holds them to be personal property only, and as such untaxable as real estate.

I do not regard the argument as of any serious moment, which would by sheer force confer a meaning by construction, upon the unmeaning or unintelligible words of a statute.

If, upon the literal and legal reading of the words employed they are incapable of application, or enforcement, the Act simply falls. It is incapable of execution, and of this there are many examples in the books. A notable instance of this kind occurred in the case of the Commonwealth *v.* Bank of Pennsylvania (3 W. & S. 173), in which this Court refused to enforce an Act of Assembly and supplement thereto, relating to the election of assignees of the Bank of Pennsylvania, for the express reason that the meaning of the Act was so uncertain that it could not be determined to the satisfaction of the Court.

It has been repeatedly held that if the plain words of a statute lead to an absurd result, that is not a sufficient reason for changing the natural interpretation of the words employed. Thus in Abley *v.* Dale (11 C. B. 378) the Chief Justice, on p. 391, says: "If the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead in our view of the case to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." In Woodward *v.* Watts (2 Ell. & Black. 452) CROMPTON, J., said: "I do not understand the rule of construction to go so far as to authorize us, where the Legislature have enacted something which leads to an absurdity, to repeal that enactment and make another, for them, if there are no words to express that intention." In Green *v.* Wood (7 Q. B. 178) Lord DENMAN, C. J., said: "We are bound to give to the words of the Legislature all possible meaning which is consistent with the clear language used. But if we find language used which is incapable of a meaning we cannot supply one. It is true that we have here words which, as they stand, are useless; a circumstance, perhaps, not altogether unprecedented. But, to give an effectual meaning, we must alter not only "or" into "and," but "issued" into "levied." It is extremely probable that this would express what the Legislature meant. But we cannot supply it. Those who used the words thought that they had effected the purpose intended. But we, looking at the words as Judges, are no more justified in introducing that meaning than we should be if we added any other provision. We can do no more than give such a meaning as the words authorize."

In the case of Frye *v.* Chicago, etc., R. R.

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Co. (73 Ill. 399) it was held that although, where the object of the Legislature is plain, and the words of the Act unequivocal, Courts ought to adopt such a construction as will best effectuate the intention of the Legislature, yet it is a well-settled rule of construction that they must not, even in order to give effect to what they may *suppose* to be the intention of the Legislature, put upon the provision of a statute a construction not supported by the *words*, even though the consequences should be to defeat the object of the Act.

But there is a still more serious objection to the argument we are considering, and that is, that the assumption upon which it is based is not true in fact. The Act upon its plain reading is neither meaningless nor absurd. It means that the real estate of railroad companies in the city of Pittsburgh is taxable for city purposes. That meaning we are compelled to respect and to enforce. If there is prior legislation to that effect we must nevertheless give to this Act the same effect. If such prior legislation should be repealed this remains, and we cannot refuse to enforce it in its literal sense without repealing it, which of course we cannot do. The utmost therefore that can be said of the Act in question is that it is superfluous. It is very certain, however, that mere superfluity of legislation is no objection either to its validity or its effective operation. It is not at all uncommon to discover different legislative enactments in relation to the same subject, but surely it was never considered that the redundancy of legislative action thus ascertained, constituted any reason for denying it actual operation, or for changing its plain meaning.

In the Act under consideration the words "real estate" are the only words which designate the subject of taxation, and it is the real estate of railroad companies only which is directed to be taxed. These words, when applied to the property of railroad companies have received a fixed definite meaning by the repeated decisions of this Court. They do mean and include real estate in its ordinary acceptation, and hence they are clearly applicable to all the real estate of railroad companies. But we have declared that certain structures and works which are necessary to the use of railroads, are not real estate, though but for that use they would be. This meaning is the legal meaning, and therefore the actual real meaning of the Legislature when legislating for the taxation of the property of railroad companies. It is of course competent for that body to say that the words "real estate" shall not have that meaning in a given case, but in this case they have done nothing of the kind, and hence their fixed legal meaning should prevail.

But let us consider the argument by which the contention of the city in the present case is sustained. It is thus stated in the paper-book of the very able counsel for the city: "The Legislature of 1859 knew of the decisions in the Permanent Bridge Case, and in the Lehigh Coal and Navigation Company Case. They knew that merely subjecting land or real estate to taxation within the county or city did not thereby enable the county or city to tax the real estate occupied by (the) corporation with its necessary works. Therefore in the Act of 1859, in so many words they said that the real estate either owned or possessed by a railroad company, should be therefore (thereafter?) subjected to municipal taxation, the same as other real estate owned by individuals." This is probably the strongest and most ingenious presentment in support of the construction contended for by the city that the subject will admit of. It refers the meaning of the Act to the conscious, or supposed conscious, intelligence of the members of the Legislature which passed it. Yet what is the true character of the argument? In very terms it affirms that the Legislature knew the existing state of the law, knew that if they simply declared that the "real estate" of railroad corporations should be taxed, the "necessary works" would not become subject to taxation. Yet, notwithstanding this knowledge, they deliberately, consciously, and intelligently chose those very words in designating what property should be taxed. The learned counsel for the city conclude from this premise that the Legislature meant that all the real estate of railroad companies, including the indispensable structures, should be taxed. To my mind, precisely the opposite inference is the only one that can be drawn. If the Legislature knew that the words used had a defined and restricted meaning, which excluded the structures in question from taxation, how is it possible to resist the conclusion that if they used them at all they used them in that sense? To hold the contrary is to hold that the members of the Legislature violated their duty and their official oaths; that they deliberately used words which they knew had a certain fixed, definite, and restricted meaning, when they intended that the words should have an entirely different and opposite meaning. We have no right to impute such conduct, or the motive or purpose which would prompt it, to a co-ordinate branch of the government, and if we had the right we ought not, in the interest of public morals and policy, to exercise it. If this Legislature knew that by using only the words "real estate," in the Act designating the subjects of taxation, the indispensable structures of railroad companies would not become subject to taxation, then if they really intended such structures to be taxed, they should, and necessarily

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would have said so in unmistakable language. It was a perfectly simple and easy matter to do so either by naming the structures, such as passenger stations, freight houses, engine houses, offices, water stations, etc., or by using general language with an express declaration that it was intended to include all the works and structures of the companies, whether used for the purposes of the roads or not. Not having done so, and having used only words which have received a fixed, definite, legal meaning by the repeated decisions of this Court, we are bound to infer they intended to use them in that sense.

It is argued with much earnestness that because the real estate of *railroad companies*, as distinguished from all other real estate, was made taxable by this Act, therefore we must infer, that the necessary works and structures were intended to be included. When it is considered that the general Acts of 1834 and 1844 made taxable *all* real estate, and *all* houses, lands, and lots of ground, without any distinction of ownership or use, this argument loses much of its force, because those Acts were quite as applicable to the real estate, houses, lands, and lots of railroad companies as to those of other corporations or individuals. But the argument is definitely met and answered by a decision of this Court which has never been doubted or overruled, in which the ownership of the property subject to taxation was much more limited than in the present case. In the case of Wayne Co. *v.* Del. and Hudson Canal Co. (3 Harr. 351), the Act of April 1, 1825 (P. L. 141), which authorized the company to improve the navigation of the river Lackawaxen, provided in the fifth section "that the property of the said company, whether real or personal, within this State shall at all times be liable for its debts, and subject to taxation, in like manner as similar property held by an individual or corporation, now is or may be." It was held by this Court that the reservoirs created by the company for supplying the canal with water; the houses and gardens occupied by the lock-tenders and collectors along the canal and railroad; the engines and machinery for raising cars up the planes and the engine-houses; the houses and gardens occupied by the engineers attending the engines, and the collector's and engineer's office in Honesdale were not subject to taxation for State or county purposes. The point was made by counsel for the county, on the argument in this Court, that the Act in question expressly made taxable the real and personal estate of this particular corporation in like manner as the same kind of property held by an individual or corporation. But this Court, and also the Court below, held that the works and buildings above mentioned were not taxable, and adhered to the general doctrine expressed in the cases heretofore cited. It seems to me this case is a complete answer to the entire argument on behalf of the city in the present case, so far as mere authority is concerned, and that consistency requires that we should either overrule it or stand by it and give it application to the present contention. It seems to me also that the case of Northampton Co. *v.* Lehigh Coal and Nav. Co., above cited, is equally imperative and controlling in the same direction. There the very purpose of the Act in question (Act of April 8, 1873, § 1, P. L. 64) was to repeal all laws exempting real estate from taxation, and the express words of the Act were "that all real estate within this Commonwealth shall be liable to taxation for all such purposes as now is, or hereafter may be, provided by general laws, excepting only therefrom the classes of property specifically exempted from taxation" by certain Acts relating to places of worship, burial grounds, etc. etc. When a special exception was inserted in this Act which did not include railroad or canal companies, it might well be argued that the intention of the Legislature, as well as the words of the Act, subjected all other *real estate* within the Commonwealth to taxation without any regard to its ownership or use. But we then thought differently, and held to the course of all the previous decisions, that the term *real estate* did not include the necessary works and constructions of a railroad company, because they were not real estate but a part of the corporate franchise. I cannot help thinking that a due respect to the dignity of this tribunal, to the consistency of our own decisions, to the stability of legal principles, requires that we should adhere to the construction we have always given to the identical words we are now considering, and to hold that the works proposed to be taxed in the present proceedings are not taxable because they are not real estate, and therefore do not come within the operation of the Act in question. If they are taxable it will necessarily follow that all of the track, and the land upon which it is laid, within the limits of the city of Pittsburgh, will be subject to taxation, and therefore to seizure and sale. As such a result is entirely at war with all settled principles and doctrines relating to this class of property, I cannot assent to a decision which leads necessarily and directly thereto. I am equally unable to follow the devious path of a supposed legislative intent, which may or may not exist, according to the higher or lower grade of intelligence, or of personal integrity of individual members of a legislative body; especially as it is quite possible to understand, that many members may have been willing that such a bill should pass, for the very reason that they regarded it as

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unavailing to change the existing law, and subject indispensable structures of railroad companies to taxation.

The vice of the argument from intention in this particular case is, that the evidence of the supposed intention is not found in the words of the Act, but in facts and considerations outside of it. Thus it is argued that the real estate of the city of Pittsburgh is subject to taxation by other law, and, therefore, an intent must be inferred to tax the necessary structures. The existence of such other legislation is a fact entirely outside of the present Act. We must take cognizance of that legislation, of its terms, and its import, before we can proceed with the argument founded upon its meaning and effect, as affecting the supposed intent in the present legislation. We are not referred either by the findings of the Court below, or by the arguments of counsel on either side, to the legislation which imposes taxation for city purposes upon real estate within the limits of the city of Pittsburgh. Whether it is the general law of the State alone, or whether it is composed in part of local statutes affecting the city, or the county of Allegheny, we are not informed. But it is sufficient to know that it is not contained in the Act we are considering, and must be ascertained by an examination of Acts altogether foreign to, and independent of it. Now, as I understand the law upon this subject, this cannot be done; in other words, in construing an Act upon the theory of a supposed intention, the evidence of the intention must be found in the language of the Act, and not outside of it. In the case of Schooner Paulina's Cargo *v.* The United States (7 Cranch, 52), Ch. J. MARSHALL says: "In construing these laws, it has been truly stated to be the duty of the Court to effect the intention of the Legislature; but this intention is to be searched for in the words which the Legislature has employed to convey it." . . . "But should this Court conjecture that some other act, not expressly forbidden, and which is, in itself, the mere exercise of that power over property which all men possess, might also be a preliminary step to a violation of the law, and ought, therefore, to be punished, for the purpose of effecting the legislative intention, it would certainly transcend its own duties and powers, and would create a rule instead of applying one already made."

In the case of Rex *v.* Stoke Damerel (7 Barn. Legislature did not mean that which they have expressed."

In Rex *v.* Poor Law Commissioners (6 Ad. & Ell. p. 1), COLERIDGE, J., says: "It is, in my opinion, so important for the Court in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience, or an alleged equity upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section which is within its words but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute, and also that to adhere to the literal interpretation is to decide inconsistently with other and overruling provisions of the same statute."

In Everett *v.* Wells (2 Scott, N. C. 531), TINDALL, C. J., says: "It is the duty of all Courts to confine themselves to the words of the Legislature, nothing adding thereto, nothing diminishing."

In Potter's Dwarris on Statutes (p. 146), one of the rules of interpretation is thus stated: "20. In the enactment of statutes, the rule of interpretation is, in respect to the intention of the Legislature, that where the language is explicit, the Courts are bound to seek for the intention in the words of the Act itself, and they are not at liberty to suppose or to hold, that the Legislature intended anything different from what their language imports," citing Supervisors of Niagara *v.* The People (7 Hill, 513).

In Priestman *v.* The United States (4 Dall. 28), CHASE, J., said, on p. 30, n. 1: "By the rules which are laid down in England for the construction of statutes, and the latitude which has been indulged in their application, the British Judges have assumed a legislative power, and on the pretence of judicial exposition have in fact made a great portion of the statute law of the kingdom. Of those rules of construction, none can be more dangerous than that which distinguishing between the intent and the words of the Legislature, declares that a case not within the meaning of a statute, according to the opinion of the Judges, shall not be embraced within the operation of the statute, although it is clearly within the words; or *vice versâ*, that a case within the meaning, though not within the words, shall be embraced. For my part, however, sitting in an American Court, I shall always

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concentrates an exhaustive consideration of the subject thus: "But in modern societies, where the division of political attributes is so much more nice and rigorous, where the business of legislation has become multifarious and enormous, and especially in this country, where the judiciary is so completely separated from the Legislature, it must be untrue in fact that they can have any personal knowledge, sufficient really to instruct them as to the legislative intention; and if untrue, in fact, any general theory or loose idea of this kind must be dangerous in practice. I believe that, subject to the rules hereafter declared, and subject to the exceptions of equitable construction, to be discussed in the next chapter, the tendency of all our modern decisions is to the effect, that the intention of the Legislature is to be found in the statute itself, and that there only the Judges are to look for the mischiefs meant to be obviated, and the remedy meant to be provided."

It is not necessary to prolong citations of this class of authorities; they are very numerous.

It cannot be argued that the words "real estate" in the Act in question have an ordinary meaning which would include the necessary works of railroad corporations, because those words have received a judicial construction which fixes and establishes their meaning, excluding those works on the ground that they are not real estate. This consideration brings into operation another rule of construction which seems equally decisive of the present contention. In Potter's Dwarris on Statutes, p. 274, it is thus expressed: "Words and phrases, the meaning of which in a statute has been ascertained, are, when used in a subsequent statute to be understood in the same sense." In note 4, at the foot of the same page, the rule is more fully expressed and accompanied with authorities thus: "When the terms of a statute which has received judicial construction are used in a later statute, whether passed by the Legislature of the same State or country, or by that of another, that construction is to be given to the later statute. (Commonwealth *v.* Hartnett, 3 Gray, 450; Ruckmaboye *v.* Mottichmund, 32 Eng. L. & Eq. 84; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633; Rigg *v.* Wilton, 13 Ill. 15; Adams *v.* Field, 21 Vt. 256.) It is to be presumed in such cases, that the Legislature who passed the later statute knew the judicial construction which had been placed on the former ones, and such construction becomes a part of the law."

Applying this principle to the present case, it is apparent that the Legislature must be presumed to have used the words "real estate" according to their fixed legal meaning. It follows that there is no ambiguity in the words of the Act, and it must therefore be read in conformity to the rule stated by Mr. Justice THOMPSON in Bradbury *v.* Wagenhorst (4 P. F. S. on p. 182), to wit: "Whatever may have been the legislative thought no ambiguity exists in what they have said, and where the words of a statute are plainly expressive of an intent the interpretation must be in accordance therewith."

There can be no question that the words employed in this Act are clearly expressive of an intent to tax real estate, for that is the positive language used. There are no words indicating an intent to tax personal estate, and therefore there is no ambiguity to be explained.

When we come to declare what was the intention of the Legislature which passed this Act, we enter at once upon a sea of conjecture. If we say they must have intended to tax the necessary works of the companies, we assert for them an intent which they did not assert for themselves. Of course we can only do this upon the theory that they really designed, had the mutual purpose, to tax such works. But by what authority can we say this? We know nothing of them as individuals, we cannot possibly know anything about their mental purposes, we know nothing of their personal integrity, nothing of their intelligence. Suppose the Act was drawn by a crafty and designing person in the interest of the railroad companies, who used this language because he knew that the words "real estate" would not include the necessary works of the companies. Or suppose certain members, in sufficient numbers to constitute a majority voted for it, for the same reason, and in the same interest. Either or both of these suppositions are entirely in accord with actual experience in the business of legislation, and yet either of them would, if true, utterly destroy the argument from intention. Who shall say they are not true in this case, or by what authority shall we so declare? Or suppose that either the draftsman of the Act, or the members who voted for the bill, or all the members, entertained the belief that the real estate of railroad companies was free from taxation, and sought to make it taxable in the city of Pittsburgh by this Act. In that event the words "real estate" would have their proper legal signification, they would include all real property which

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convenience and works of necessity, then of course it cannot be said that they had any specific intent to tax works of necessity, because they knew nothing about them. Lastly, if they did know of the distinction, and therefore knew the necessity of using apt words in order to tax the indispensable structures, and nevertheless did not use those words, then we are bound to presume that they did not intend to tax the structures. The legal presumption is that they did know the existing state of the law, and that they passed the Act in question with that knowledge. The learned counsel for the city, understanding this perfectly, have rested their case upon this theory. It is the only theory upon which it can be rested, but it is, in my judgment, entirely inadequate to the purpose for which it is invoked. For it necessarily presupposes the presence of a knowledge which would compel the use of words which do not appear, and the omission or carefully defined use, of words which do appear in the Act in question. Hence we cannot by mere inference assert an intent, which the Legislature, knowing the necessity of its assertion, failed entirely to express.

There is a curious circumstance in the work of the Legislature of 1858 which strongly illustrates the danger of conjecturing an intent upon considerations which are outside of an Act in question. It happens that this same Legislature, passed an Act which was approved on April 21, 1858, and is found on p. 385 of the Pamphlet Laws of that year. It is a supplement to the Act incorporating the city of Philadelphia, and its purpose is expressed in the preamble, thus—

"Whereas, the burden of taxation for the support of the government of the said city is now mainly borne by the owners of real estate therein, and it is just that the owners of personal property should contribute thereto: therefore,

"Section 1. Be it enacted by the Senate and House of Representatives, etc., That the offices, depots, car houses, and other real property of railroad corporations situated in said city, the superstructure of the road and water stations only excepted, are and hereafter shall be subject to taxation by ordinances for city purposes."

No other section of the Act imposes any taxation upon any property, and all but one relate to other subjects than taxation. It is apparent therefore that this Legislature when they really intended to tax the necessary works of railroad companies, expressly named the structures, and added general words which included all real estate used for such purposes, excepting specially the superstructure of the roads and the water stations. But what is of still more consequence, they expressly declared that this was done for the purpose of taxing *personal property*, in case of the owners of real estate. In other words, they asserted a purpose to tax personal estate only, and as an exercise of that purpose they taxed the necessary structures of railroad companies only. The conclusion is irresistible that this Legislature knew that the necessary works of railroad companies were personal estate, and also that in order to make them taxable they must be expressly named. The inference therefore seems conclusive that when they passed the Act we are considering, and only named "real estate" in it, they did not intend to tax the structures.

On this question of intention outside the words of the Act there is another circumstance of the greatest significance. The Act was approved the 4th of January, 1859, which was one day before the Legislature of that year assembled. It was really passed by the Legislature of 1858, on April 15th, and as the legislative record of that session shows it was reported, considered, and passed as a private bill and without a word of debate.

The express purpose of the Act was to enable the city of Pittsburgh to raise additional revenue by taxation. Onerous taxation was imposed by the other sections. Yet it is conceded that in all the time from the passage of the Act, down to the present proceeding, 22 years, no attempt was made by the city to tax the necessary works and structures of the railroad companies. Why is this? Certainly the persons who procured the passage of the Act knew what their own purpose was in obtaining its enactment. It must be assumed the money was needed which would be derived from the enforcement of the Act, and that the city authorities would use all the agencies which the Act afforded. Acting upon this theory they would at once and continuously thereafter have proceeded to assess and tax the structures in question. But they never did, and the only reason that can be assigned for this omission is that it was not supposed that the structures were taxable under the Act. Had the persons who obtained the passage of the Act believed the necessary works were taxable they would at least have made the attempt to have them taxed, and would have appealed to the Courts for that purpose by proper proceedings. The fact that no such attempt was made for more than twenty years after the passage of the Act in question, affords a most persuasive inference that it was not expected, and therefore was not intended by the Act to subject the necessary works of railroad companies within the city limit, to taxation for city purposes.

Contemporaneous construction and usage are regarded as valuable aids in the interpretation of statutes of doubtful meaning. (Sedgwick on Construction of Statutory and Constitutional Law, pp. 212, 215, *et seq.*) The force of this conside-

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ration is greater in the present than in ordinary cases, because the city is practically asking us to reverse her own construction of the Act in question continued for many years, when it was constantly her highest pecuniary interest to have asserted the rights which she now claims under the Act.

The legal rule upon this subject is expressed in the maxim *contemporanea expositio est fortissima in lege.* (Dwarris on Stat. 693; Phila. and Erie R. R. Co. *v.* Catawissa R. R. Co., 3 P. F. S. on p. 61.) In Stuart *v.* Laird (1 Cranch, 299) the Court said: "To this objection which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest and ought not now to be disturbed." In Rogers *v.* Goodwin (2 Mass. 475), the Court speaking of a long usage under an old Act say: "The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."

In Packard *v.* Richardson (17 Mass. on p. 143), Ch. J. PARKER, says: "A contemporaneous, is generally the best construction of a statute. It gives the sense of a community of the terms made use of by a Legislature."

To give to this Act the effect that is sought, we must either strike out the words "real estate" as useless, and insert in their place the words, "passenger stations, freight stations, freight houses, offices, engine-houses, car-houses, machine shops, and all other works and structures:" or, if the words "real estate" are left in, we must add to them, words to the following effect: "including all passenger stations, freight stations, freight houses," etc., as above, or to this effect, "and for the purposes of this Act all the necessary works and structures of said companies, used in conducting the business thereof shall be deemed and taken as real estate." Of course we have no right to take such liberties with any legislation, and the mere statement, in words, of what it is that we are asked to do, in order to affirm the judgment in this case, is, in my opinion, a conclusive reason for its reversal.

I am authorized to say that my brother PAXSON concurs with me in this opinion.

Oyer and Terminer.

April 5, 1884.

Ex parte Charles E. Briggs.

Criminal law—Murder—Insanity—Commission to inquire into mental condition of prisoner—Act of May 14, 1874.

The Act of May 14, 1874 (P. L. 160; Purd. Dig. Supplement, 1893, pl. 3), providing for the appointment of a commission to inquire into and report upon the mental condition of persons convicted of any crime, or charged with any crime and acquitted on the ground of insanity, does not apply to a prisoner convicted of murder in the first degree.

A prisoner convicted of murder, and under sentence of death, is remitted by authority of law to the control of the Executive, either for execution of sentence, commutation of it, or pardon in the manner prescribed by law.

The prisoner, Charles E. Briggs, was convicted of murder in the first degree, and sentenced to be hung, but the warrant for execution had not yet been issued by the Governor.

On April 5, 1884, a petition signed by Dr. Benjamin F. Butcher, physician-in-charge at the County Prison where the prisoner is confined, was presented to the Court, reciting the petitioner's belief in the insanity of the prisoner, and asking for the appointment of a commission to inquire into and report upon his mental condition under the provisions of the Act of May 14, 1874 (P. L. p. 160).

Josiah Adams, for the prisoner.

The petition is in proper form. It is made and signed by one of the prison physicians, according to the terms of the Act, and states his belief in the insanity of the prisoner. The Act of May 14, 1874, is very comprehensive, and includes *any person* convicted of *any crime.* "Any person imprisoned" includes all persons incarcerated, and evidently includes a prisoner convicted of murder in the first degree, and under sentence of death. This incarceration up to the time of the execution is imprisonment.

F. Amédee Brégy, Assistant District Attorney, and *George S. Graham*, District Attorney, for the Commonwealth.

This application is not opposed upon the ground that the prisoner is not insane, but because the prisoner's attorney has mistaken the method by which the prisoner's mental condition shall be correctly ascertained; and further, because opposition should be made to a new and dangerous departure in the prosecution of the criminal law of this State. The defence in this case was insanity, and a jury have decided against the prisoner. As soon as the prisoner was convicted

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of the highest crime known to the law his case then became that of the Governor and the Board of Pardons.

This provision of the law was never meant to stay the arm of the Executive, who has power to pardon absolutely, or to commute to imprisonment for life. Even if this commission were appointed it would have no authority to stay the execution of the law by direction of the Governor. The Act was intended to cover cases of conviction and imprisonment, or where a defendant has been acquitted and detained in prison owing to grave doubts as to his sanity. The whole language of the Act and intendment of the language point irresistibly to the conclusion that it covers only these two classes of cases.

Section 1 of the Act provides, "if it shall appear that the prisoner inquired of is of unsound mind and *unfit for penal discipline*," etc.; and again, in section 3, it is provided, "It shall be lawful . . . . to remand such prisoner to the place of imprisonment from which he was brought to such hospital, *to serve out the unexpired term of sentence*." It cannot be seriously contended that these provisions apply to the case of a prisoner sentenced to be hung.

Josiah Adams, in reply.

The argument of the District Attorney is a criticism of the law, and not a construction of it. Application has been made to the Governor, and he referred me to this Act.

C. A. V.

April 16, 1884. THE COURT. The prisoner is confined to the Philadelphia County Jail under a sentence of death on a conviction of murder in the first degree, and awaiting a warrant of execution from the Governor.

The physician-in-chief of the prison, Dr. Benjamin F. Butcher, has made an affidavit, under the Act of 14th of May, 1874, relative to insane criminals, that it is believed by himself and others that the said Charles E. Briggs is insane, and prays that he be removed to a hospital for the insane. This issue was made at the trial of the prisoner for murder, and was found against him. It is now proposed to reopen it under the Act of 1874. There is no allegation in the petition that he became insane since his conviction and sentence.

The Act, *inter alia*, provides that whenever any person is imprisoned within the Commonwealth, convicted of any crime whatever, application in writing may be made by the warden, under oath or affirmation that such prisoner is believed to be insane, whereupon it shall be lawful for the Court or Judge to appoint a commission of three citizens, one of whom shall be of the profession of medicine and one of the profession of law, to inquire into and report upon the mental condition of such prisoner, and if it appear he is of unsound mind and unfit for penal discipline then to make an order for his removal to a hospital for the insane.

The question made by this petition is whether or not a prisoner under sentence of death and awaiting a warrant of execution from the Governor is within the meaning and intention of the Act. As a prisoner under conviction he is within the letter of the law, is he within the intention and spirit of it? It is a well-settled principle in the interpretation of statutes that though a matter may be within the letter of the law, if it can be gathered from the statute itself that it was not within the meaning and intention of the law the statute will not apply, but must be interpreted in harmony with the meaning of the lawmaker.

There is nothing in this statute that indicates it has reference to any other class of persons under sentence than those whose punishment consists of imprisonment. It makes no reference to those who are under sentence of death. It can scarcely be supposed that if the Legislature intended it to embrace persons under sentence of death so important an omission would have been made from the statute. It is only by adhering closely to the letter of the statute that such persons can be supposed to be within its provisions.

The meaning of the Act is further shown by the third section of it, which provides that when the patient has been restored to mental sanity, if his term of imprisonment has not expired, he shall be remanded to the place of imprisonment to serve out his unexpired term of sentence.

Besides what can be inferred from the statute itself there are extraneous considerations having an important bearing on this question. A prisoner convicted of murder and under sentence of death is remitted by authority of law to the control of the Executive, either for execution of the sentence, commutation of it, or pardon in the manner prescribed by law. This discretion which is vested in him is within his control. He is the sole judge of the circumstances which may influence him to exercise clemency or enforce the execution. The discretion carries within it the

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respect to the prisoner. This renders the statute futile. In any event it seems to be an interference with the powers vested by the Constitution and laws in the Governor, and with the due and orderly administration of the law. The Legislature cannot be presumed to have intended this.

As the Board of Charities is vested with ample powers of inquiry touching the condition of the insane in prisons and hospitals, an application to them and a representation by them to the Governor of the condition of the prisoner would no doubt lead him to such inquiry as would satisfy him as to his duty in the premises.

A direct application to the Governor himself would no doubt lead him, as it has done heretofore, to inquire into the mental condition of the prisoner or for any person in the Commonwealth under sentence of death.

The petition is dismissed.

Opinion by PEIRCE, J.

[See *Ex parte* John McGinnis, *ante*, 221.]

T. W. B.

Common Pleas—Law.

C. P. No. 2. March 29, 1884.

Wanger v. Graham.

Practice—Recovery of possession by sheriff's vendee—Third party claiming title under Act of 1836, who has made affidavit and entered into the prescribed recognizance, not bound to file a transcript but only to appear and plead to proceedings instituted by plaintiff.

Rule to show cause why transcript should not be filed *nunc pro tunc*.

This was a proceeding under the Act of 1836 to recover possession of certain premises purchased by plaintiff at sheriff's sale as the property of Daniel Graham. At the hearing before the magistrate and sheriff's jury Daniel Graham made the affidavit required by the Act that the title to the premises was in George Graham, and George Graham also appeared and made affidavit that he was the owner and entered into the prescribed recognizance conditioned to appear at the next Court of Common Pleas, and then and there plead to any declaration in ejectment which might be filed against him, as provided in said Act, and the magistrate thereupon, as required by law, forbore to give judgment. The hearing was held February 5, 1884. Defendant's counsel being of opinion that he had done all that the law required, so advised his client and waited for the institution of further proceedings by plaintiff. On March 13 he was informed that the magistrate intended to give judgment and issue a writ of restitution because of defendant's neglect to remove the record into the Common Pleas by filing a transcript to the next term succeeding the hearing. Defendant's counsel thereupon took this rule, setting forth the above facts in an affidavit.

Boyer, showed cause.

Twenty days having elapsed and the defendant not having filed a transcript, I applied for a writ of restitution. That the proper practice is for the defendant to institute proceedings in the Common Pleas is shown by—

Brownfield *v.* Braddee, 9 Watts, 149.

That case was under the prior Act of 1802, but the same principle applies.

McLoughlin, contra.

I do not believe that defendant is required to do any more than "appear and plead" to an action begun by the plaintiff, but to prevent the issuing of a writ of restitution I took this rule.

The condition of the bond under the Act of 1836 is altogether different from that under the Act of 1802.

Brownfield *v.* Braddee, *supra*.
Brightly's Purdon, p. 662.

The correct practice is shown in—

Troubat & Haly's Practice, § 1399.

April 5, 1884. THE COURT. The language of the statute is that if the party claiming title shall make oath, etc., "the justices shall forbear to give judgment," and then provides the condition of the recognizance that the claimant "shall appear at the next Court of Common Pleas, . . . and plead to any declaration in ejectment which may be filed against him," etc.

The Act does not in terms say whether the duty of transferring the proceedings to the Court of Common Pleas shall be upon the plaintiff or the defendant, and it is somewhat remarkable that after nearly half a century this important point should be in doubt and without any authoritative decision.

The only case that has been found on the point is Worman *v.* McCloskey (1 Chester Co. Rep. 32; S. C., 12 Lan. Bar, 42), where Judge FUTHEY says: The proper practice is for the justice to certify the case into Court, which is equivalent to a removal by certiorari to a higher court for trial. It is not clear, however, from the report whether Judge FUTHEY means that the justice shall certify the proceedings on the request of one of the parties or on his own motion. I do not find any warrant in the statute for the latter construction, though it would be a convenient practice, and perhaps has been followed in some cases, as the reports have a very notable absence of mention of the party by whom the certificate was

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filed in the Court, the language being almost uniformly that "the proceedings were certified," etc. (See Kimball *v.* Kelsey, 1 Barr, 183; Dean *v.* Connelly, 6 Barr, 239; Newell *v.* Gibbs, 1 W. & S. 496; Walker *v.* Bush, 6 C. 352.) In Hibbs *v.* Rue (4 Barr, 348), however, it appears from the language of COULTER, J., p. 350, that the *plaintiff* filed the recognizance, and that would appear to have been regarded as the correct practice, though the Court only noticed it *obiter*.

In the absence of precedents therefore we have to consider this case on general principles, and except for the length of time that the practice has seemed to remain in doubt I should have thought it beyond question that after the proper affidavit and recognizance by the defendant have stayed the proceedings before the justice, the next step should be taken by the plaintiff. The express language of the recognizance is that the defendant "*shall appear and plead* to any declaration in ejectment which may be filed against him." Until such declaration is filed no further obligation is imposed on him, and he may safely rest on the case as it stands.

On the other hand, the plaintiff has two courses open to him. He may bring a formal action of ejectment to the next Court, or he may have the proceedings certified and elect to treat them as an action of ejectment, and proceed to declaration and trial as the statute says, "in due course of practice." (Walker *v.* Bush, 6 C. 352, and cases already cited above.) The choice is with him, and he must make the first step.

The case of Brownfield *v.* Braddee, 9 W. 149, cited by plaintiff, arose under the Act of 1802, under which the defendant's recognizance was conditioned "to prosecute his claim with effect at the next Court of Common Pleas," etc., and the duties and position of the parties were altogether different from what they are under the revised Act of 1836. (Hibbs *v.* Rue, 4 Barr, 351.)

We are of opinion, therefore, that the defendant is not bound to file the certificate of proceedings, but, as in this case he desires to do so, the present rule is made absolute.

Opinion by MITCHELL, J. J. D. B., JR.

Scire facias sur mortgage.

The mortgage was executed by the defendant April 12, 1882, to the Huntington Building Association for a loan on twelve shares of stock. In addition to the ordinary provisions of a building association mortgage, it contained a clause that the mortgagee should deliver to the association on or before October 1, of every year receipts for all taxes of the current year upon the premises mortgaged; and the scire facias clause provided that the whole debt should become due if the mortgagor should not pay the taxes.

The plaintiff issued the scire facias with a suggestion of default, in failure to exhibit receipts or paying taxes for 1883.

The affidavit of defence averred that the mortgagor had complied with his covenants in all other respects but the payment of taxes; that the clause relating to taxes is without authority, and in violation of the laws of the association; that no person was appointed before whom, and no meetings were held, at which the receipts could have been exhibited; and that no call had ever been made upon defendant or any one else to comply with the clause.

Charles Davis, for the rule.

The covenant to pay taxes and exhibit receipts is a valid one.

Girard Co. *v.* City of Phila., 7 Norris, 393.

John A. Bickel, contra.

The covenant is *ultra vires*.

Faulkner's Appeal, 11 WEEKLY NOTES, 48.
B'ld'g Assoc. *v.* Schott, 6 Id. 399.

Or, if legal, there was no valid attempt to enforce it. It has been waived in every other case.

[THAYER, P. J. You admit that the taxes are not yet paid; hence you cannot with a very good grace claim to avoid what is in the nature of a forfeiture.]

We will pay them if we are relieved, but without such assurance it were foolish to do so.

The plaintiff has misled the defendant by never before exacting compliance with this covenant. If it be intended now to enforce it, express notice to that effect should have been given.

Cogley *v.* Browne, 11 WEEKLY NOTES, 224.
Wanamaker *v.* Macaully, Id. 450.

Davis, in reply.

A waiver cannot have the effect contended for.

Gerke *v.* Jacoby, 7 WEEKLY NOTES, 438.
Bank *v.* Shoemaker, 13 Id. 255.

THE COURT. Rule absolute.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, MAY 8, 1884.* [NO. 22.

Supreme Court.

Oct. '83, 130. October 18, 1883.

Cochran, Guardian, etc. v. Young.

Wills—Registers—Judicial acts of—Conclusiveness of probate—Act of 1856—Limitation—Fraud.

The Act of April 22, 1856 (P. L. p. 532), providing that the probate of a will devising real estate shall be conclusive as to such realty unless appealed from within five years, affects the title to the lands, and is not merely a limitation of the remedy.

The register, in admitting a will to probate, acts judicially, and his judgment cannot be impeached in a collateral proceeding; after five years, the probate is conclusive upon all parties whether infants, femes covert, or persons *non compotes mentis.*

The proceeding is *in rem* as well as *in personam*, and the probate of a paper purporting to be the last will and testament is conclusive of that fact, unless appealed from within five years. The subsequent production and probate of a will later in date does not affect the conclusiveness of the decree on the will first proved.

Error to the Common Pleas of Butler County.

Ejectment, by Charles Cochran, guardian of Charles S. McCandless, against Simon Young, for a tract of land in Centre Township, Butler County. Plea, not guilty.

On the trial, before McJunkin, P. J., the following facts appeared: Charles S. McCandless and W. D. McCandless, his brother, were the owners of the tract of land in question. Charles S. died August 8, 1862, and on September 5, 1862, a paper purporting to be his last will and testament, dated October 22, 1861, was duly admitted to probate in Butler County, wherein testator devised his property, real and personal, to his parents during life, and then to his brother, the said W. D. McCandless. The parents shortly afterwards both died, and W. D. McCandless went into possession of the property. On March 14, 1876, W. D. McCandless and wife, by deed in proper form and for a full consideration, conveyed the property in dispute to Simon Young, the defendant, who took possession.

In the spring of 1862, Charles S. McCandless, Jr., son of W. D. McCandless and nephew of the said testator, was born.

On February 11, 1881, a writing bearing date June 18, 1862, which purported to be the last will of the said Charles S. McCandless, was presented for probate in Butler County. The subscribing witnesses to this instrument were Geo. McCandless (deceased), and the aforesaid W. D. McCandless. Upon the oath of W. D. McCandless and proof the genuineness of Geo. McCandless's signature, this latter instrument was admitted to probate. It did not appear who had custody of this paper between the date of its execution, June 18, 1862, and the date of its probate, February 11, 1881. In this paper, the testator bequeathed his interest in the tract of land in dispute to his nephew, Charles S. McCandless, Jr., infant son of the said W. D. McCandless.

In March, 1882, Charles S. McCandless, Jr., by his guardian, brought this action of ejectment to recover possession of the undivided half of the property described in the writ.

The Court directed the jury to find a verdict for the plaintiff, subject to the opinion of the Court upon the reserved question, whether or not the probate of the first will for over five years without appeal was conclusive against all parties, under the Act of 1856.

Subsequently the Court filed an opinion, holding that the Act of April 22, 1856 (P. L. p. 532, sec. 7), was a bar to plaintiff's right of recovery, and directed judgment to be entered for the defendant, *non obstante veredicto*. Thereupon the plaintiff took this writ, assigning for error the entry of judgment for defendant upon the question of law reserved *non obstante veredicto*.

Jno. M. Thompson (*Charles McCandless* with him), for plaintiff in error.

We believe that too sweeping effect has been given to the 7th section of the Act of 1856. The statute prevents any contest of the probated will, for any cause which directly attacks it. But it does not prevent a party from probating the true will. A man can only leave one last will. The cases relied upon to sustain the ruling below do not touch the point raised. The Act was intended to secure titles under wills from attack, for any cause which is directed against the will itself.

But a person claiming under the true will is not interested *to contest* the probate of the alleged former will. Fraud vitiates everything it touches.

A. T. Black, for defendant in error.

The 7th sec. of the Act of 1856 means what it says: and the language is strengthened by the preamble and title to the Act. The fraud of W. D. McCandless cannot destroy the title of Simon Young, an innocent purchaser, who was neither party nor privy to the fraud.

The principles of this case have been already decided.

Warfield *v.* Fox, 3 Smith, 382.
Folmar's Appeal, 18 Smith, 482.

The adjudication of the register is conclusive, unless appealed from within the time limited by law.

Hegarty's Appeal, 25 Smith, 503.

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The probate of a will by the register is a judicial decree which cannot be impeached collaterally in an action of ejectment brought in right of the heir.

Wilson *et al.* *v.* Gaston, 11 Norris, 207.

January 7, 1884. THE COURT. On the 5th of September, 1862, a testamentary paper, dated October 22, 1861, purporting to be the last will and testament of Charles S. McCandless of Centre Township, Butler County, was admitted to probate in the usual form by the Register of Wills of Butler County. By the provisions of this will, the testator, who died August 8, 1862, devised and bequeathed all his real and personal estate to his brother, W. D. McCandless, subject to a life estate therein to his father and mother.

After the decease of the life-tenants, W. D. McCandless, accepting the devise to him made, entered into the possession of the testator's interest in the lands, assumed the ownership thereof, and on March 24, 1876, conveyed the same to Simon Young, the defendant, for the consideration of $18,600.

It is not pretended, that Simon Young was not a *bona fide* purchaser, and it is admitted that he had paid a full price for the lands.

On February 11, 1881, another instrument of writing bearing date June 18, 1862, also purporting to be the last will and testament of the said Charles S. McCandless, deceased, was admitted to probate by the Register of Wills of Butler County. The probate of the latter instrument was effected by the oath of the said W. D. McCandless, who was one of the subscribing witnesses, and by proof of the genuineness of the signature of George McCandless, deceased, who was the other.

Thus, it appears, that two testamentary papers, have been duly probated, in the same county, and entered of record as the last will and testament of Charles S. McCandless, deceased. As the testator could make but one last will and testament, the single question presented on this record is which of these papers is to be taken and recognized as such.

There is no question of disputed fact, and the law must determine the difficulty. Both were offered and received in evidence, on part of the plaintiff, the only proof of either being the sentence or decree of the Register in the probate of each.

It has been held in Rowland *v.* Evans (6 Barr, 435); Holliday *v.* Ward (7 Harris, 485), and in many other cases, both before and since the passage of the Act of April 22, 1856, that the Register in taking the probate of a will is a judge; that the admission of a will to probate is a judicial decree; that his judgment in its favor is evidence of its validity, conclusive in all respects as to personal, and presumptive as to real property, and that it can only be set aside on appeal.

The probate as to realty was, however, but *prima facie* proof that the instrument was, in fact, the last will and testament, and no lapse of time gave the probate any conclusive effect. Twenty-one years' continuous and adverse possession, claiming under the will, might render the possession secure; two concurring verdicts in ejectment might establish title as against the party assailant, but the decree of the Register never became conclusive.

The Act of April 22, 1856, however, provided that "the probate, by the Register of any will devising real estate" should be "conclusive as to such realty, unless within five years from the date of such probate, those interested to controvert it" should "by caveat and action at law, duly pursued, contest the validity of such will as to such realty."

It is entitled "An Act for the greater certainty of title and more secure enjoyment of real estate." The preamble declares "that public and private prosperity and happiness require that titles to real estate should be certain and secure, and that the people should acquire, hold, and improve their homesteads and estates, in the confidence that they will not be lost by secret and unknown claims, or by fraud and perjury, and also alienate them at their full value, without abatement for legal doubts and uncertainties."

In the construction of the 7th section of this statute a number of questions have arisen, which may now be considered settled by the decisions of this Court.

1. It is not to be regarded simply as a statute of limitation, it is a provision "for the greater certainty of title." Statutes of limitation affect the remedy only, but this section of the Act of 1856, as we have said in Warfield *v.* Fox (3 P. F. S. 382); Hegarty's Appeal (25 P. F. S. 517); and McCort's Appeal (2 Out. 33), lays down a rule of evidence, which after the lapse of five years, without caveat or action at law duly pursued, makes that conclusive which before was *prima facie* only; it therefore affects the title to the lands and not merely the remedy for its recovery.

2. A will can now be contested "by caveat and action at law, duly pursued," and the contestant is restricted to the proceeding before the Register, and an issue *devisavit vel non* directed by the Orphans' Court. The probate of a will, by the Register, is a judicial act, which cannot be collaterally impeached in an action of ejectment, brought in the right of the heir-at-law, to recover the real estate devised by the will. (Wilson *v.* Gaston, 11 Norris. 207.)

3. That those interested to controvert the probate, therefore, are necessarily those interested in

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contesting the validity of the will, they, or any of them, may, at any time within five years, appeal from the decision of the Register, admitting the will to probate. (McCort's Appeal, 2 Out. 33.)

4. That the probate of a will devising real estate is conclusive on all persons, whether infants, *femes covert*, persons *non compotes mentis*, or not, unless contested as directed by the 7th section of the Act of 1856. (Warfield *v.* Fox, 3 P. F. Smith, 382.)

These are the deliberate conclusions of this Court after a careful study of this statute, and we are unwilling to modify or change them. Individual cases of special hardship may, and doubtless will, occur, which at first blush may appear to bring in question the wisdom of these rulings, but we believe this construction to be in accord with the purpose and design of the statute.

The distinct question of fact which was before the Register for adjudication on September 5, 1862, was whether or not the writing dated October 22, 1861, submitted for probate, was the last will and testament of Charles S. McCandless, deceased. His adjudication, as to this, was a sentence or decree against "all interested to controvert it."

No one of these, perhaps, was named in the decree, or had notice of the proceeding, but all interested to contest its validity, as to the realty, were bound within the five years, then next ensuing, to take notice of the fact, whether named or notified, or neither.

The proceeding was *in rem* as well as *in personam*. All persons interested to controvert the will must therefore be regarded as parties or privies.

We are bound, therefore, to accept the will of October 22, 1861, as the testator's last will and testament; its validity cannot now be questioned, as to the realty devised under it. We have no right to assume that the paper of June 18, 1862, was his last will, simply because it bears a later date than the former; the presumption is otherwise, and that presumption is now conclusive.

It may be that the probate of the first testamentary paper, as the last will and testament of Charles S. McCandless, deceased, at the instance and for the benefit of W. D. McCandless, the devisee therein named, was a gross and most shameful fraud upon his child, and assuming this, the plaintiffs in error contend that the conclusive effect of a record, or of any judicial decree, may be impugned for fraud.

Assuming this to be true upon due proof, in an appropriate proceeding, how could such an attack prevail as against the present defendant? He is a *bona fide* purchaser, for a full valuable consideration paid. His purchase must be assumed to have been made upon the faith of the Register's decree, which except for the alleged fraud, by the lapse of five years, had ripened into a conclusive presumption of law, as to the titles under the will, but he had no knowledge of, or participation in the fraud, and is therefore entitled to protection against its consequences.

Titles to real estate "should be certain and secure," and the very purpose and design of the Act of 1856, would be defeated, if an innocent purchaser, under such circumstances, could not hold his estates "in the confidence that they would not be lost by secret and unknown claims or by fraud and perjury."

The judgment is affirmed.

Opinion by CLARK, J.

GREEN, J., absent. J. M. S.

July, '83, 221. January 28, 1884.

Furbush et al. v. Chappell et al.

Distress—What is sufficient seizure—Fixtures—When distrainable.

The seizure of property necessary to complete a distress need not be an actual seizure of the particular goods. It is sufficient for the landlord to give notice of his claim for rent, and to declare that the goods which he names shall not be removed from the premises till the rent is paid.

A fixture slightly attached to the freehold, which the tenant may remove at his pleasure during the term, and which may be removed without destroying its character or injuring it, is distrainable.

A spinning mule, fastened to the floor of a mill with wooden screws, so as to run, like bolts, is such a fixture.

Error to the Common Pleas No. 4, of Philadelphia County.

Replevin, by Merrill A. Furbush and Charles A. Furbush, trading as M. A. Furbush & Son, against Chappell and Taylor, trading as Chappell & Taylor, and Ellicott Fisher.

On the trial before ELCOCK, J., the following facts appeared:—

The action was brought to recover a spinning mule, that originally belonged to Chappell & Taylor, and had been placed by them in a mill which they rented from Ellicott Fisher. It was about ninety feet long, occupied eleven feet space in width, and had from four hundred to six hundred spindles. It was fastened to the floor with wooden screws three or four inches long, so as to run, like bolts. The plaintiffs, who had originally built the mule for a price which was never paid them, had received from Chappell & Taylor a bill of sale of it, and had sent their workmen to the mill to remove it. Before the workmen had detached it from the building, Ellicott Fisher, the landlord, came to the mill and threatened to arrest the workmen,

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giving as a reason that Chappell & Taylor owed him some rent. According to plaintiffs' witness, Fisher did not state the amount of rent. According to Fisher's testimony, he said there was five months' rent due, but it does not appear from either testimony that he stated the amount of money due. In consequence of Fisher's threats, the plaintiffs' men desisted from the attempt to take the machine, and the parties left the mill. Taylor, one of the tenants, then locked up the mill and gave the key to Fisher, who then said that he had possession, and that the machine could not go until the rent was paid. The plaintiffs then sued out the writ of replevin. Afterwards Fisher went to the mill with a constable, but found that the sheriff had seized the machine under the writ of replevin.

The Court directed the jury to find a verdict for defendants, and to assess the damages at $417.50, being the amount of rent in arrear. Verdict and judgment accordingly. The plaintiff thereupon took this writ, assigning for error the instruction of the Court.

John G. Johnson (*Frank P. Prichard* with him), for plaintiffs in error.

The issue for the jury was: Did the landlord seize the machine as and for and in the name of a distress? To support the affirmative of this issue, it is submitted that he should have shown:—

(1) An actual manual seizure or such an unequivocal declaration of seizure in the presence of the machine and of the parties as would in law be equivalent thereto; and (2) That he made this seizure "as and for and in the name of a distress for rent," specifying the amount of rent due, so that the owner of the chattel could tender the rent, or if the distress was excessive have his remedy under the Act of Assembly.

It is submitted that even accepting the landlord's own testimony, he did neither of these things. He did not make actual seizure, and, while he threatened to arrest plaintiffs' men for removing the machine, he said nothing which indicated a present intent to take the machine into his own possession. Above all, he did not say what amount of money he claimed.

The cases of Wood *v.* Nutt (5 Bing. 10), Cramer *v.* Mott (L. R. 5 Q. B. 357), relied on by the Court below, were decided in England, where the disposition to support the right of dis-

Jackson & Gross on Landlord and Tenant, § 128, p. 105.
Pitt *v.* Shew, 4 B. & Ald. 206.
Clarke *v.* Holford, 2 Car. & K. 540.
Dalton *v.* Whittem, 3 Q. B. 961.
Moore *v.* Drinkwater, 1 Fost. & F. 134.
Darby *v.* Harris, 1 Q. B. 895.

There is but one English case opposed to this weight of authority, that of—

Hellawell *v.* Eastwood. 6 Exch. 295.

But this was overruled in the Exch. Cham. by—

Holland *v.* Hodgson, L. R. 7 C. P. 328.

In America the rule of Hellawell *v.* Eastwood (*supra*), never was law.

See Judge Hare's Note to Simpson *v.* Hartopp, 1 Sm. L. C. *534.

Especially is that case at variance with the Pennsylvania decisions, for in this State it has been settled beyond all dispute that machinery in a mill is a fixture, even though it be removable by a tenant.

Voorhis *v.* Freeman, 2 W. & S. 116.
Pyle *v.* Pennock, 2 W. & S. 390.
Harlan *v.* Harlan, 8 Harris, 303.
Christian *v.* Dripps, 4 Casey, 271.
Morris's Appeal, 7 Norris, 368.

It is true that replevin will not, as a rule, lie for a fixture, for the reason that the title to real estate cannot be tried in a personal action, but *cessante ratione cessat et ipsa lex*, and where the fixture is one which the plaintiff has a right to remove, and he claims it as a chattel, by virtue of that right of removal and not by reason of any claim of ownership to the realty, replevin will lie.

Charles L. Lockwood (*Joseph A. Sinn* with him), for defendants in error.

No actual, manual seizure of the goods is necessary to constitute a distress.

Cramer *v.* Mott, L. R. 5 Q. B. 357.
Wood *v.* Nunn, 5 Bingh. 10.
Smith's Landlord and Tenant, *166, 224.
Taylor's L. and T., § 578.
Wood's L. and T., 942.
Woodfall's L. and T., 420.
Bullen on Distress, 131.
Hutchings *v.* Scott, 2 M. & W. 809.
Swann *v.* Falmouth, 8 B. & C. 456.
Thomas *v.* Harries, 1 M. & G. 695.

The plaintiffs' evidence by the witness Grice was, "Mr. Fisher would not let us take the machine away, because he said Chappell & Taylor owed him some rent."

This was sufficient seizure for all purposes. It

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Gilbert on Distress, *39.
Note to Simpson *v.* Hartopp, 1 Sm. L. C. *533.

It is confined to such additions to the freehold as cannot be removed without destroying their character or injuring them, and which consequently cannot, if pledged, be restored *in statu quo*.

McGregor *v.* High, 21 L. T. Rep., N. S. 803.

Hellawell *v.* Eastwood, *supra*, is exactly similar to the present case, and has never been overruled.

Holland *v.* Hodgson, *supra*.
The Queen *v.* Lee, L. R. 1 Q. B. 244.
Waterfall *v.* Peniston, 6 Ell. & Bl. 876.
Turner *v.* Cameron, L. R. 5 Q. B. 309.
Longbottom *v.* Berry, L. R. 5 Q. B. 123, 137.

In Pennsylvania it has long been held that between landlord and tenant a chattel annexed for trade purposes is not a part of the freehold, but mere personal property. This has been held true of a steam engine.

Lemar *v.* Miles, 4 Watts, 330.
Heffner *v.* Lewis, 23 Smith, 302.

Of an engine-house of stone and wood.

White's Appeal, 10 Barr, 252.

Of a steam boiler.

Shell *v.* Haywood, 4 Harris, 523.
Hill *v.* Sewald, 3 Smith, 271.
Seeger *v.* Pettit, 27 Smith, 437.

It is made plain by the decisions cited, that in Pennsylvania a machine placed by a tenant in a factory for trade purposes, and affixed merely to the floor, so as to steady it while running, is neither a part of the freehold nor a "fixture" within the meaning of the old writers. It is, to all intents and purposes, a chattel, because the law presumes in favor of trade that the tenant did not intend by fastening it to the floor to change its chattel nature. It can be taken under a fieri facias against the tenant, can be disposed of by a gift or bill of sale, and on the death of the tenant passes to his executor.

The decisions in which machinery has been held to pass by mortgage of a factory or mill are not relevant, and only show that such machinery can be made either realty or personalty by contract.

Harlan *v.* Harlan, 8 Harris, 303.
Coleman *v.* Lewis, 3 Casey, 291.

Besides, if the machine was not distrainable, replevin could not be maintained for it, for the action of replevin, like trover, will not lie for fixtures or things affixed to the freehold, *before severance*, as it is effectual for the delivery of personal property only.

Roberts *v.* Dauphin Bank, 7 Harris, 71.
Overton *v.* Williston, 7 Casey, 155.
Darrah *v.* Baird, 13 WEEKLY NOTES, 332.
Heaton *v.* Findlay, 2 Jones, 304.

The plaintiffs are, therefore, placed in the inconsistent position of contending: first, that the machine was not a chattel, and therefore not distrainable; and second, that it was a chattel and replevin would lie for it. It is submitted that the true rule is that in the case of a chattel fixture, while the tenant has a right of removal, the landlord has his distress and the tenant his replevin.

February 11, 1884. THE COURT. A landlord may verbally distrain for the non-payment of rent, and he may by parol authorize a bailiff to distrain. As a general rule, to render the distress complete, there must be a seizure of the property distrained upon, but a very slight act is sufficient to constitute a seizure in contemplation of law. It need not be an actual seizure of the particular goods. If the landlord gives notice of his claim for rent, and declares the goods which he names shall not be removed from the premises until the rent is paid, it is a sufficient seizure.

Fixtures which the tenant has no right to remove from the freehold are not distrainable; but fixtures slightly attached which the tenant may remove at his pleasure during the term, and which may be removed without destroying their character or injuring them, may be distrained. They can be restored in the same plight. This spinning mule was such an article. It was subject to sale on a fi. fa. as personalty, and was a chattel subject to distress.

Judgment affirmed.

PER CURIAM. D. H.

Jan. '83, 174. May 16 & 17, 1883.

Slaymaker v. Farmers' National Bank of Lancaster.

Decedents' estates—Administration—Administrator de bonis non.

Where an administrator keeps an account in bank in his representative capacity, and dies before completing his duties, the administrator *de bonis non* is not entitled to claim from the bank the amount of the deposit. He must, in order to recover this, demand it from and sue the representative of the original administrator.

Where a bank pays over the amount of such deposit to the administrator *de bonis non*, this will constitute no defence in an action against the bank by the executor of the original administrator.

The rights and duties of administrators *de bonis non* explained and commented upon.

Error to the Common Pleas of Lancaster County.

Assumpsit, by Amos Slaymaker, executor of James L. Reynolds, who was administrator of William Mathiot, deceased, against The Farmers' National Bank of Lancaster, to recover a certain sum deposited in said bank by the plaintiff's decedent.

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On the trial, before LIVINGSTON, P. J., the following facts appeared: James L. Reynolds, on March 27, 1854, took out letters of administration upon the estate of one William Mathiot, deceased. On March 30, 1854, he opened an account as administrator in the bank defendant. This account was kept running until the death of Reynolds, on April 5, 1880, at which time there was in bank a balance of $770.76. On April 10, 1880, plaintiff took out letters testamentary on Reynolds's estate. On May 1, 1880, letters of administration *de bonis non*, upon the estate of William Mathiot, deceased, were granted to Catharine H. Mathiot. On May 5, the bank on demand paid the whole balance on deposit to said Catharine H. Mathiot. On February 15, 1882, plaintiff drew a check on the bank defendant for the amount of the deposit. Payment being refused, the present suit was instituted.

The Court, on motion, entered judgment of nonsuit, and subsequently refused to take off the same. Plaintiff thereupon took this writ, assigning for error the refusal of the Court to take off the nonsuit.

Amos Slaymaker and *Geo. M. Kline*, for the plaintiff in error.

Mrs. Mathiot had no right to demand the money, and the payment to her was unauthorized, and constitutes no defence to the present action.

Eyster's Estate, 5 Watts, 133.
Hamaker's Estate, 5 Watts, 204.
Bowman's Appeal, 12 Smith, 166.
Commonwealth *v.* Strohecker, 9 Watts, 479.
Stair *v.* York Nat. Bank, 5 Smith, 364.
Whiteside *v.* Whiteside, 8 Harris, 473.
Black *v.* Black, 10 Casey, 354.
Shollenberger's Appeal, 9 Harris, 341.
Ashford *v.* Ewing, 1 Casey, 213.
Lindenbigler *v.* Gourley, 6 Smith, 166.
Mussleman's Appeal, 15 Smith, 480.
Hammett's Appeal, 2 Norris, 392.
Carrick *v.* Carrick, 8 C. E. Green, 364.

W. M. Franklin and *H. M. North*, for the defendant in error.

Mrs. Mathiot was properly entitled to receive the deposit.

Brooks *v.* Smyser, 12 Wright, 86.
In re Montgomery, 3 Brewst. 306.
Frazier *v.* Bank, 8 W. & S. 18.
Stair *v.* York National Bank, 5 Smith, 364.
Com. *v.* Barnitz, 9 Watts, 257.
Com. *v.* Strohecker, Id. 479.
Drenkle *v.* Sharman, Id. 485.
Weld *v.* McClure, Id. 495.
Carter *v.* Trueman, 7 Barr, 315.
Meiser *v.* Eckert, 7 Harris, 201.
Little *v.* Walton, 11 Harris, 164.
United States Bank *v.* Macalester, 9 Barr, 475.
Jackson *v.* Bank of the U. S., 10 Barr, 61.
American Board of Commissioners' Appeal, 27 Conn. 344.

October 1, 1883. THE COURT. Administrators *de bonis non* have power to recover from their predecessors, or their legal representatives, all moneys, goods, and assets remaining in their hands, due and belonging to the estate of the decedent; to prosecute actions upon promises made to such predecessors in their representative character; to sue forth and defend writs of error, or of scire facias, or of execution upon judgments obtained in the name of their predecessors, and to proceed with unexecuted executions for collection of such judgments, provided that in any suit for the recovery of money, goods, or assets, remaining in the hands of the predecessor, or his legal representative, brought before he shall have settled his final account, the Court shall have power to stay proceedings therein, upon the defendant's filing such account in the Register's office twenty days previous to the term next after the term to which the writ was returnable, until final settlement of said account, and the Court in which the suit is pending shall render judgment for the balance appearing by the account to be due to either party. (Act of February 24, 1834, P. L. 77.) The object of the statute was to vest every administrator *de bonis non* with power to collect from his predecessor, or his legal representative, all assets in his hands, or for which he was liable, that belonged to the estate. (Commonwealth *v.* Barnitz, 9 Watts, 252.) Prior to its enactment an administrator *de bonis non* could not recover the assets in the hands of his predecessor who had died; then the creditors, legatees, or distributees of the estate were under the necessity of resorting to the personal representatives of the deceased executor or administrator to obtain satisfaction of their respective claims; but now they look to the successor who has all the powers of the original administrator, and whose administration is a continuation of the original administration under a separate responsibility, but by the same authority. (Scott on the Int. Laws, 518, 521.) All assets belonging to the estate of the decedent, remaining in the hands of the first administrator, or to which he was entitled but had not administered, must pass into the hands of the successor in office.

"An administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, etc., which remain in specie and were not administered by the first executor or administrator. Also, it is holden that if an executor receives money in right of his testator, and lays it up by itself, and dies intestate, this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects as goods in specie. And whatever assets are in the hands of a third person, at the death of an administrator or executor intestate, the administrator *de bonis non* may sue for the recovery." (Williams on Exec.,

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916; Bac. Abr. Exrs. B. 2, 2.) These principles, relied on by the defendant, established long prior to the Act of 1834, were considered by this Court in an elaborate opinion wherein it is said: "that the collection of debts due to the testator or intestate, or disposition, change, or alteration of the goods made by the executor or administrator, would protect them from the claim of the administrator *de bonis non*, as unadministered goods," and, "that if the goods are changed or altered, and remain no longer in specie, or have been disposed of, the administrator *de bonis non* cannot claim them; and so of the debts, unless they be such as grow out of contracts to which the testator or intestate was a party, for otherwise they cannot be said to be debts due and owing to the testator or intestate. (Potts, Adm'r, *v.* Smith, 3 Rawle, 361, pp. 370, 371.) Money of the decedent received, laid by itself, and remaining in specie, should not be confounded with money received by the executor in the conversion of goods and collection of debts belonging to the estate. Debts arising upon contracts made with the testator in his lifetime, and owing to his estate, differ from debts contracted with the executor in the management of his trust. A note given to the executor for the price of goods of the estate, is owing to him, and assets in his hand; but a note given to the testator is not assets in the executor's hands till paid. A judgment obtained by the executor against a person who owed money to the testator, is not assets in his hands until levied by execution or received; but if a third person, without the executor's consent, receives money owing to the estate, and the executor sues such third person, and obtains judgment, he becomes responsible as if the money had been paid to himself, and the judgment becomes assets the moment it is obtained. (Jenkins *v.* Plume, 1 Salk. 207, cited in Potts *v.* Smith, *supra.*)

Aside from the personal estate which remains in specie, and was not administered by the first executor or administrator, and the uncollected debts owing to the estate, the administrator *de bonis non* may recover the assets remaining in the hands of his predecessor. He can bring suit immediately, but the defendant may have proceedings stayed until the account shall be adjusted, and then the judgment shall be for the balance. What could more properly be em-

to the testator on note and book account, and had certain articles of personal property belonging to the estate in his possession, proved the will, accepted the trust, and was qualified, but died before letters testamentary were actually delivered to him, and before he had inventoried or sold the goods; it was held that the executor's administrator could file an account charging the executor's estate with said indebtedness and the value of the goods, deducting proper disbursements and claims for service, and also that the administrator *de bonis non* was entitled only to the balance remaining in the hands of the predecessor after settlement in the Orphans' Court. (Bowman's Appeal, 62 Pa. St. 166.) There, the executor had done nothing with the goods, save taking care of them. How much stronger must be the reason for an account when the goods have been disposed of for money, or debts due the estate have been collected. Whatever doubt exists, whether goods which were in the executor's possession at the time of the testator's death, and remained in specie till the executor's death, should not be taken by the administrator *de bonis non*, there can be none, that money received by the executor for goods he sells and in payment of debts owing to the estate, is administered.

James L. Reynolds, administrator of William Mathiot, deceased, had an account in the bank which began in 1854, and continued till his death in 1880. His deposits were numerous, many of them small, made in a number of years, aggregating over $30,000, and the balance when he died was $770.76. Whether that balance really belonged to himself for services and other just charges against Mathiot's estate, does not appear in the bank account, nor is it reasonable that it should. While living he had absolute control of the deposit. Had the bank refused to pay it on demand, he could have sued and recovered in his own name; he could not have recovered on a declaration averring that the debt was owing on a contract made with the deceased in his lifetime. In bringing suit, had he appended the words, "administrator of William Mathiot," they could have been treated as surplusage, not affecting the merits of the case. No decree or order of any court, or other cause, appears why he, if living, or his legal representatives, if dead, should not demand and recover the money. The facts are simple, and reveal a

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Jan. '84, 330. March 3, 1884.

Shaaber et al. v. Bushong & Bro.

Partnership—Statute of Frauds.

One partner cannot bind his co-partners jointly with himself to pay the debt of another.

A promise to pay a note out of money belonging to the maker in the hands of the promissor when the note falls due, and if that fund be insufficient, that the promissor would individually pay the same, is a promise to pay the debt of another within the Statute of Frauds.

Error to the Common Pleas of Berks County.

Debt, by Jacob Bushong and Henry Bushong, trading as Bushong & Bro. against Daniel Shaaber, Adam Johnston and Henry Johnston, late trading as Shaaber, Johnston & Co., upon the following note:—

No. 165. Office of the Berks County Railroad Co.
Reading, May 13th, 1874.

Three months after date the Berks County Railroad Company promises to pay to the order of Shaaber, Johnston & Co., Ten Hundred and Twenty-One 42-100 Dollars, without defalcation, for value received, payable at the office of said company, Reading, Pa.

$1021.42. FRANK C. SMINK, *Treas.*
HENRY BUSHONG, *Pres.*

Indorsed, SHAABER, JOHNSTON & CO.

Pleas, *nil debet*, payment with leave, set-off, etc.

On the trial, before SASSAMAN, J., the following facts appeared: The plaintiffs were a firm of bankers, who had discounted the above note. The railroad company having made default, they brought this suit against the defendants as indorsers.

The defendants offered to prove that the note was given under the following circumstances, to wit: The banking firm of Bushong & Bro., plaintiffs, was composed of Henry and Jacob Bushong, who were also at the time of giving the note officers of the said Berks County R. R. Co., Henry Bushong being its president, and Jacob Bushong one of its directors. The said Henry Bushong was both the principal man in said company and also the business agent and manager of the banking firm of Bushong & Bro. The defendants carried on the Franklin Iron Works at Reading, Pa., and manufactured cars for said request was then repeated, and the note in suit given upon Henry Bushong's express promise, that when the note fell due, it would be paid by the said Bushong & Bro. out of any moneys of the said railroad company deposited in their bank, and that in the event of not enough money being on deposit to the credit of the said company, the said firm of Bushong & Bro. would pay the note themselves.

Offer objected to by plaintiffs as irrelevant, within the Statute of Frauds, and disclosing no consideration for the promise set up. Objection sustained on the ground that Henry Bushong had no authority to bind his firm by such a promise.

Verdict and judgment for plaintiffs for $1575.09. Defendants thereupon took this writ, assigning for error, *inter alia*, the rejection of his offer of evidence as above.

Frank R. Schell, for plaintiffs in error.

The promise is not within the statute.

Malone *v.* Keener, 8 Wright, 107.
Dock *v.* Boyd & Co., 12 Norris, 92.

Bushong had authority so to bind his firm, for it was not incorporated, but merely a private partnership, wherein each partner is the agent of all the other partners.

Jeff. Snyder and *Geo. F. Barr*, for defendants in error.

The promise of one partner that the firm will pay the debt of a third person is not binding on his co-partner.

McQuewans *v.* Hamlin, 11 Casey, 517.

The promise is within the statute.

Maule *v.* Bucknell, 14 Wright, 39, 52.

March 17, 1884. THE COURT. It was not within the general scope of the business of the firm for one partner to bind his co-partner jointly with himself to pay this debt of another. No special authority from his co-partner to do so is alleged.

The offer is not to prove a contract to pay the note out of money in possession of the defendants in error at the time the promise was made, but out of money of the maker which might be in their hands when the note became due. The offer is not to prove that any money of the maker was in the possession or control of the maker when the note matured. The alleged contract is, therefore, to pay the debt of another, and is invalid under the statute. (Townsend *v.* Long

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Jan. '83, 216. February 13, 1883.

Spring Run Coal Company v. Tosier.

Bankruptcy—Provable debt—Cutting and conversion of standing timber—Damages under Act of March 29, 1824—Interlocutory judgment—Liquidation of damages upon a writ of inquiry subsequent to discharge in bankruptcy.

In an action of trespass to recover treble damages under the Act of March 29, 1824, for cutting and converting standing timber, the plaintiff obtained judgment for want of an appearance, but before damages were assessed by inquisition the defendant was adjudicated a bankrupt. On a sci. fa. to revive the judgment, the defendant in his affidavit set up his discharge in bankruptcy as a defence:

Held, that the plaintiff's claim for damages under the statute was a provable debt under the Bankrupt Act, and that therefore the affidavit set up a valid defence.

Nassau *v.* Parker, 1 Clark, 298, distinguished.

Error to the Common Pleas of Elk County.

Trespass *vi et armis*, brought Nov. 28, 1868, by The Spring Run Coal Company against Thomas Tosier, to recover, under the Act of March 29, 1824, treble damages for cutting, carrying away, and converting white pine timber from the plaintiffs' land without their consent. Plea, not guilty.

On September 20, 1876, appearance and plea were withdrawn, and on the same day judgment was entered against the defendant for want of appearance and plea. On May 23, 1881, an inquisition was held and damages were assessed at $11,714.47. On September 19, 1881, a sci. fa. was issued to revive the judgment and continue the lien. On November 23, the defendant filed an affidavit of defence in which he averred that on April 30, 1878, he filed his petition in bankruptcy, and was duly adjudged a bankrupt; that on May 9, 1879, he obtained his discharge from all debts and claims provable against his estate, which existed at the date of filing his petition, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy, and that he was informed and believed that the said judgment was a debt provable, and was not exempt from the operation of said discharge in bankruptcy.

On January 16, 1882, the plaintiffs took a rule on defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defence. Subsequently the Court discharged the rule. Exception. The plaintiffs thereupon took this writ, assigning for error the action of the Court in discharging the said rule.

John G. Hall and *C. H. McCauley*, for plaintiffs in error.

The single question raised here is whether an action in tort for damages to real estate by cutting and conversion of standing timber becomes a provable debt in bankruptcy by reason of an interlocutory judgment for default of appearance and plea before the damages are liquidated?

Under the 19th section of the Bankrupt Law of 1867 the following claims are provable: (1) Debts due and payable by the bankrupt at the time of adjudication. (2) All debts then existing but not payable until a future day. (3) All demands against the bankrupt for or on account of any goods and chattels wrongfully taken or converted.

It is also provided in the same section:—

"If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the Court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debt other than that above specified shall be proved or allowed against the estate." (Rev. St. § 5067.)

This claim is not provable because not within the classes enumerated above, damages for torts to real estate and unliquidated damages being excluded. The damages could not have been made certain on the interlocutory judgment, because at that time the amount of timber cut and converted, and its value, could only be determined by a jury. Such damages are not provable unless liquidated.

In re Hennocksburgh & Block, 7 N. B. R. 39.
Howland *v.* Carson, 16 Id. 374.
Nassau *v.* Parker, 1 Clark, 298.

The cases cited on the other side are inapplicable, for there the judgment was definite, but in this case the judgment is interlocutory, and merely an inchoate judgment. The damages were assessed under the writ of inquiry, and final judgment was entered thereon in 1881, long after the defendant's discharge.

The matters in the affidavit of defence should have been urged by the defendant against the assessment of damages, and the entry of the final judgment in the original action. In this case, the defence is confined to matters occurring since the rendition of the judgment.

In no case can the merits of the original judgment be inquired into by the defendant on a sci. fa. upon that judgment so as to enable him to set up a defence which he might have used in the original suit.

Cardesa *v.* Humes, 5 S. & R. 65.
Davidson *v.* Thornton, 7 Barr, 131.

W. W. Ames and *Samuel Linn*, for defendant in error.

When the defendant was adjudged a bankrupt, the plaintiffs' claim ceased to be in tort, and was in the form of an unliquidated judgment, and therefore was a contract of record within the Bankrupt Law of 1867, sec. 19. The original action was brought under Act of March 29,

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1824, sec. 3, which provides a remedy for cutting and conversion of timber in trespass or trover. A judgment in trover is provable under section 19 of the Bankrupt Law.

Under the statute the damages for cutting and converting are three times the market value of the timber taken. The value and amount taken is a certain basis for calculating damages for *id certum est quod certum reddi potest.* A judgment which must be liquidated or paid in money is to all intents a debt of specialty.

Stone *v.* Boston and Maine R. R., 7 Gray, 539.
In re Sidle, 2 N. B. R. 221.

The judgment, by default in this case, became a judgment *quod recuperet*, and not an interlocutory judgment. By operation of law the discharge in bankruptcy paid the judgment, and could be interposed as a defence to the revival, thereof or execution thereon.

Boyd *v.* Vanderkemp, 1 Barb. Ch. R. 273.
In re Clough, 2 N B. R. 151.
Blumenstiel on Bankruptcy, 270.

April 16, 1883. THE COURT. This action was brought against the defendant for the cutting and conversion of standing timber to recover "treble the value thereof" under the Act of March 29, 1824 (P. L. 152). On September 20, 1876, judgment was entered in default of an appearance and plea. The damages were liquidated under a writ of inquiry and final judgment entered on May 23, 1881.

For present purposes, it must be taken as admitted that on April 30, 1878, the defendant was adjudicated a bankrupt, and that he obtained his discharge on May 9, 1879. The sole question is, whether the plaintiff's demand was a provable debt in bankruptcy at the time the defendant was adjudicated a bankrupt.

The interlocutory judgment established the right of the plaintiff; but the quantum of damages sustained by him was not then ascertained. A judgment by default in an action for a specific thing, as in debt for a sum certain, is absolutely complete. But where damages are to be recovered, because the Court know not what damages the plaintiff has suffered, a jury must be called to assess them. The process is called a writ of inquiry, and prior to the Act of May 22, 1722, in the execution thereof, the sheriff sat as a judge and tried by a jury what damages the given in open Court, "and after the inquest consider thereof they shall forthwith return their inquisition, under their hands and seals; whereupon the Court may proceed to judgment, as upon inquisition of that kind returned by the sheriff." That mode of inquiry is now a matter of right, but is not subject to review in an appellate court. (Bell *v.* Bell, 9 Watts, 48.) The inquiry determines the amount of damages, when in open Court, with precisely the same result as a sheriff's inquisition.

Although the judgment by default may be incomplete for purposes of lien and execution, it is complete in determining the plaintiff's right of recovery. It is a bar to another action between the same parties for the same cause. The only process or order to which the plaintiff is entitled is one for ascertainment of his damages, the jury are bound to find some damages, and the defendant has no right to be heard, except as to the amount, for the judgment is conclusively binding until vacated or reversed. The cause of action, having been established by the judgment, is merged in it, and cannot again become the basis of a suit between the parties. If an action would not lie on the judgment until after its liquidation, the plaintiff's hands are tied until the liquidation. The fact that execution cannot be had, or an action be commenced until the damages are assessed, does not change the character of the judgment.

The judgment is a debt in the nature of a contract, though the cause of action upon which it was founded may have arisen from a tort. In order to give a just effect to a judgment, sometimes it is proper to look behind it to see upon what it was founded, as when it becomes necessary for the Court to determine whether the defendant is entitled to exemption of property from levy and sale in execution, or whether the plaintiff may sue out a *capias ad satisfaciendum.* So, in that way, when a defendant claims he is discharged under the bankrupt law, it may be ascertained whether the debt upon which the judgment was founded, was created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer or while acting in any fiduciary character.

We think it clear that the plaintiff's claim for damages under the statute became a provable

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case, where there is no certain rule for measurement of damages, is not a point in this case.

At argument reference was made to Nassau *v.* Parker (1 Clark, 298). A verdict has not the legal effect of a judgment. Where a verdict was obtained before adjudication in bankruptcy, and judgment afterwards, the case is that of a pending suit at the time of adjudication, subsequently determined.

Writ of error dismissed, at the costs of the plaintiff, without prejudice to the plaintiff's right to a trial by jury.

Opinion by TRUNKEY, J.

CLARK, J., absent. F. J. A.

July, '83, 15. February 14, 1884.

Alcott v. Hugus.

Contracts; entire and divisible — Estoppel — Former recovery.

Where the subject of a sale consists of an entire lot of standing timber of a specified quality, and the price to be paid is not apportioned to any item or part thereof, the contract is entire.

Where a contract is entire and not divisible, but one action can be maintained thereon.

Where the consideration of an entire contract is a cash payment, and a promise to give negotiable notes at three, six, nine, and twelve months, a refusal to give such notes after cutting part of the timber is a breach for which the vendor can sue and recover damages for the whole sum for which the notes were to have been given.

Where a suit has been brought under the conditions above stated on the ground of refusal to give the notes, and under the instruction of the judge the jury found a verdict for the amount of the one note which would have been then due, and judgment is entered on the same, such judgment is a bar to a subsequent suit on the same contract.

Error to the Common Pleas of Somerset County.

Assumpsit, by Isaac Hugus against Edward Alcott, for damages for an alleged breach of contract. Pleas, non-assumpsit, payment with leave, and former recovery.

On the trial, before EWING, P. J., the following facts appeared: On April 18, 1878, Hugus by articles of agreement in writing and signed by each party sold to Alcott all the timber on a certain tract of land in Addison Township, which was subject to the lien of judgments Alcott refused to give the negotiable notes, but continued to cut and carry away the timber as though no lien existed against the land.

On September 25, 1878, Hugus first brought suit on this contract when only one payment would have been due, and filed a narr. containing the common counts, and a special count upon the written agreement averring "that the defendant had not paid the several sums of money, nor given said negotiable notes as he had promised to do, or any or either of them, or any part thereof." He also filed a statement of claim for the whole amount for which the timber was sold. The Court instructed the jury that the narr. was for the timber actually taken by the defendant under the agreement prior to September 25th; the jury returned a verdict for $200 (the amount of the first note with interest). Judgment was entered, execution was issued, and the money was made.

Subsequently, after all the payments on the original contract were due, Hugus brought this present suit for the same cause of action filing a narr. containing the common counts and a special count on the same contract.

The defendant requested the Court to charge, *inter alia*, as follows:—

(1) That plaintiff having counted as for an entire cause of action, in a former suit entered to No. 141, November Term, 1878, and defendant pleaded to the whole declaration; upon which issue was joined, trial had, and a recovery in favor of plaintiff, said plaintiff cannot recover for any part of the sum or claim counted for in the former action *in solido*—in this action.

(2) That if the plaintiff in the action entered to No. 141 November Term, 1878, declared as for an entire cause of action, embracing the entire claim in this suit, even though it was originally capable of separation into distinct parts, yet if declared on as a whole, and defendant pleaded to the whole declaration, issue joined, trial had, and recovery and judgment for plaintiff; and if the present suit is to recover any part of what was embraced in the first suit, plaintiff is estopped by the first suit, and the estoppel extends to all that was put in issue in the said first suit, and that was or might have been passed upon by the jury, and plaintiff cannot in this suit show that any part that was counted for in the first suit was withheld from the jury.

(3) That whenever it is determinable by the

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1882, show that all matters in controversy in this suit are the identical matters in controversy in the former suit, the plaintiff is estopped by the verdict and judgment in that suit.

To these points the Court answered as follows:—

"These points all refer to the effect to be given to the recovery in the case between the parties at No. 141, November Term, 1878. The question is wholly for the Court to decide on inspection of the whole record and papers. At first glance at the amended declaration, it appeared to us that it was an action to recover the whole amount due on the agreement in default of payment on notes—but the learned Judge (ROWE) who tried the case gave it a different interpretation, saying it was not such an action—and we cannot say that he was wrong in the ruling. The first count which sets out the agreement gives no intimation of any default in regard to the giving of the notes, it is only in the conclusion after the various counts that any such intimation is given. The plea and record evidence set up a complete legal excuse for not giving the stipulated notes, and it is so ruled by the Court on the trial, and it is apparent, to wit, the existing liens. This being the case, the plaintiff could only recover in that suit for the payment that was due when he brought his suit on the 25th September, 1878—there was but one payment so due, to wit, the first of $168.75 with its interest. He could not legally recover even that unless, in addition to it being due, the defendant at the time suit was brought had already cut a sufficient proportion of the whole timber to be cut off the tract, to make the defendant safe against the liens—not only for the $25 cash paid, but for this payment of $168.75 that under the terms of the agreement was due at the institution of the suit. I do not see how under the pleadings and admitted facts in that case plaintiff was entitled to recover any more, or how he could recover for the three payments not due. The learned Judge submitted the question to the jury as to whether or not the defendant had at the time of the bringing of the suit, cut a sufficient portion of the timber to entitle the plaintiff to recover anything.

"Under this instruction the jury must have found that the proportion of timber cut at the time was sufficient to entitle the plaintiff to nearly all of the first time payment, but not all, as the verdict of $200 is a little less than the principal and interest of the first payment. It is clear that the instructions of the Court and the findings of the jury excluded everything beyond the first instalment from consideration in that case.

"On an examination of the whole voluminous record I am of the opinion that the pleadings and the record evidence necessarily excluded from the recovery in that case the three payments that did not fall due until after the suit was brought, and that therefore the plea of former recovery in the present case is not a bar to the recovery of a portion of plaintiff's claim not recovered in the former action. It is good as to the first payment and its interest."

Verdict for the plaintiff in the sum of $363.76, and judgment thereon. Whereupon defendant took this writ, assigning for error, *inter alia*, the answer to the above points.

Valentine Hay (*Colborn & Colborn* with him), for plaintiff in error.

The recovery upon the first action worked an estoppel to any subsequent action on the same contract.

Shenk *v.* Mingle, 13 S. & R. 29.
Girard *v.* Taggart, 5 S. & R. 19.
Sykes *v.* Garber, 2 Outerbridge, 183.

Where the contract is entire and there is a recovery upon such contract, the party cannot maintain a second suit even on clear proof that no evidence was given in the first as to part of the demand in controversy.

Hess *v.* Heeble, 6 S. & R. 57.
Bitzer *v.* Killinger, 10 Wright, 44.
Gans *v.* Renshaw, 6 Barr, 34.
Nicol *v.* Carr, 11 Casey, 381.

J. O. Kimmel, for defendant in error.

Where the cause of action is separable, the plea of former recovery should not prevail.

Carmony *v.* Hoober, 5 Barr, 307.

A recovery of a part of a claim is no bar to a suit for another part not due at the time of first suit.

Kane *v.* Fisher, 2 Watts, 253.

March 3, 1884. THE COURT. By the agreement Hugus sold to Alcott and Waltz "all the timber growing and being upon a tract of land in Addison Township containing two hundred and twelve acres on Cucumber Run, adjoining land of W. J. Barr, which is suitable for staves, ties, and manufacturing into lumber; in consideration whereof said parties of the second part shall pay presently $25, and give their four negotiable notes at three, six, nine, and twelve months in equal sums, to wit, $168.71." Within what period the timber was to be cut and taken is not stated, but the time and mode of payment are specified. In the first action the plaintiff could have recovered the whole contract price, if none of the timber had been cut, on the ground that the defendant had refused to give the notes. Refusal to give the notes was a breach of the contract, and the measure of damages could have been nothing less than the whole sum for which the notes were to have been given. Judgment upon the contract for default in giving the notes would have discharged the obligation; it could not be split into several actions. (Shenk *v.*

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Mingle, 13 S. & R. 29.) Had the timber all been cut before the beginning of that action, the plaintiff could have recovered the contract price, although had the notes been given only one would have been due, for the defendant could not have time for payment of the money after the breach of contract to give notes.

The subject of sale consisted of the entire lot of standing timber of a specified quality, and the price to be paid was not apportioned to any item or part thereof, and therefore the contract is entire. (Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351.) A gross sum was to be paid for the timber, and the divisible nature of the payment had no effect upon its entirety. The consideration was cash and negotiable notes, presently to be paid and delivered. Although the notes were to become due at different dates, the vendor was entitled to them immediately.

The plaintiff filed in his first suit a narr. containing common counts, and a special count upon the written contract, averring that the defendant had not paid the several sums of money, nor given said negotiable notes as he had promised to do, or any or either of them, or any part thereof. He filed a statement of claim for the whole amount for which the timber was sold. But the Court instructed the jury that the narr. was not for refusing to give the notes, but for timber actually taken by the defendant, under the agreement, prior to September 25, 1878; that if the defendant had cut all the timber prior to that date he must pay the whole consideration; "and if the defendant cut the trees on this Hugus land both before and after the 25th September, 1878, he is to pay for what he cut before that date, and according to the price fixed in the agreement." Neither the pleadings nor instructions of the Court show that the plaintiff claimed a specific part of the consideration for which the note at three months was to be given; on the contrary, both show that he claimed the whole. The plaintiff presented his allegations and proofs in his own way; whether the ruling of the Court was right or wrong is not now a question, for the judgment stands unimpeached.

Here the narr. contains common counts, and a special count upon the same contract. The foundation for recovery in the former suit was the same as it is in this, and that judgment is a conclusive bar to another recovery. (Corbet *v.* Evans, 25 Pa. St. 310.) Whether the former claim was based on the breach for not giving the notes, or on the price of the timber according to the agreement, it was upon the contract. If for the default in not giving the notes, and it were clear that the verdict was only for one of them, he could not recover the amount of the others in a second suit. (Logan *v.* Caffrey, 30 Pa. St. 196.) No principle is better settled than that where a contract is entire and not severable, but one action can be maintained thereon. The plaintiff was utterly mistaken if he supposed he could sustain suits on this contract, from time to time during the cutting of the timber by the defendant, for such sums as the timber cut was worth measured proportionately to the price of the whole. When he claimed all the purchase-money on the ground that all the timber had been cut and the notes had been refused, if he proved the claim, he was entitled to a verdict for the whole. After a trial on the merits, the judgment bars another suit for the same thing.

This is unlike a case where the first action was defeated by a mere technical objection. Where the merits of the second suit were necessarily excluded from the first, the plaintiff ought not to be barred, as where the judgment set up did not spring from the foundation of the action, but was the consequence of an objection that touched only the plaintiff's then right to sue. (Carmony *v.* Hoober, 5 Pa. St. 305.) And in covenant where the plaintiff declared for instalments not due as well as those that were due, and the jury expressly found for those due, the recovery was not a bar to an action for an instalment not due at the institution of the first suit. (Kane *v.* Fisher, 2 Watts, 246.)

Unfortunately for this plaintiff, his first suit was not brought for an instalment of purchase-money, payable at a certain date; it was for the purchase-money on an entire contract, and the judgment for a small fraction of his demand discharged the obligation. Even where a demand orignally consisted of distinct parts and the plaintiff chose to have it tried as if entire, but recovered only a part, he is barred from recovering the other in a second action. (Hess *v.* Heeble, 6 S. & R. 57.) We conclude with the final remark of Justice GIBSON in that case: "I am aware that this decision may bear hard on the justice of the cause, and I regret it: but it is peculiarly the province of a court of error to hold the rule steady and see that the particular equity of a case does not prevail over the law."

Judgment reversed.

Opinion by TRUNKEY, J.

CLARK, J., absent. W. M. S., Jr.

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Common Pleas—Equity.

C. P. No. 2. June 11, 1883.

Brown et al. v. Griffin et al.

Equity—Trustees—Jurisdiction of the Common Pleas—That an unincorporated association, not a charity, is subject to the sole government and control of a superior association, does not deprive the Common Pleas of its jurisdiction to compel certain trustees of said subordinate association, removable at its pleasure, to transfer the trust estate to new trustees, duly chosen by said subordinate association.

Hearing on bill, answer, and proofs.

Bill in equity, wherein David Brown and fifteen others, members of King Solomon's Tabernacle, No. 6, United Order of Brothers and Sisters of Love and Charity, suing for themselves and such others as are or may become members of said Tabernacle, the complainants, and James Griffin, Sarah Gordon, and the Western Saving Fund Society, were respondents.

For the allegations of the bill see the report of the proceedings had on the demurrer thereto. The demurrer was overruled. (13 WEEKLY NOTES, 91.)

The respondents, save Griffin, by their answers submitted themselves to the Court. Griffin by his answer in substance, *inter alia*, alleged, and by proof or admission established, that the said association, in June, 1876, united itself and became subject to the Union Grand Tabernacle of the Order of Brothers and Sisters of Love and Charity, whose constitution provided it should "have the sole government and superintendence of all subordinate tabernacles."

The other facts, as admitted by the answer or established by the proofs, were, *inter alia*, that in pursuance of a rule of the Western Saving Fund Society, the King Solomon's Tabernacle No. 6, etc., an unincorporated association, not a charity, composed of the complainants and respondents Griffin and Gordon, had appointed the said Griffin and Gordon trustees for itself of its deposits in said fund. They subsequently, at a meeting duly held in 1881, discharged the said trustees, and elected one Shire and one Young in their stead; but Griffin and Gordon, nevertheless, refused to deliver the deposit-book to the complainants, and to transfer the said deposits to the new trustees, Shire and Young, orators, and to transfer the said deposit-moneys to the said . . . Shire and . . . Young, in trust for said tabernacle."

Alexander Simpson, Jr., for complainants.

These trustees are removable at the pleasure of the association. The question at issue is not part of the government and superintendence of the association complainant. This Court has jurisdiction to decree the transfer of the trust estate to the new trustees.

Act June 14, 1836, §§ 15, 28; Purd. Dig. 1417, pl. 15; 1419, pl. 28.

Brown *v.* Griffin, 13 WEEKLY NOTES, 91.

J. Cooke Longstreth, for the respondent Griffin.

The sole jurisdiction is in the Union Grand Tabernacle.

THE COURT. Decree for the complainant under the second prayer of the bill.

I. T. M.

C. P. No. 3. March 22, 1884.

Spielman v. Oil Co.

Costs in equity—Injunction affidavits.

In equity.

Sur defendant's appeal from prothonotary's taxation of costs.

The Master had reported a decree placing the costs upon the defendant. The prothonotary's taxation of costs, among other items, contained allowances for two injunction affidavits as follows:—

"Injunction affidavit 1st page, 32 lines @ 10 cents, $3.20.
" " 2d page, 15 lines @ 6 cents, .90.
Injunction affidavit 1st page, 24 lines @ 10 cents, 2.40.
" " 2d page, 31 lines @ 6 cents, 1.86."

The defendant took the above appeal, specifying these items, *inter alia*, for objection.

Albert T. Goldbeck, for defendant.

The equity fee bill does not allow for drawing affidavits.

Quay *v.* Quay, 1 Chester Co. Rep. 489.

Edward Willard, for complainant.

THE COURT. Let the costs allowed for the injunction affidavits be struck out.

A. M. B.

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Common Pleas—Law.

C. P. No 2. March 7, 1884.

Wilkinson v. Starr.

Deceit—Trespass on the case for—Pleading—While an unfulfilled promise will not sustain an action for deceit, still, if the promise include a misrepresentation of the then existing facts, the action may lie—A demurrer generally to a declaration is bad if one count be good.

Sur demurrer to declaration. Trespass on the case for deceit.

In the first count of the declaration it was in substance alleged, that for five hundred dollars, on the 17th of February, 1882, and for one thousand dollars, on the 22d of September, 1882, paid S. by W., the said S., on the last-mentioned day, purported to assign and agreed to deliver to W., out of the first issue to S., certain bonds of the G. Company, and represented that said bonds were then due him from said company, and that he had no doubt they would be deliverable within ten days; that W. paid said money on the faith of said representations, and demanded, etc., but never received any of the said bonds; that none of the said bonds are, or ever were, due S.; that he knew this fact when he made the said representation, and that he intended to and did defraud, etc., W. of the said fifteen hundred dollars.

The second count differed in substance from the first only in alleging that W. paid S. all of the fifteen hundred dollars on the 22d of September, 1882.

The defendant demurred, assigning as cause thereof, *inter alia*, and in substance: (1) That the alleged fraudulent representations were merely promises for future conduct; and (2) that part of the consideration is stated to have been paid before said representations were made.

Diehl, for the demurrer.

In analogy to cheating by false pretences the misrepresentation must be of existing facts.

[HARE, P. J. A promise may be so worded as to amount to such a misrepresentation.]

As part of the consideration was paid before the misrepresentation, there is no injury therefrom.

Michener, contra.

We aver an agreement to sell bonds, accompanied by a false representation that the seller was then entitled to said bonds. The second count avers paying all our money at the time of the representation. The demurrer is general, and falls if either count is good.

THE COURT. Demurrer overruled.

I. T. M.

C. P. No. 3. February 2, 1884.

Lantz v. Fowler.

Affidavit of defence law—What is a proper copy of book entries.

Sur rule for judgment for want of a sufficient affidavit of defence.

The copy of book entries filed contained charges, *inter alia*, as follows:—

"1883, May 2d, Fowler & Yarnall.
5 Boxes Rudy Soap 5-100 . . 500 at 4¾, 23.75"

The defendant's affidavit set forth that the copy filed was not such a copy of book of original entries as would entitle the plaintiff to judgment.

Broadhurst showed cause.

This was not such an entry as would entitle the plaintiffs to judgment for want of an affidavit of defence. There is no charge made. Fowler and Yarnall are not charged. Judge MITCHELL, in Farrell *v.* Baxter (11 WEEKLY NOTES, 400), says, that it is well settled that a copy of book entries must charge the defendant.

Uhler *v.* Kohler, 2 WEEKLY NOTES, 67.

Sparhawk for the rule.

In Farrell *v.* Barber no names were mentioned in the entry. Here Fowler & Yarnall distinctly appear.

THE COURT. Rule absolute. A. B. W.

C. P. No. 3. Feb. 9, 1884.

Atkinson & Co. v. Harper.

Affidavit of defence law—Sufficiency of copy filed—Book entries unintelligible to the defendant—Charges stated in the customary manner.

Rule for judgment for want of a sufficient affidavit of defence.

The copy of book entries filed was as follows:—

July 7, 1883.

H. Harper,

To Atkinson & Co., Providence, R. I.

⅙	doz.	6006	Tail Pin,	$5.50	per doz.,	$0.91⅔.
"	"	6007	" "	5.50	"	91⅔.
"	"	6008	" "	5.50	"	91⅔.
"	"	6009	" "	5.50	"	91⅔.
"	"	6010	" "	4	"	66⅔.
"	"	6011	" "	4	"	66⅔.
"	"	6012	" "	4	"	66⅔.
"	"	5091	Scarf Pin,	4.00	"	66⅔.
"	"	524	Chain,	12.00	"	2.00.
¼	"	309	S. C.,	5.00	"	1.25.

etc. etc.

The affidavit of defence stated, *inter alia*, that the deponent was "unable to ascertain from the copy filed whether same contains items of charge

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correctly stated against deponent, and that the same is unintelligible to him."

Josiah R. Adams, for rule.

De Forest Ballou, contra.

THE COURT. There is no allegation that the charges are not stated in the manner customary among jewellers. That is all that can be required.

Rule absolute.

Per LUDLOW, P. J.

YERKES, J., absent. A. M. B.

Orphans' Court.

February 19, 1884.

Schada's Estate.

Decedent's estate—Petition for exemption—Application for by executor and guardian, who has sold testator's effects shortly after his death, without taking any inventory, when the rights of creditors may have intervened, is too late, but he is answerable to the minors for any loss his neglect has caused—Act of June 4, 1883.

Sur petition for exemption.

The petition of Frank, Ernst, and Carl, minor children of Oscar Schada, the decedent, by their testamentary guardian, Richard Snyder, who was also executor of the estate, represented that the said Oscar, their father, died in October, 1883, leaving no widow. The prayer of the petition was that the said minors might retain personal property amounting to fifty dollars and cash amounting to two hundred and fifty in accordance with the Act of April 14, 1851 (Purd. 416, pl. 60).

To this petition exceptions were filed on behalf of certain creditors of the decedent, the substance of which is given in full in the opinion of the Court (*infra*).

John Dolman, for the minors.

Reed & Pettit, for the creditors, exceptants.

March, 1 1884. THE COURT. The decisions under the Acts granting exemption out of the *v.* Hettrick, 5 P. F. S. 292; Sipes *v.* Mann, 3 Wr. 416.) In deference to the knowledge on their part of the special relief which their situation calls for, a liberal choice is accorded to the beneficiaries; where the estate will permit it, they may select either goods or money or land. But their option lies between these species of property in the shape in which they passed from the hands of the decedent, and it is in no sense a lien which will attach to the proceeds arising from their sale. The choice must be specific, and the property chosen must be identified and valued by an appraisement. Where these formalities, or more correctly, these requisites, have been disregarded, no considerations of hardship have as yet relaxed the rigidity of the rule. (Williams's Appeal, 10 Nor. 69.) In that instance, the decedent's personal property was sold within two months after his death, and before a guardian was appointed for his children. The latter, a few days after he had qualified, applied for the exemption on behalf of his wards, and his claim was declared to be too late. The Act of 4th of June, 1883 (P. L. 74), now compels the selection of property for the use of minors under fourteen years of age, by the guardian or the administrator or executor, but it expressly requires that the property shall be appraised. Can we, by treating that as done which should have been done, annul this injunction? The executor, six days after his testator's burial, and without taking an inventory, sold the property and realized the sum of $518. In his capacity of testamentary guardian he then asked that the exemption might be allowed in cash to the minors. He has thus raised an issue, which is no longer doubtful, between the privilege of the minors and the rights of the creditors. The latter object that their rights had attached before the privilege was exercised, and their objection must be sustained, (Baskin's Appeal, 2 Wr. 65; Davis's Appeal, 10 Cas. 256; Downing's Appeal, 37 Legal Intell. 64; Maier's Estate, 1 Pear. 420.) We do not pretend to say that the minors are without redress. They are all within the protection of the Act of 1883, because while the duty imposed by that Act attaches only when a minor shall be under the age of fourteen years, it is extended, when it has once attached, to all the children. In the case in hand, one of the wards is below that age. For any loss which the executor by his neglect has occasioned he is clearly answerable in damages. (Compher *v.* Compher, 1 Cas. 31; Neely *v.* McCormick, Id. 255.)

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, MAY 15, 1884.* [NO. 23.

Supreme Court.

July, '83, 38. January 16, 1884.

Bolton v. King.

Bankruptcy—Promise—Consideration—Amendment—Practice.

The effect of a discharge in bankruptcy is absolutely to extinguish a debt and not merely to bar the remedy for its recovery. Hence the mere acknowledgment of a debt after a discharge in bankruptcy therefrom, however clear, distinct and unambiguous it may be in its terms, is not sufficient to restore the debt so that suit can be maintained thereon.

The promise to restore a debt from which the debtor had been discharged by proceedings in bankruptcy upon which suit can be brought must be a clear, distinct, and unequivocal promise to pay the specific debt (not the expression of a mere intention to pay), and must be without qualification or condition.

The moral obligation to pay coupled with the fact of the pre-existing liability is sufficient consideration for such a promise.

A statement in the following terms, "We owe her the money, will pay it some day, can't say when," is a sufficient promise upon which to bring suit for a debt discharged by proceedings in bankruptcy.

Where plaintiffs declare against a firm for a debt which has been discharged by proceedings in bankruptcy, and on the trial prove a sufficient promise by one partner subsequent to the discharge to pay the debt, the narr. may be so amended after verdict as to declare against that partner only.

MERCUR, C. J., and GORDON, J., dissent.

Error to the Common Pleas of Philadelphia County.

Foreign attachment, by Mary King against Thomas Bolton, Henry Bolton, and John Bolton, trading as the Bronx Company.

Upon security being entered, the attachment was dissolved and the plaintiff declared in as-

$400. New York, July 3, 1872.

On demand after date we promise to pay to the order of Mrs. Mary King, four hundred dollars at our office. Value received. BRONX CO.

[U. S. stamp, 20 cents.] J. M. BOLTON, Agent.

[Indorsed.] September 9, 1878. Received twenty-eight dollars interest to July 3, 1877. MARY KING.

The suit was originally brought against Thomas Bolton, Henry Bolton, and John Bolton, trading or late trading as the Bronx Company. On the trial before verdict the record was amended by leave of Court, by striking out the names of Thomas Bolton and John Bolton, as defendants, and trading, or late trading, as the Bronx Company, so that the cause proceeded as if the suit had been brought against one of the defendants, Henry B. Bolton only, as if he only had been sued, and declared against in the narr. on a promise made by him after his discharge in bankruptcy, by decree of the United States District Court for the Southern District of New York, made April 17, 1879. After verdict, and before judgment, an amended narr. was filed, as of the day of trial, by leave of the Court, in accordance with said amendment.

The case rested almost entirely on a letter written by the defendant below to Mr. Shallcross, who was attorney for Mrs. King, at that time, about March, 1881. This letter was lost, and though careful search was made, it was not found; and parol evidence was admitted on the trial to explain its contents. Mr. Rowland, a witness called on behalf of the plaintiff, testified that he had read the letter several times; he took it home and read it to his wife; that he remembered the contents, and thought he could give it word for word, as follows: "We owe her the money, will pay it some day; can't say when."

Mr. Shallcross testified that he could not give the exact phraseology of the letter, but said: "My distinct recollection about the letter is that it first acknowledged the receipt of my letter, and admitted the indebtedness upon the note, that they could not pay then, but that some time in the future—it was indefinite as to the time—the note would be paid."

The defendant, Bolton, did not recollect the contents of the letter, and did not give his version of it at all, and did not contradict the

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constitute a promise to pay, which would revive the original debt, and if the jury find no other evidence in the case establishing an express promise to pay, the verdict should be for the defendants."

(8) "If the jury find from the evidence that Henry Bolton wrote a letter to John Shallcross, Esq., acknowledging the receipt of his letter, and admitting the indebtedness upon the note, saying that they could not pay the note then, but that some time in the future, indefinitely, the note would be paid, that alone would not constitute an express promise to pay the debt; and if they find no other evidence of an express promise made after the filing of the petition in bankruptcy to pay this debt, the verdict should be for the defendants."

Answer. "I answer these two points together; the jury must consider the testimony of these two witnesses together. If they find from the testimony of both that there was an express promise to pay then the verdict should be for the plaintiff. I have more fully answered these points in my general charge, and I refer to that as containing a full answer to them."

Verdict accordingly for the plaintiff. Subsequently a motion in arrest of judgment was discharged, and judgment entered on the verdict. Thereupon the defendant took this writ, assigning for error, *inter alia*, the action of the Court in permitting the plaintiff to file an amended declaration, as of the date of the trial, charging only one of the defendants, after verdict rendered; and entering judgment upon the verdict in favor of the plaintiff and against the defendant.

Henry M. Dechert, for plaintiff in error.

The plaintiff first declared upon the original undertaking of the three defendants on the note supported by their subsequent promises, and the substantial issues were upon the making of those promises within six years, and since their several discharges in bankruptcy. It is well settled that such a declaration is defective. The discharge released the defendants generally from "all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy."

Rev. Stat. U. S., Sec. 5119.

The original debt is merely a consideration which renders the new promise available; it is the latter which creates a new contract upon which suit may be brought.

Field's Estate, 2 Rawle, 351.
Earnest *v.* Parke, 4 Rawle, 452.
[illegible]

cases of discharge in bankruptcy to sustain the action.

The expression of a mere intention is not sufficient. In Yoxtheimer *v.* Keyser (1 Jones, 364), the discharged bankrupt replied to an inquiry whether he would pay the debt in question, that "he was going to pay it as soon as he got able," and that he was going to pay all his honest debts, except some in the city. The Court held the language insufficient.

Canfield's Appeal, 1 WEEKLY NOTES, 67.
Allen *v.* Ferguson, 9 Bank. Register, 481.

Frank S. Simpson, for defendant in error.

It is submitted that there was no error in allowing the plaintiff to file an amended declaration after the verdict and before judgment. The record having been amended on the trial, without objection on the part of defendant, by striking out the names of all the defendants except Henry B. Bolton, the cause proceeded to trial upon the issue formed by the plea of the discharge in bankruptcy, and the subsequent promise to pay the debt. Such amendments can at any time be made, and they are favored by the Court. Even at common law, without our statute of amendments, the Court has power to direct or permit such amendments, which, before the Act of 1872, were allowed after verdict.

Bailey *v.* Musgrave, 2 S. & R. 219.
Bigley *v.* Bigley, 21 Pitts. L. J. 99.

These statutes of amendments have always been liberally construed by this Court, which has held that no verdict ought to be set aside when there has been a full trial upon the merits, and the formal addition of a party will cure the defect in the record.

Patton *v.* R. R. Co., 15 Nor. 169.

It is submitted, therefore, in view of all the authorities, that the words of the defendant in this particular case not only show a clear, distinct, and unequivocal acknowledgment of the debt on the note due to the plaintiff, but also a distinct and unambiguous promise to pay it.

Kingston *v.* Wharton, 2 S. & R. 208.
Willing *v.* Peters, 12 S. & R. 177.
McKinly *v.* O'Keson, 5 Barr, 369.
Haines *v.* Stauffer, 1 Harris, 540.

February 25, 1884. THE COURT. This action was originally a foreign attachment, brought by Mary King against Thomas Bolton, Henry Bolton and John Bolton, trading or late trading as "The Bronx Company;" the attachment being dissolved, however, the action proceeded in assumpsit. The plaintiff's claim was upon a note of The Bronx Company, dated July 3, 1872, for four hundred dollars, payable to the order of

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of the Statute of Limitations, and also a special plea of their discharge in bankruptcy from all debts contracted prior to 28th May, 1878. The plaintiffs joined issue on the plea of the statute, and replied to the special plea, that the defendants, after they became bankrupts, ratified and confirmed their promises, etc., and upon this the defendants joined issue. On the trial, the record was so amended that Henry Bolton was the only defendant, and the verdict was against him alone.

The Statute of Limitations is a bar to the remedy merely, and does not discharge the debt; there remains, therefore, besides the mere moral obligation to pay, the pre-existing indebtedness as a consideration for a new promise; it has, therefore, been repeatedly held that from a clear, distinct, and unequivocal acknowledgment a promise may be inferred, if that acknowledgment is consistent with a promise. (Palmer *v.* Gillespie, 95 Pa. St. 340; Wesner *v.* Stein, 97 Pa. St. 322; Lawsa *v.* McCartney, 31 Pitts. Leg. Jour. 255.) A promise, whether express or thus implied, has been regarded as a waiver of the statutory defence, and the remedy is restored; the action must of course proceed upon the original contract, not upon the new promise.

But the mere acknowledgment of a debt, however clear, distinct, and unambiguous it may be in terms, is not now sufficient to restore a debt, which has been discharged under the operation of the bankrupt law. (Yoxtheimer *v.* Keyser, 11 Pa. St. 364; Canfield's Appeal, 1 WEEKLY NOTES, 67; Allen *v.* Ferguson, 9 Bankruptcy Law Jour. 481.) The effect of a discharge in bankruptcy is an absolute extinguishment of the debt, and not a mere bar of the remedy for its recovery. Nothing remains after the discharge but the moral obligation to pay, which, taken with the fact of the prior legal obligation, has been held to form a sufficient consideration for a new express promise; in the nature of the case, however, there cannot arise a promise by implication, as the mere acknowledgment of a debt would not create any liability, if, in fact, no debt existed. The promise to restore a debt from which the debtor has been discharged, whether by proceedings in bankruptcy or otherwise, must be a clear, distinct, and unequivocal promise to pay the specific debt, not the expression of a mere intention to pay; it must be without qualification or condition, and must contain all the essentials of a valid, express agreement, excepting only the element of a valid consideration; the moral obligation, taken with the fact of a pre-existing liability, will furnish the consideration. In an action upon such a claim the declaration must therefore be upon the new promise, and not the original, as the latter is extinguished by the discharge.

The facts, principally relied upon by the plaintiff below, to establish the fact of a new promise by Henry Bolton to pay the debt, evidenced by the note of July 3, 1872, and to relieve her claim not only from the bar of the statute but from the defendants' discharge, are contained in a letter written by the defendant to John Shallcross, Esq., who was the plaintiff's attorney in the collection of the note. The trial was had on the 6th February, 1883; Mr. Shallcross testified that about two years before the trial he wrote a letter in behalf of his client to Henry Bolton, concerning the note, and received a reply in writing, which was passed into the hands of Thomas Rowland, and was afterwards mislaid or lost.

Mr. Rowland, being called to testify as to the contents of this letter, says:—

"The letter, I think, had a printed heading of the Bronx Company; it was signed H. B. Bolton, the defendant. I think I can give the contents word for word: "We owe her the money, we will pay it some day, can't say when.—H. B. Bolton.' I read the letter more than once; I think I have gone over the letter twice or three times; I took it home, and I think I have gone over that letter several times."

Mr. Shallcross, testifying on the same subject, says: "It is utterly impossible for me to give the exact phraseology of the letter; my distinct recollection about the letter is that it first acknowledged the receipt of my letter, and admitted the indebtedness upon the note; that they could not pay the note then, but that some time in the future, it was indefinite as to the time, the note would be paid. That is about all my recollection of the answer to my letter."

The language of the letter from Shallcross to Bolton was directed to the specific debt in suit, and the acknowledgment and promise contained in Bolton's reply, whatever may have been its precise form, were certainly also made with reference to the same debt. Whether Mr. Rowland or Mr. Shallcross stated correctly the contents of Mr. Bolton's letter was a question for the jury; the testimony justified a submission; as an acknowledgment of indebtedness and a promise to pay combined in a single phrase, no form of words could be more distinct, clear, and unequivocal than this: "We owe her the money, will pay it some day, can't say when." It is true no time was fixed for the payment, but no condition was annexed, no qualification superadded; the word "will" is auxiliary to "pay"; the letter was not the expression of mere sentiment, or of a willingness or intention to pay only; it contained a present, positive promise, deliberately made by a business man in reply to a business letter, and an action was maintainable upon it as soon as made. If Bolton had written, "We owe her the money, will pay it," no one could

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for a moment doubt the sufficiency of such an explicit promise, and yet the time of payment is just as indefinite, as if the words "some day, can't say when," were added. If the promise is otherwise in proper form, it is unimportant that no particular time is designated for payment.

The action having been instituted as a foreign attachment, in which the funds accruing to the defendant from the Brooks estate were attached, it was unimportant, we think, that the defendant was shown to have afterwards received his share; the record of the attachment exhibited the fact that this fund had been attached, and that the attachment had been dissolved on the entering of security. We regard this feature of the case as of little consequence to either party, and even if the testimony might in strictness be considered as immaterial, we would be unwilling to reverse the judgment for that which could not have done him any harm.

The statutes providing for amendments have always been liberally construed. The Court was certainly right in making the order allowing the plaintiff to file an amended declaration after verdict and before judgment. The amended declaration was just in such form as "to make the pleadings and record conform to what was tried before the jury, and found by the verdict," and was therefore within the letter of the Act of 14th March, 1872 (Purd. Dig. 70, pl. 7). (Resides *v.* Hadden, 2 Jones, 243.)

We are of opinion that this cause was rightly tried; we find no error in the record, and

The judgment is affirmed.

Opinion by CLARK, J.

MERCUR, C. J., and GORDON, J., dissent, as they deem all the evidence clearly insufficient to revive a debt extinguished by a discharge in bankruptcy. H. P.

Jan. '84, 241. February 15, 1884.

Meredith v. Haines et al.

Money counts—Money had and received—Money paid under mistake of fact—Unintentional payment.

Money paid by the plaintiff to the defendant under a *bona fide* forgetfulness of facts which disentitle the defendant to receive it, may be recovered back. It is no bar to recovery that the plaintiff paying money under a mistake of fact, had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate the facts.

it at the bank at which it was payable, and in their settlement received payment for it in cash. Afterwards the National Bank of Chester County, before closing, discovered that the maker of the note had not sufficient funds to meet the note. They then went to him and asked him to make good his account; but learning that he had just made an assignment for the benefit of creditors, they went to H. & Co. and asked them to refund the amount of the note, which H. & Co. did. M., who had notice of the action of the bank, afterwards drew a check upon H. & Co. for the amount of the note, and, upon their refusal to pay, brought suit:

Held, that the bank at which the note was payable having paid the note under a clear mistake of fact, was entitled to recover the money so paid, the rights of neither party having been prejudiced, and that plaintiff was not therefore entitled to recover.

Error to the Common Pleas of Chester County.

Amicable action, by Henry C. Meredith against Eber D. Haines and Joseph T. Murtagh, trading as E. D. Haines & Co., tried by agreement before the Court, FUTHEY, P. J., without a jury, by whom the facts of the case were found to be as follows:—

"The defendants, E. D. Haines & Co., are bankers in West Chester, with whom the plaintiff, Meredith, kept an account. The plaintiff held a negotiable note, given to him by one Edwin Chambers, for $196, dated March 6, 1883, and payable thirty days after date at the National Bank of Chester County. This note was indorsed by the plaintiff to the defendants, and discounted by them, and the proceeds placed to the credit of the plaintiff on their books. On the day the note matured, which was on a Saturday, the plaintiff directed the defendants to hold it until the following Tuesday, without presentation for payment or protest. On the last-mentioned day the note was taken to the National Bank of Chester County, where it was made payable, soon after the opening of the bank, and was marked 'good' by the book-keeper and returned, he supposing that Chambers had funds in the bank to meet it; and on the subsequent settlement of their mutual accounts by the defendants and the bank, some two hours thereafter, on the same day, the bank treated the note as cash and paid it. On posting the accounts of the day, about three o'clock in the afternoon, the book-keeper of the bank found that he had been mistaken in his figures, that Chambers had not moneys on deposit sufficient to meet the note, and that it had been paid under a mistaken idea of the state of his accounts. On discovering the error, the bank, without delay, returned the note to the defendants, and the money was refunded by them to the bank. On the same day Chambers, before

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on his return of the assignment of Chambers, and called on Murtagh, one of the defendants, to ascertain if the note had been paid. Murtagh had been absent from the bank during the latter part of banking-hours, and not being aware that the note had been returned and the money refunded, informed him that the note had been paid. Subsequently, however, upon the same evening, the cashier of the National Bank of Chester County saw the plaintiff and informed him of the mistake, that the note had been rereturned to the defendants and the money refunded, and that the note had not been paid. The plaintiff then, on the same evening, called on Haines, the senior member of defendants' firm, who also gave him the same information. The next morning Murtagh, on learning of the mistaken information he had given the plaintiff, called on him and informed him of the error, and gave him the same explanation which had been given him by his partner, and by the cashier of the bank on the evening before. The plaintiff had moneys on deposit with the defendants, and they charged to his account the amount of the note. The plaintiff afterwards drew his check on the defendants for the amount thus credited, and payment of the check being refused, this amicable action was instituted."

It appeared in evidence that on the morning the Bank of Chester County paid the note Chambers had on deposit with them $84, and did not make the assignment until about three o'clock of the same day. The evidence further showed that it was the custom of the bank to correct errors upon the same day. The plaintiff submitted the following points:—

(1) The note in question having been discounted by the defendants became their property, and the moment it was paid by the maker, or at the bank at which it was payable, the plaintiff, as indorser, was released, and the defendants could not charge it to the plaintiff's account. *Refused.*

(2) When the defendants were paid the note thus held by them, any acceptance by them of the note again, and a return of the amount thereof in cash, did not confer upon them the right to charge it to the plaintiff's account, but was done at their own risk and option, and the plaintiff is not bound thereby. *Refused.*

The Court entered judgment for defendants in the following opinion:—

"The question presented for consideration is, whether the bank could lawfully require the defendants to refund the moneys thus received by them.

"It is a general principle that if a man through some mistake, or misapprehension, or forgetfulness of facts, has received moneys to which he is not justly and legally entitled, and which he ought not *in foro conscientia* to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise from him to pay over the amount to such owner; and if money has been paid under forgetfulness or a mistake of facts, the person making the payment is entitled to recover back the money. (3 Addison on Contracts, §§ 1406, 1408; 2 Daniel on Negotiable Instruments, §§ 1226, 1243, 1369; McCrickart *v.* Pittsburgh, 7 Norris, 133.) In the case before us the bank in paying the note in question did not intend to pay it with their own moneys; they supposed they were paying it with the moneys of the maker.

"We are of opinion the case comes fully within the principles referred to, and that the bank having made the payment under a clear mistake of fact, was entitled to recover back from the defendants the moneys thus mistakenly paid them, unless the rights of the receivers of the moneys or of the indorser of the note had been prejudiced by the mistake, so that it would be inequitable to require the moneys to be refunded. (3 Addison on Contracts, § 1409; 2 Daniel on Negotiable Instruments, § 1369; Tybout *v.* Thompson *et al.*, 2 P. A. Browne, 27.)

"We cannot see that the rights of any one have been thus prejudiced. Had the moneys of the bank not been mistakenly paid the indorser would have been responsible to the holder of the note. That the moneys thus paid by mistake were handed back did not injure the indorser. It left him in the same position. They were not the moneys of the maker.

"The indorser, by reason of the transaction, lost no security or means of making the money from the maker. He received notice of the non-payment of the note on the same day, and as soon as he would have received such notice had there been no such transaction as that referred to.

"We are of opinion that the indorser was not discharged from liability to the holders of the note, and that they had a right to retain his moneys deposited with them in payment thereof. (Daniel on Negotiable Instruments, § 1369; Ritter *v.* Singmaster, 23 P. F. S. 400.)

"The points presented by the plaintiff are answered in what has been already said, with the remark that there is no evidence that the note in question was paid by the maker, as stated in the first point. Judgment will therefore be entered in favor of the defendants by the prothonotary."

The plaintiff thereupon took this writ, assigning for error the action of the Court.

Charles H. Pennypacker, for plaintiff in error.

The Bank of Chester County by its action gave Chambers an extension of credit, which was not a mistake for rectification. The bank was bound to know on the presentation of the

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paper that their depositor had funds to meet it, such is the business of a bank, and without such an obligation on the part of the bank business could not be carried on. The bank recognized the extension of credit to Chambers by first sending to him to make good the deposit. Their action was that of giving him credit for $110, he having $84 on deposit. The mistake, if there was a mistake, was on the part of the bank in improperly giving a credit, and they should properly bear the burden of their own acts. But it is submitted that the action here is between Meredith and his private bankers, who, after discounting the note, became its owners. And the moment the note was paid by the Bank of Chester County, it became extinguished paper, and Meredith's liability as indorser terminated. If the defendants chose to return the money, they did so at their own risk, and their action should not bind us.

[PAXSON, J. What does it amount to more than overdrawing a bank account by check.]

That is it exactly. The bank, as occurs every day in the banking business, treated Chambers as good for $110.

R. T. Cornwell, for defendant in error.

Did Haines & Co. make themselves liable to the Bank of Chester County to return the money paid on the note?

[PAXSON, J. The Bank of Chester County could have unquestionably compelled Haines & Co. to repay.]

Certainly, for money paid under a mistake of fact may be recovered if demand is made before any one is prejudiced by such mistake.

Thomas *v.* Brady, 10 Barr, 164.
Ritter *v.* Singmaster, 23 Sm. 400.
2 Daniel on Negotiable Instruments, sec. 1369.

And negligence in making the mistake is no bar to recovery.

Lawrence *v.* American National Bank, 54 N. Y. 435.

The testimony here showed that it was the constant practice of the bank to correct such mistakes, and the plaintiff failed to show that he was in the slightest degree injured by the mistake or its correction.

March 3, 1884. THE COURT. Haines & Co. discounted the note for Meredith upon his indorsement. They, being the owners, presented it at the bank where it was made payable Chester County, for if so, Meredith's claim is without merit of any kind—he had notice the same day and was fully informed of the transaction with the National Bank.

That money paid under a mistake of fact may be recovered back is so authoritatively settled, that the principle is not controverted by the plaintiff. He seems to think some duties rested upon Haines & Co., as bankers, by which they could hold the money, after getting it in their hands, even if another person could not; but he has not shown their superior rights. Money paid by the plaintiff to the defendant under a *bona fide* forgetfulness of facts, which disentitled the defendant to receive it may be recovered back; it is not sufficient to prevent a party from recovering money paid by him under a mistake of fact, that he had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate the facts. (Kelly *v.* Solari, 9 M. & W. 54.) That was a case where the directors of a life insurance company had been informed that the policy was forfeited in the lifetime of the insured, and after his death, having forgotten the fact, paid the money on demand of the administratrix. Where the plaintiff, having an account with Post, made up a statement showing a balance due Post of $10,643.10, which they paid to the defendant, assignee of Post, and afterwards discovered that they had omitted to charge Post with $5000, loaned to him, it was held that they were entitled to recover. The defendant claimed that the plaintiffs were negligent, and had the means of discovering the mistake at and before the time of payment; but the Court remarked: "Negligence in making a mistake does not deprive a party of his remedy on account thereof. It is the fact that one by mistake unintentionally pays money to another to which the latter is not entitled from the former, which gives the right of action." (Lawrence *v.* American National Bank, 54 N. Y. 432.)

It seems superfluous to add anything to the remarks of the learned Judge of the Common Pleas. The evidence was ample to warrant the findings of facts. Chambers did not pay the note. The National Bank of Chester did not intend to advance the money for him, or pay it with its own money. Nothing was owing on the note by that bank to either of the parties in this

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Jan. '83, 27. January 9, 1884.

Dickinson v. The City of Philadelphia.

Streets—Paving—Municipal claims—Assessment bills—When city not liable—Act of April 5, 1870.

The Commissioner of Highways of the city of Philadelphia, in pursuance of an Act of the Legislature, contracted with one A. to pave a certain street, A. to be paid for his work by assessment bills against the properties along the street. The contract contained the provision that the city should be at no expense for said paving, excepting for the intersections of cross streets. A. did the paving, and in an action on one of the claims, it was held that, the property along the street being rural, the Act was unconstitutional as to said property, and the assessment was invalid. A. then brought an action against the city to recover the value of the paving done in front of said property:

Held, that he was not entitled to recover.

Horter *v.* City of Philadelphia, 13 WEEKLY NOTES, 40, followed.

Error to the Common Pleas No. 2, of Philadelphia County.

Debt, by William W. Dickinson against the city of Philadelphia, to recover the price of certain paving on Market Street, between Forty-third and Sixty-third streets, in the said city.

The case was referred to William Wynne Wister, Jr., Esq., as referee, under the Act of June 16, 1836, who found the facts to be substantially as follows: The Act of April 5, 1870 (P. L. 890), authorized the Commissioner of Highways of the city of Philadelphia to open Market Street from Forty-third Street to Sixty-third Street "to the full width as laid down on the plan of the city, and to grade said street, and to enter into contract with a competent paver to curb and pave the same, said contractor to collect the cost thereof, except for intersections, from the property owners, as is now by law and ordinance provided."

In pursuance of the provisions of this Act the Commissioner of Highways entered into a contract with W. W. Dickinson, the plaintiff, to perform said work. By this contract it was provided, *inter alia*, that the city should "be at no expense for said paving, excepting crossing stone and intersections of streets." It was further provided, that all costs of paving (except intersections) should be collected from the owners of property fronting on the street. The work was fully completed according to the terms of the contract. The cost of paving the intersections was paid by the city. For the cost of the rest of the work the contractor received assessment bills apportioned against the properties along the line of the street. These bills being unpaid, claims for the amount thereof were filed against the different property owners. The property is all rural, consisting principally of farm land, brickyards, and suburban residences. A writ of scire facias being issued on one of these claims, it was finally decided by the Supreme Court, in Craig *v.* City (7 WEEKLY NOTES, 117), that the property being rural, the frontage assessment rule was unconstitutional.

Plaintiff thereupon brought the present action.

The referee found, as matter of law, for the defendant. Exceptions were filed by plaintiff, which were dismissed by the Court, and judgment was entered for the defendant. Plaintiff thereupon took this appeal, assigning for error the dismissal of said exceptions and the said judgment.

J. R. Rhoads and *D. W. Sellers*, for plaintiff in error.

Townships, boroughs, and cities are merely agencies of the State—at least were so in 1870.

Phila. *v.* Fox, 14 Smith, 180.

The Act of 1870 was, therefore, a resumption by the State of a portion of the functions of the city. It was within the powers of the Legislature to impose the duty of making this contract on the Commissioner of Highways, and to impose the cost as usual—as though the city had acted directly.

Smedley *v.* Irwin, 1 Smith, 445.
Sharp's Appeal, 5 WEEKLY NOTES, 239.
Com'th *v.* Johnson, 2 Binney, 278.
City *v.* Field, 7 Smith, 328.
Com'th *v.* Commissioners, 32 Smith, 137.
Perkins *v.* Slack, 5 Norris, 280.

Where value is given for a chose in action, the same must be valid, and be what it purports to be. If it is not, then its equivalent in money must be paid, unless it was accepted with a full information and knowledge of the risk attending its validity.

Horback *v.* Reeside, 6 Wharton, 47.
Shob *v.* Hess, 1 Watts, 151.
Ludwig *v.* Meyre, 5 W. & S. 436.
Charnley *v.* Dulles, 8 W. & S. 353.
Porter *v.* Bright, 1 Norris, 441.
Swanzey *v.* Parker, 12 Wright, 441.

Whenever the courts have sustained a right on which labor or money has been expended, a change of doctrine by the courts shall not cause a loss of the right thus arising on judicial decision.

Gelpcke *v.* City of Dubuque, 1 Wallace, 207.

Before the decision in Craig *v.* City it had never been suguested by Court or Legislature in the long roll of cases that ground fronting on a street was exempt from assessment because it was rural.

McMaster *v.* Com'th, 3 Watts, 292.
Lipps *v.* City, 2 Wright, 503.
Hammett *v.* Philada., 15 Smith, 155.
Stroud *v.* City, 11 Smith, 255.
Kelly *v.* Pittsburgh, 4 Norris, 176.

Charles E. Morgan, Jr., Assistant City Solicitor (with whom was *William Nelson West*, City Solicitor), for defendant in error.

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The manifest intention of the parties was that the contractor should look to the property owners for payment for all work other than that at intersections, which only was to be paid for by the city.

The rule of the cases cited by the plaintiff in error does not apply where all parties to the contract stand upon the same plane, and either actually possess knowledge of the defects in the chose, or are affected with it. The plaintiff knew or was bound to know that said assessments according to the frontage rule were unconstitutional. He with full knowledge of the right of the property owners along the line of the street to refuse to pay the assessment bills, agreed to accept them in payment, and took the risk of such refusal.

The Commissioner of Highways was incompetent to bind the defendant expressly or by implication for paving, etc., other than at intersections, unless authority so to contract is found in the Act of 1870, in the absence of an ordinance of Councils and a sufficient previous appropriation of money.

Parker *v.* City, 11 Norris, 403.
Matthews *v.* Id., 12 Norris, 147.

It was incumbent upon the plaintiff as upon all other persons dealing with an agent of a municipal corporation whose powers are limited, to ascertain the nature and extent of his authority. And the corporation will not be bound by any agreement entered into by him in its name, unless within the scope of his agency.

Dillon on Municipal Corporations, pp. 464, 472, 476.
Bladen *v.* The City, 10 Smith, 464.
Parker *v.* The City, 11 Norris, 403.
Mathews *v.* The City, 12 Norris, 147.
Horter *et al. v.* The City, 13 WEEKLY NOTES, 41.

January 21, 1884. THE COURT. We are unable to distinguish this case in principle from Horter *et al. v.* The City of Philadelphia (13 WEEKLY NOTES, 41). The controlling facts are the same. The contract on which this suit was brought expressly stipulates that "all costs of paving, excepting intersections and for curb and gutter stones, shall be collected by the contractor from the owners of the property fronting on the said Market Street," and also that the city "shall be at no expense for said paving, excepting crossing stone and intersections of streets and the necessary gutter stone for the intersections." The

Jan. '84, 101. February 7, 1884.

Britton v. Commonwealth.

Criminal Law—License—Distillers—Act of April 10, 1849—Act of March 31, 1856—Act of April 20, 1858.

A distiller of whiskey, having a license under the law of this Commonwealth, is at liberty to sell the whiskey manufactured by him at any place within the same county where his manufactory is established. Because he sells such liquor in a different township of the same county from that in which his manufactory is located, he is not liable to be indicted for selling liquor without a license.

The effect of a statutory local prohibition against the sale of liquor upon a distiller's license, not passed upon.

Error to the Quarter Sessions of Fayette County. Indictment against William Britton for selling liquor without a license.

On the trial, before WILLSON, P. J., it appeared that the defendant had regularly paid his county tax as a distiller in Brownsville, Fayette County. His place of sale was at Connellsville, in the same county, and this was his only place of sale in the county. The defendant asked the Judge below to charge the jury as follows: "If you find that the defendant had a licensed distillery at Brownsville, and sold the whiskey there distilled at his warehouse in Connellsville; and did not sell elsewhere in the county, and there only whiskey manufactured in his Brownsville distillery, in quantities not less than one gallon, he is not guilty." Refused.

Verdict guilty, and sentence accordingly. The defendant thereupon took this writ, assigning for error the refusal of his point as above.

R. H. Lindsey (*A. D. Boyd* with him), for plaintiff in error.

(The Commonwealth did not appear, and no paper-book on its behalf was presented.)

February 25, 1884. THE COURT. By the Act of 10 April, 1849, it was provided that the mercantile appraisers of the respective counties should embrace, in their annual returns to the respective county treasurers, all the breweries and distilleries in their respective counties, with the names of the owners, and the number of gallons of liquor brewed or distilled by each, re-

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Act of 1849; but the rates of license were increased, and it was provided that such license should not authorize sales of less than five gallons, except malt and brewed liquors, which might be bottled and delivered in quantities not less than one dozen bottles. The Act of 20 April, 1858, after making some modifications in the rates, provided that brewers and distillers may thereafter sell any liquors, which they have been licensed to manufacture and sell, in any quantity not less than one gallon.

The defendant below is the owner or operator of a distillery, located in Brownsville, Fayette County, where he manufactures whiskey. His distillery has been, from year to year, regularly appraised and returned by the mercantile appraiser of Fayette County; and, in pursuance thereof, he has regularly paid to the county treasurer of that county his distiller's tax, and at the trial he exhibited a receipt or license, covering the period of time at which the offence charged in the indictment is alleged to have been committed, in the following form, viz:—

"Received of William Britton, twenty-five dollars, which entitles him to distiller's license for one year from date in the County of Fayette, in Pennsylvania.

"LEVI BRADFORD,
"June 1, 1883." County Treasurer.

There is no contest made in regard to the alleged sales, but the defendant claims that having paid a tax as a distiller, carrying on his business at Brownsville, he had a right to sell the whiskey, of his own manufacture, at Connellsville, or at any other single point in Fayette County. He concedes that he must manufacture and sell within the county, and that he cannot sell at more than one point in the county; but he contends that the place of sale may be in the same or a different municipal division of the county as he may choose; that there is nothing in the law which necessarily restricts the place of sale to the place of manufacture, if both be conducted within the county in which he has the license to operate. The license of a distiller, under the provisions of the several Acts of Assembly referred to, appears to confer a privilege to be exercised within the proper county. He is appraised, taxed, and licensed in the same manner as a vendor of merchandise, upon the return of the mercantile appraiser, and the license thus obtained secures the privilege not only to manufacture but to sell the product. There is no requirement expressed on the statute that this sale shall be conducted at the precise place of manufacture. The applicant for a distiller's license is not required, as a licensed retailer is, in an application to set forth the particular place in which his business is proposed to be conducted, or to designate the building, with its adaptation to the particular purposes of the license. The business, like that of a vendor of merchandise, is open to all who may choose to engage in it, upon compliance with the law. There is nothing expressed in the statute, or in the form of license prescribed by law, or in the form of procedure to obtain it, which restricts the business to any particular place, or to any subdivision of the county.

Under the revenue laws of the United States, distilled spirits can only be withdrawn from the distillery warehouse, and made the subject of sale and delivery, on payment of the revenue tax thereon; and, when this tax has been paid, they must be removed at once; if suffered to remain "on the distillery premises," they are forfeited to the United States (Rev. Stat. U. S., sec. 3288). The place of manufacture cannot, therefore, in the nature of the case, be the place of sale. If the liquors which the defendant was licensed to manufacture and sell must necessarily be manufactured in one place, and under existing laws sold in a different place, how can it be seriously contended that the place of sale is to be determined by or limited to the place of manufacture? It may be anywhere else in the county, but it cannot be there.

The defendant has been indicted for and convicted of a criminal offence—an offence created by statute; and as this, as well as all other penal statutes must be strictly construed, we cannot import into its provisions a prohibition which it certainly does not express.

We are of opinion, therefore, that the defendant was protected, in his sales of liquors at Connellsville, by his distiller's license, which gave him the right to manufacture liquors and to sell them at any single point within the county of Fayette.

We are not informed that there is in Connellsville any statutory local prohibition against the sale of liquors, and we are therefore not to be understood as expressing any opinion upon the effect of such a prohibitory law where it does exist upon the license of a distiller. It will be time enough to determine that question when it arises and is properly before us.

The judgment is reversed, and the record with this opinion, setting forth the causes of reversal, is remanded to the Court of Quarter Sessions of Fayette County for further proceeding.

Opinion by CLARK, J. E. A. B.

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May, '83, 21. May 29, 1883.

Mahoney Mutual Assessment Life Association v. Commonwealth, ex rel. Attorney-General.

Court of Common Pleas of Dauphin County—Jurisdiction, when it extends throughout the State—Corporations—Proceedings for dissolution—Insurance companies in counties other than Dauphin—Certiorari.

The jurisdiction of the Court of Common Pleas of Dauphin County, in proceedings to close the business of insurance companies, pursuant to the Act of April 4, 1873 (P. L. 20), extends to insurance companies located in any county of the Commonwealth.

Certiorari lies to review the record in such cases.

Certiorari to the Court of Common Pleas of Dauphin County.

The record showed the following facts:—

The suggestion of Henry W. Palmer, Esq., Attorney-General of the Commonwealth of Pennsylvania, set forth, that the Insurance Commissioner of the Commonwealth had communicated to him the fact that said Commissioner had reason to believe that the Mahoney Assessment Life Association, incorporated in accordance with the Act of May 1, 1876, and located at Selinsgrove, Pennsylvania, had not conducted its business in accordance with certain (specified) provisions of its charter; and that said company is insolvent, and its assets are not sufficient for carrying on the business of the same. The relator, therefore, prayed for an order requiring said company to appear and show cause why its business should not be closed.

The Court granted an order as prayed for, which was returned "Served, Wm. H. McCarty, Prest."

An answer was filed, signed by the President, the Secretary, and the Treasurer of the company, setting forth, *inter alia*, "that for several months past this association has not and is not now doing any business, and can present to this Court no valid reason why its charter should not be taken from it, and its business closed."

Whereupon the Court, on May 11, 1882, made a decree, "that the said corporation defendant be and the same is hereby dissolved, and its corporate business ended."

show cause why attachments should not issue against the officers of said dissolved corporation, to require them to deliver up the books, etc., of the corporation. The said officers thereupon obtained a rule to show cause why all proceedings should not be restrained as to them.

The said officers, also, upon a petition setting forth, *inter alia*, that said corporation had its locality by its letters-patent at Selinsgrove, in the county of Snyder, Pa., where its principal office was, and where its business was conducted; and further, that said corporation, for the reasons stated, was not included within the provisions of the said Act of April 4, 1873, under which these proceedings were instituted, by reason whereof the said decree of dissolution was improvidently made, obtained a rule to show cause why said decree of dissolution should not be vacated.

Pending said rules the defendants took this writ of certiorari, assigning for error, *inter alia*, that it appearing by the suggestion of record that the said corporation was located in Selinsgrove, in the county of Snyder, and not in the county of Dauphin, the said Court of Common Pleas of Dauphin County had no jurisdiction in the premises, and the said decree of dissolution, and all proceedings in the case, were void for want of jurisdiction.

J. Merrill Linn (with him *Geo. H. Irwin* and *B. F. Junkin*), for the plaintiffs in error.

A certiorari lies in this case.

Tidd's Practice, 330, 333, 1051.
Pringle *v.* Carter, 1 Hill (S. C.), 53.

Where a new jurisdiction by summary proceeding is given by statute, everything necessary to give the Court jurisdiction must appear affirmatively on the record, otherwise the proceedings will be void.

Grignon *v.* Astor, 2 How. (U. S) 319.
Bates *v.* Merchant's Bank, 8 Porter (Ala.), 99.
Levert *v.* Bank, Id. 144.
Hamilton *v.* Burum, 3 Yerg. 355.
Barry *v.* Patterson, 3 Humph. 313.
Tidd's Practice, 337.
Cross *v.* Smith, 2 Ld. Raymd. 836.

The Court of Common Pleas of Dauphin County had not jurisdiction of this corporation in Snyder County. The Act of 1873 does not give it, and it is a general principle that county courts have no extra-territorial jurisdiction, except where it is expressly conferred by statute. The Act of April 7, 1870 (P. L. 57), giving to

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particularly specified in the antecedent clause—viz: where the Commonwealth sues for claims due the Commonwealth. Thus, this Court have held that said Act does not give jurisdiction to issue mandamus to a State officer.

Commonwealth *v.* Wickersham, 9 Norris, 311.

Want of jurisdiction cannot be waived by appearance and plea, and it can be taken advantage of by certiorari, or otherwise, at any stage of the proceedings, before or after judgment, in the court below, or in the appellate court.

Camp *v.* Wood, 10 Watts, 120.
Walker *v.* Turner, 9 Wheat. 541.
Borough of Little Meadows, 28 Pa. St. 256.
Green *v.* Creighton, 10 S. & M. 159.
Hurd *v.* Lomdes, 7 How. (Miss.) 229.
Gordon's Appeal, 9 WEEKLY NOTES, 55.
Huffsmith *v.* Levering, 3 Whart. 115.

Robert Snodgrass, Deputy Attorney-General (*Lewis C. Cassidy*, Attorney-General, with him), for the Commonwealth, moved to quash the writ of certiorari on the ground that certiorari does not lie to statutory proceedings for the dissolution of an insurance company, the only remedy being by appeal under section 52 of the Act of May 1, 1876. This remedy, being special and statutory, is exclusive. The three months within which an appeal may be taken having expired since the date of the decree of dissolution, that decree is final and not reviewable. As to the jurisdiction: The terms of the Act of April 7, 1870 (P. L. 57), as well as its spirit and reason, include this case. It gives the Dauphin County Common Pleas "jurisdiction throughout the State for the purpose of hearing and determining all suits, claims, and demands whatever, at law and in equity, in which the Commonwealth may be the party plaintiff, for accounts, unpaid balances, unpaid liens, taxes, penalties, and all other causes of action, real, personal, and mixed." This has for ten years been understood to authorize the Attorney-General to proceed in this Court against an insurance company in any part of the State, and no one has even suggested a doubt as to the legality of such action.

October 1, 1883. THE COURT. We listened attentively to the able argument of the counsel for the plaintiff in error, and have since carefully examined the whole record and the authorities cited, but cannot find any sufficient error on which to reverse the judgment. Certiorari would not lie to correct many of the alleged collateral errors, if they existed; yet the regularity of the record may be reviewed on writ of certiorari. We therefore refuse to quash the writ. In so far as we can review the record on this writ it is sufficiently regular and correct.

Judgment affirmed.

PER CURIAM. F. M. O.

Common Pleas—Law.

C. P. of Dauphin Co. March, 1883.

Commonwealth v. City of Philadelphia.

Board of Revenue Commissioners—Powers and duties of, under Act of April 29, 1844—How affected by Act of May 24, 1878—Their office to equalize taxation by adjustment of valuations returned—Cannot act as assessors.

Assessors must list and assess the persons and property taxable in their several wards, townships, and districts, and make return of the same to the County Commissioners or Board of Revision of Taxes, whose duty it is to correct errors and supply omissions in the assessments, and return the same to the Board of Revenue Commissioners.

It is the duty of said Board, under the Act of April 29, 1844 (P. L. 499), to equalize taxation in the various counties and cities of the Commonwealth, by adjusting the valuation on the returns made by the same.

Under the Act of May 24, 1878 (P. L. 126), the duties of said Board were extended and its powers defined, but not so as to include any of the functions exercised by assessors, County Commissioners, or Board of Revision, under the former Act.

The Board of Revenue Commissioners, at a meeting held October 20, 1880, received returns, and made a valuation of property taxable in the Commonwealth, for State purposes, which valuation fixed the amount of property in the city of Philadelphia, liable to the four-mill tax, at $44,724,925. The valuation for the whole State, including Philadelphia, was $98,066,824. This was accepted by the various counties and cities, and the tax paid thereunder. At a subsequent meeting, held November 23, 1882, the Board, without disturbing the valuation of the other counties and cities of the Commonwealth, raised the valuation of the city of Philadelphia to $200,000,000, by adding mortgages, not returned by the local assessors and Board of Revision. On appeal from said action of the Board:

Held, that the Board of Revenue Commissioners have no power to act as assessors by adding to the returns made to them through the County Commissioners and Board of Revision of Taxes subjects of taxation not contained in such returns; and that they, therefore, exceeded their powers when they did so, by making the increase complained of in this appeal.

Com'th *v.* Butler Co., 2 Pears. 421; Same *v.* Blair Co., Id. 415; City *v.* Mackey, Id. 406, and City *v.* Cochran, 34 Leg. Int. 160, followed.

Appeal by the city of Philadelphia from the action of the Board of Revenue Commissioners in increasing the valuation of said city, on property subject to taxation for State purposes.

The petition of the city set forth, *inter alia*, that the Board of Revenue Commissioners of Pennsylvania, having accepted the returns made by the Board of Revision of Taxes of Philadelphia, and by the Commissioners of the several counties of the Commonwealth, on October 20,

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1880, and having acted on the same, and no appeal having been taken from said adjustment and valuation, under the provisions of the Act of May 24, 1878 (P. L. 126, § 6), the same became final, and binding upon the parties thereto, until another adjustment and valuation of the property subject to taxation for State purposes was made in all the several counties of the Commonwealth.

With the petition were presented and exhibited the returns made to and accepted by the Board of Revenue Commissioners, by the several counties of the Commonwealth, and the taxes charged and paid thereunder.

That the return for the said city exhibited property taxable for State purposes to the amount of $44,724,925, upon which a tax was assessed and paid in the amount of $178,899.69.

That since October 20, 1880, the Board of Revenue Commissioners has not made such general adjustment and valuation as would legally bind said city. But that, on November 23, 1882—after a return in detail called for by them and made by the Board of Revision of Taxes, exhibiting property taxable for State purposes to the amount of $45,863,769, on which, at four mills, the tax would be $185,455.07—said Board of Revenue Commissioners, without requiring any further return from the assessors, or the Board of Revision of Taxes, or directing interrogatories to them, upon evidence which showed the total amount of mortgages recorded in Philadelphia County to be $499,000,000, but did not designate in items and amount which of the same were exempt or presumed to be paid, without specifying in particular the new subjects of taxation, and without requiring a general return from all the counties of the Commonwealth, did increase the valuation of said city to $200,000,000, and the tax thereon, at four mills, to $800,000.

That upon appeal and argument the said Board of Revenue Commissioners refused to reduce the same.

That said increased valuation specified no items of taxable property not included in the return made in 1880; that it gave said city no data on which to make a new assessment, without which the city, being a mere collector, could make no collection.

That it included the property of corporations and associations which are exempt from such taxation, or are liable directly to the State for the same.

That the city cannot collect beyond the amount of the assessment, and therefore the excess over the amount returned in 1880 would have to be recovered from real estate, or other property not legally subject to taxation for State purposes.

That if said increase is sought to be collected under the Act of June 7, 1879 (P. L. 112), and its supplement, the Act of June 10, 1881 (P. L. 99), such action is void, as being in conflict with sect. 1, Art. 9, of the Constitution of Pennsylvania, and Art. 14 of the Amendments to the Constitution of the United States, which provide for uniformity of taxation.

That said action is illegal, because the said tax is in excess of the sum of $500,000, which is limited as the aggregate amount to be paid by the whole Commonwealth, under the Act of May 24, 1879 (P. L. 127), not repealed by the Acts of June 7, 1879, and June 10, 1881, *supra*.

And the petition prayed the said Court of Common Pleas of Dauphin County to declare this action of the Board of Revenue Commissioners to be illegal, and certify the same to said board, under the Act of May 24, 1878 (P. L. 126).

The Court, SIMONTON, P. J., ordered the petition filed, fixed the day of hearing for March 6, 1883, and ordered that notice of the same be given to the Board of Revenue Commissioners.

J. Howard Gendell and *Robert Snodgrass*, Deputy Attorney-General (with whom was *Lewis C. Cassidy*, Attorney-General), for the Commonwealth.

M. E. Olmsted, *L. D. Gilbert*, *Wm. Nelson West*, City Solicitor (with whom were *John H. Weiss*, and *C. E. Morgan, Jr.*, Assistant City Solicitor), for the city of Philadelphia.

November 5, 1883. THE COURT. The Board of Revenue Commissioners, created by the Act of May 24, 1878 (P. L. 126), in session at Harrisburg, November 23, 1882, fixed the valuation of the property in the city of Philadelphia, taxable at the rate of four mills on the dollar for State purposes, for the year 1882, at $200,000,000. The proper authorities of said city, being dissatisfied with the action of the Board, took the necessary steps to bring the case into this Court by appeal, as provided for in said Act. It thereupon became our duty, as defined in section 8 of the Act, to inquire into the facts, and to ascertain whether said Board exceeded its powers, or failed to do equity in the premises, or acted without sufficient evidence. From the evidence adduced on the hearing, we find the facts to be as follows: The Board of Revenue Commissioners met October 20, 1880, and after having received from the Commissioners of the several counties, and the Board of Revision of Taxes of the city of Philadelphia, the returns and statements specified in section 2 of the Act, and duly considered the same, they fixed the valuations of the property subject to the four-mill tax, in the several counties of the State, including the city and county of Philadelphia.

Duplicate records of these valuations were made and filed in the manner directed in section 4,

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and it was therein set forth that they were "to be and remain as the valuations of the property of the said counties until the next meeting of the Board." These duplicates were given in evidence, and from them we find that the valuation of all the property in Philadelphia, subject to the four-mill tax, was fixed at $44,724,925, and the total valuation of the same description of property in the whole State, including Philadelphia, was fixed at $98,066,824.

The State tax for 1880 and 1881 was charged against and paid by Philadelphia on the valuation thus fixed, without appeal or objection. An official statement of the State tax, due for 1882 from Philadelphia, calculated on the same basis, was sent by the State Treasurer to the Commissioners of Philadelphia, July 21, 1882. To this statement the following note was appended: "The Commonwealth of Pennsylvania reserves the right to increase the above amount of State tax, if evidence is obtained to show that the returns made by Philadelphia are incorrect."

Thereafter, in September, 1882, the Revenue Commissioners called upon the Board of Revision of Taxes in Philadelphia to furnish them with "a statement of property in Philadelphia subject to the State tax for the current year." This statement was received at a subsequent meeting of the Board, held November 23, 1882. It showed an increase above the amount of the statement made in 1880 of over $1,000,000, the aggregate being $45,863,769. With this statement before them, and without addressing any interrogatories to the Board of Revision of Taxes, or to any of the assessors of Philadelphia, or to any other official, the Board at said meeting, on November 23, 1882, increased the valuation for Philadelphia City and County from $45,863,769 to $200,000,000, and duly notified the Board of Revision of Taxes, the County Commissioners, and the Treasurer of Philadelphia, of such increase.

The Board did not, at or prior to November 23, 1882, require any assessment or call for any statement from the Commissioners of any of the other counties in the State, showing the amount and value of the property in all or any of said counties subject to the four-mill tax. Their action was confined entirely to Philadelphia, and there is nothing in the case which tends to show that the increase made as above stated was made "in order to equalize taxation" "among the several counties in the Commonwealth." The valuation for the other counties remained, and still remains, as it was fixed at the meeting of the Board in 1880.

The evidence upon which the Board acted in thus increasing the valuation for Philadelphia was contained in a series of manuscript volumes, produced before them, containing a transcript from the books in the office of the Recorder of Deeds of Philadelphia, showing the unsatisfied mortgages from 1850 to 1882; and oral testimony intended to aid in determining what sum of the whole amount represented by said mortgages remained unpaid. The aggregate of all the mortgages shown by these volumes was $495,000,000. After making what they considered an ample allowance for all deductions indicated by the oral evidence, they fixed the amount of those which they thought might fairly be considered unpaid at $200,000,000, as above stated. They did not attempt to specify the particular mortgages still unpaid, or to designate any individual resident of Philadelphia as the owner of any one of them; nor did they adopt or consider any scheme or system of valuation of different classes of mortgages, dependent upon the differing rates of interest reserved therein, or the varying length of time within which they were to become due. In short, they made no valuation whatever, but simply declared that there were in Philadelphia unpaid mortgages of the nominal or face value of $200,000,000, held, we may assume, against solvent debtors. They did not, either in act or intention, change the valuation put by the Assessors and Board of Revision of Taxes in Philadelphia upon the mortgages actually returned by them; their action amounted to and was intended as a finding that there were mortgages, unassessed and unreturned, for an amount sufficient to swell the total to $200,000,000.

Having thus ascertained the facts, we are next to determine whether the Board of Revenue Commissioners, in increasing the amount of property subject to the four-mill tax in Philadelphia, in the manner above detailed, exceeded their powers. We can better determine what are the functions and powers of this Board after we have obtained a clear view of the functions and powers of the other agencies whose combined action is necessary to the valid assessment of a State tax.

We need not cite authorities to show that the first step in the process of levying a valid tax is an assessment, and that without this no subsequent proceeding can be sustained. Recognizing this fundamental principle, the Legislature has created the office of assessor, provided for the appointment of proper incumbents of the office, specified their duties, prescribed the oath to be taken to bind them to their performance, and denounced appropriate penalties for wilful or negligent failure to perform.

They are required by law "to make out and return a just and perfect list of the names of all the taxable persons residing within their wards, townships, and districts respectively, and of all property taxable, together with a just valuation

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of the same;" and they are clothed with ample powers to enable them to perform this duty. They are required to return the assessments thus made to the County Commissioners in the several counties, and to the Board of Revision of Taxes in Philadelphia, which Board in said city possesses all the powers, and has imposed upon it all the duties of the County Commissioners in the several counties, so far as relates to the levy and assessment of taxes. By the Act of March 14, 1865 (P. L. 320), it is made the duty of this Board of Revision to "revise and equalize the assessments by raising or lowering the valuations either in individual cases or by wards; to rectify all errors; to make valuations where they have been omitted; and to require the attendance of the assessors or other citizens before them for examination under oath or affirmation, singly or together." Thus, we see, the law has provided assessors in every township, ward, and district throughout the Commonwealth, whose sworn duty it is at a stage in the process of taxation, prior to that at which the action of the Board of Revenue Commissioners can legally begin, to list every person, and assess all property made taxable by law, and also in every county, including Philadelphia, a Board of Revision whose like duty it is to correct all errors and supply all omissions of these assessors. Each of these officers occupies a well defined place in the revenue system, and has well defined duties to perform in the working of that system; each must perform the duties belonging to the office which he holds and the stage in the process to which his work belongs; and it is only when the several acts necessary to the imposition of a valid tax are performed by the officer designated by law for that purpose, that they become binding upon the taxpayer. Hence, since the duty of listing every taxable and assessing all property made taxable by law is expressly imposed upon the assessors; and the duty of correcting all their mistakes and omissions rests upon the County Board of Revision, and as all this must be done and its result returned to the Board of Revenue Commissioners before they can act at all; and since these prior steps complete the work of levying the tax so far as the county rates are concerned, we should hardly expect to find this Board empowered to perform the duties of assessors remark that evidently the main purpose of the creation of the Revenue Board by the Act of April 29, 1844, was to equalize taxation for State purposes throughout the State by adjusting the valuations of real estate as returned by the County Commissioners of the several counties. In some of these real estate was systematically assessed at only one-half or one-third of its real value, while in others the full value was given, and hence, without equalization by some body having power to include the whole State in its action, the greatest inequality in the burden of taxation would prevail.

What their powers and duties were, while that tax still existed, is thus stated by STRONG, J., in the County of Schuylkill *v.* The Commonwealth (12 C. 524), on page 534: "After having in the earlier sections" of the Act of April 29, 1844, "made provision for ascertaining the subjects of taxation and their value, and established a rate, the Legislature proceeded in section 36 to create a Board of Revenue Commissioners to equalize the assessments and taxes for the use of the Commonwealth in the different counties. The duty of this Board, as defined in that and the two next following sections, is to determine and adjust the aggregate value of property made taxable by law in the city of Philadelphia and the several counties, adjusting these aggregates so as to make the taxes bear as equally as possible upon all the property in the Commonwealth. They have nothing to do with the property of the individual taxpayer. To assist them in the discharge of their duties the County Commissioners of the several counties are required to furnish for their use a statement under oath of the return made by the assessors, of the value in the aggregate of all the property liable to State tax in the said counties respectively, distinguishing real from personal estate. The Board is then to make a valuation of the property in each county, and make a record of it, one copy of which shall remain in the office of the Auditor General, 'as the valuation of the said property,' that is, of the property in said county, until the next meeting of the Board."

The tax on real estate for State purposes was abolished in 1866. Thenceforth, the main reason for the existence of the Board of Commissioners had disappeared; yet the law creating

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sors in Philadelphia had not assessed and returned all the watches taxable for State purposes in that city, added upon the duplicate record made out by them 15,000 to the number returned by the assessors, without designating the owners. This action was complained of by the city, and the question of the powers of the Board was thus brought before the Courts, and it was declared by this Court and by the Supreme Court that in making this increase in the number of watches they had exceeded their powers. In this Court, in City of Philadelphia *v.* Mackey (2 Pearson, 406), PEARSON, P. J., said: "The Revenue Commissioners were authorized to equalize the valuation in the different counties by increasing or diminishing the same, but not by introducing new items never before assessed or returned. *The Revenue Commissioners could not add new property never taxed.*"

And in the City of Philadelphia *v.* Thomas Cochrane (34 Leg. Int. 160), the Supreme Court having before it the same question, though not the same parties, said: "We are of the opinion neither the old Board of Revenue Commissioners nor its substitute, the present State Board, has power to add to the number of watches returned as assessed. Such an order is founded on no evidence, and no return from which the existence of other subjects of taxation can be legally determined. The proper purpose of the constitution of the Revenue Board is to equalize taxation by revising the valuations of the several counties, thereby to prevent injustice to some by the under-valuation of others. *But the subjects of taxation, whether watches, horses, or farms, are those only which are returned in due process of assessment,* which ascertains their number and ownership. *To add so many watches, carriages, or other subjects not found and returned by the assessors is to require the county to perform an impossibility, to wit, to collect taxes when the subjects and the owners are not ascertained by any due process.*

"If there be 15,000 watches added, their owners must be found to pay the taxes on them. If it be alleged that the county returns are fraudulent by way of suppression, some new machinery must be provided to procure a new assessment and return of the omitted items and owners."

The language of these opinions was used in defining the powers of the Revenue Board under the Act of April 29, 1844. We must, therefore, inquire further whether the Act of May 24, 1878, in force when the action complained of in this case was taken, has so enlarged those powers as to make this language inapplicable.

A careful examination and comparison of these Acts, one with the other, satisfies us that such is not the case. Indeed, so far as the powers of the Board are concerned, the latter Act is in the main a mere transcript of the former. In both Acts the purpose of the creation of the Board is declared to be "for equalizing the assessments and taxes for the use of the Commonwealth in the different cities and counties thereof." The sources of information to which the Board may resort are more ample in the latter Act, but the purpose is the same in both, namely, to aid them in adjusting and equalizing taxation among the several cities and counties." The *duties* of the Board are enlarged under the Act of 1878, which requires them so to adjust and equalize the tax that it "shall not exceed in the aggregate the sum of five hundred thousand dollars to be paid by the several cities and counties of this Commonwealth for one year." This restriction was repealed by the Revenue Act of June 7, 1879, but this does not affect the question of interpretation which we are now considering. We may here remark that the title of the Act of 1878, which is "An Act *defining* the powers and *extending* the duties of the Board of Revenue Commissioners," does not, as was argued by counsel for the Commonwealth, purport to increase the powers of the Board. *Defining* is not necessarily *increasing.*

In both Acts they have, at least by implication, power to "increase the aggregate value of the assessable property in any county" above the valuation returned by the assessor only when they "shall find it necessary so to do" in order to "equalize taxation." In short, the Acts are, so far as relates to the powers of the Board, so nearly alike in their terms that we have no hesitation in accepting the cases above cited as authorities in determining those powers under the Act of 1878 as well as under that of 1844. But, in addition to this, the powers of the Board under the latter Act have come in question in several cases which have arisen since its passage. These cases are reported as Commonwealth *v.* Blair County (2 Pearson, 415), and Commonwealth *v.* Butler County (Id. 421). We do not consider it necessary to extend this opinion by quoting their language; they are clearly authority for the conclusion to which we have arrived, to wit: That the Board of Revenue Commissioners have no power to act as assessors by adding to the returns made to them through the County Commissioners and Board of Revision of Taxes subjects of taxation not contained in such returns; and that they, therefore, exceeded their powers when they did so, by making the increase complained of in this appeal. And a moment's consideration will make it abundantly manifest that they "failed to do equity in the premises." By the adjustment and equalization made by them in 1880, they fixed the aggregate value of all the property in the State subject to

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the four-mill tax at $98,066,842; and the value of that portion thereof belonging to Philadelphia at $44,724,925. On this valuation the whole tax in the State was $392,238.23, of which the property in Philadelphia paid $178,899.69, or more than one-third of the whole. This conclusion was reached by the Board in 1880, when they had before them, and considered and compared the returns from all the counties in the State. And it was acquiesced in by all the counties—a circumstance which adds to the presumption that it was fair and equitable. But in 1882, without any change in the other counties, and without even considering the question whether any change ought to be made in them, the Board increased the valuation of Philadelphia from $44,724,925 to $200,000,000, thus increasing its tax from $178,899.69 to the enormous sum of $800,000, and changing the proportion of the four mill tax paid by Philadelphia from a little over one-third of that paid by the rest of the State to nearly four times as much, or, to state it in another form, leaving the tax in all the other counties in the State as it was, and increasing it in Philadelphia nearly fivefold. Hence, if the adjustment of 1880 was fair and equitable, as we may fairly assume from the fact that it was made by the Board with the proper data before them, and was accepted by all the counties without complaint, the increase made in Philadelphia in 1882 must have been grossly inequitable.

These conclusions dispose of the case, and it is, therefore, unnecessary to pass upon the other questions presented by the specifications of the appeal and argued by counsel. We may add in closing, that if any person is in possession of information tending to show that there are persons and property in Philadelphia escaping their share of the burden of taxation which should be borne in just proportion by all, the proper parties to whom to communicate it are the assessors and the Board of Revision of that city. They have the power and authority to make it available, not only for the purpose of State, but also of local taxation. In accordance with the provisions of section 9, of the Act of 1878, we ascertain the amount of the error in increasing the sum of the property in Philadelphia subject to the four-mill tax to be the difference between $45,863,769 and $200,000,000, to wit: $154,136,231, and direct the Prothonotary to certify the same to the Auditor General and State Treasurer as provided in said section of said Act.

Opinion by SIMONTON, P. J. P. C.

C. P. No. 3. February 9, 1884.

Jacoby v. Bunting.

Debtor and creditor—Time—Agreement to accept a certain sum in discharge of a debt—Time within which consideration must be paid.

Rule for judgment for want of a sufficient affidavit of defence.

A sci. fa. to revive a judgment of June Term, 1875, had gone out in November, 1883.

The affidavit of defence set forth the following agreement:—

"Philadelphia, August 28, 1878.

Know all men by these presents, that we, the undersigned creditors, or some of the creditors of Samuel C. Bunting, Jr., do hereby agree with him and with each other to accept in full payment of the debts due to us respectively the sum of one hundred dollars.

"And upon the receipt of the said sum by us respectively to make, execute, and deliver to the said Samuel C. Bunting, Jr., such releases and acquittances as may be requisite and proper for releasing and discharging him from all liability or responsibility whatever for said debts.

"And it is further agreed that the agreements and stipulations herein contained shall extend to the heirs, executors, administrators, and assigns of the subscribers hereto."

The agreement was signed and sealed by the plaintiff and thirteen other creditors.

The supplemental affidavit (filed December 29, 1883) contained the following offer:—

"And the said defendant now here tenders to the plaintiff the said sum of one hundred dollars for the purposes in said agreement set forth, as a payment of the claim for which suit is brought."

W. A. Manderson, for the rule.

The tender should have been made within a reasonable time. The agreement was made in August, 1878, and no actual tender was made until January 12, 1884. There is no allegation that the agreement has been complied with in respect to the other thirteen creditors, and, in point of fact, it has not been so complied with.

A. I. Phillips, contra.

THE COURT. Time not being expressed as of the essence of the contract, a compliance with it by the defendant within a reasonable time will be deemed sufficient. Here, less than six years have elapsed, and we think the tender made in time.

Rule discharged, on payment of $100 by defendant to plaintiff within two weeks, plaintiff to execute thereupon a proper release.

Per LUDLOW, P. J.

YERKES, J., absent. A. M. B.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, MAY 22, 1884.* [No. 24.

Supreme Court.

July, '83, 41, 120, 121, 213, 214. January 21, 1884.

Hunt's Appeal.
Lehman's Appeal.

Decedents' estates—Executors and administrators—Covenant—Real estate—Lien—Act of February 24, 1834, section 24—Will—Conversion.

A covenant entered into by a decedent in his lifetime, guaranteeing the payment of interest on a mortgage until the mortgaged premises are so improved as to constitute an adequate security for the mortgage-debt, survives him, and can be enforced against his executors and administrators, so as to recover interest accruing after the death of the decedent.

Quain's Appeal, 10 Harris, 510, explained and its principle not extended to the present case.

The lien of such a covenant as is above specified can only be continued against the real estate of the decedent by bringing suit thereon within five years of the decedent's death, or by filing a copy of said covenant within said period.

A mere testamentary power of sale vested in executors to sell real estate will not work a conversion.

Appeals from the Orphans' Court of Philadelphia County.

These were five separate appeals from a decree of the said Court in the settlement of the estate of John H. Jones, deceased.

The facts of the case were as follows:—

In December, 1873, John H. Jones agreed to purchase from Edwin W. Lehman and John L. Buzby, trustees of the estate of William Crean, deceased, two lots of ground in the Twenty-fourth Ward of the city of Philadelphia. The deed was made at the request of Jones to William S. Kite. The whole purchase-money of the first lot was secured by eight purchase-money mortgages, bearing even date with the deed, Jones entered into a written agreement under seal in which the above transactions are recited, and he bound himself "to be responsible for and guarantee the payment of the interest upon each of the said ten several indentures of mortgage above mentioned, as the same shall accrue, unto the said Edwin W. Lehman and John L. Buzby, executors and trustees as aforesaid, until such time as the lot or subdivisions of said larger lot shall be improved to fully secure the mortgage debt thereon secured." The lots have not been improved up to the present time.

In 1874 Jones made an agreement exactly similar with Emily Lehman, which recited the purchase by him from her of a lot also in the Twenty-fourth Ward of Philadelphia; a conveyance by her to Kite, dated July 6, 1874; seven mortgages given by Kite to her upon the same date—one for $1458.33, five for $1166.67 each, and one for $875, with interest payable half-yearly; and a covenant by Jones to be responsible for the interest in the same words as those contained in his covenant with Lehman and Buzby.

Jones died September 21, 1874, having appointed Benaiah S. Hunt and George N. Watson his executors, with power to sell all or any part of the real estate. These executors filed a partial account of the personalty in 1878, which was referred to E. Coppée Mitchell, Esq., for audit. The auditor filed three reports upon this account. Subsequently the executors sold some of the decedent's real estate for the payment of his debts, paid the proceeds into Court, and the same auditor was appointed. The estate proved insolvent.

HUNT'S APPEAL (No. 1).

In the distribution of the personal property counsel for Lehman and Buzby, trustees, presented a claim for interest on their mortgage up to January 1, 1883, amounting to $5460, under the covenant of decedent to be responsible for the same; also a similar claim for $3820 on behalf of Emily Lehman.

These claims were excepted to by counsel for the accounting executor:—

"*First.* Because neither Mr. Jones nor his executors have any power to comply with this covenant to build by improving these lots which were conveyed to Kite, and are now vested in

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to disappoint other creditors of the general estate."

The Auditor decided against the first and second objections, but sustained the third. Exceptions were filed, and the third objection also was overruled, the Court delivering the following opinion:—

"The Auditor has very clearly shown that the principle of Quain's Appeal (10 Norris, 510), which restricts liability for ground-rent falling due after the death of the covenantor, to the land out of which it issues, cannot be extended to a mere personal covenant not running with the land for the payment of money. If the law were as contended by counsel for the accountant, every contract for the payment of money not falling due within a year from the death of the contractor would, as a logical consequence, be of no validity. The case of White's Executors *v.* Commonwealth (3 Wright, 171), cited by the Auditor, and the provision in the Act of February 24th, 1834 (Purd. Dig. 422, § 24), continuing the lien of debts not maturing within five years after the death of the debtor, fully sustain his views upon this subject, and the exceptions to the proof of the debts of Edwin W. Lehman, executor, and Emily Lehman are overruled.

"It was error, therefore, to exclude these creditors from the distribution. The principle which permits a creditor having a lien upon one fund to compel a creditor having a lien upon two to proceed in the first instance against that which he alone can resort to does not apply where, as here, the two funds do not belong to the common debtor. (Conser's Appeal, 11 WEEKLY NOTES, 220.)

"But, under any circumstances, it cannot be right to apply the principle so as to deprive the creditor having the right to two funds of any participation whatever in one of them. The mere statement of this proposition is sufficient to show the error which the Auditor has fallen into in this respect. (See Mason's Appeal, 8 Norris, 402.) Gould's Estate (6 WEEKLY NOTES, 562), which he has cited, is not to the point. It is not the case simply of creditors, nor was there there any exclusion from the fund; distribution was simply *suspended* for four months, with directions to the creditor (which were complied with) to proceed in the mean while against the mortgaged premises."

The executor thereupon took an appeal, filing the following assignments of error:—

(1) The Court below erred in not holding that

(3) The Court below erred in not deciding that after the death of Mr. Jones no claim for interest on the mortgages could be paid out of any fund or property except the land mortgaged.

APPEALS OF EDWIN W. LEHMAN, EXECUTOR, ETC., AND EMILY LEHMAN.

HUNT'S APPEALS (NOS. 2 AND 3).

Subsequent to the filing of the account of the personal property the executors made sale of certain real estate to pay debts, and paid the proceeds into Court for distribution. It was shown before the Auditor that on December 1, 1876, suit was begun by Lehman *et al.*, trustees, etc., against Hunt *et al.*, executors, etc., and service of the writ was accepted. No further proceedings were had until January 10, 1883, when a narr. setting forth the above covenant of John H. Jones was filed, together with a bill of particulars, and on January 25, 1883, defendant filed pleas. On January 24, 1883, another suit was begun, service was accepted, and a narr and pleas in all respects similar to those in the first case were filed.

Similar suits were instituted by Emily Lehman, and were, *mutatis mutandis*, the same as the above. All of said suits were, *inter alia*, for interest accruing subsequently to decedent's death.

The claim was made that the bringing of suit within five years continued the lien of the indebtedness due *and to become due* upon the covenants upon the real estate of the decedent indefinitely, or at any rate until presumption of payment would arise from lapse of time.

The Auditor reported—

"After hearing the argument of counsel, and a careful consideration of the matter, the Auditor is of opinion that the second suit brought by Mr. Carty, having been commenced more than five years after the death of John H. Jones, is without any effect whatever upon the lien, and that if, as claimed by Mr. Carty, the lien of the indebtedness created by this covenant is to be continued against the real estate of the decedent for a longer period than five years from his death, it must be by means of the effect of the first action, which was commenced on the 1st of December, 1876.

"The Auditor is of opinion that the first suit brought by Mr. Carty continued the lien against the real estate of the decedent of the debt which was then sued for. . . . So far as the debt was due at the time the suit was brought, in the

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fund in court is the proceeds of real estate sold nearly eight years after the decedent's death. The Auditor is therefore of opinion that the claimants have no lien upon the fund except for the debt for which suit was brought."

The Court confirmed this report, filing no opinion. Both parties appealed. The claimants assigned as error—

(1) "The decision that the second suit had no effect in keeping alive their lien.

(2) "The decision that the first suit only continued the lien of interest *then due*.

(3) "The decision that to retain their lien it was necessary that claimants should have filed a copy or statement of the covenant.

(4) "The Court erred in deciding that in view of the default of the decedent, and his executors after his decease, in not fulfilling the covenant by improving the lots, and that the action commenced in 1876 was a full knowledge, notice, and demand to the executors of the nature and character of the continuing claim, and that such action having been brought within five years after the decedent's death, that it continued the lien of the covenant for ten years, and that, therefore, claimant is entitled to an allowance for all interest accruing under the covenant within the period of ten years after his decease."

The accountant assigned as error—

(1) "The Court below erred in not holding that the claims of Emily Lehman, and of Edwin W. Lehman and John L. Buzby, executors and trustees under the will of William Crean, deceased, should be confined to the lands on which the mortgages held by them were liens.

(2) "The Court below erred in holding that the bringing of the suits in the Court of Common Pleas No. 1, to December Term, 1876, Nos. 421 and 422, continued the lien of the debts.

(3) "The Court below erred in allowing any part of the said claims."

Henry C. Olmsted and *Edward Olmsted*, for Benaiah S. Hunt, executor.

A covenant in a ground-rent deed does not survive against executors and administrators except as to the rents which accrued in the lifetime of the decedent.

Quain's Appeal, 10 Harris, 510.
Gardiner *v.* Painter, 3 Phila. 365.
Williams's Appeal, 11 Wright, 283.

The same rule applies to other contracts.

Bland's Admr. *v.* Umstead, 11 Harris, 316.
Dickinson *v.* Callahan's Admr., 7 Harris, 227.

A conversion of real estate into personalty (which is contended for by claimants' argument), is only worked when the direction to sell is imperative.

Lindley's Appeal, 13 WEEKLY NOTES, 65.
Jones *v.* Caldwell, 1 Outerbridge, 42.
Peterson's Appeal, 7 Norris, 397.
Anewalt's Appeal, 6 Wright, 414.

Claimants seek to keep the lien of their debt alive by substituting for the plain requirements of the law the fact that the executors or their counsel had *knowledge* of the claim.

A devise for the payment of debts creates no special testamentary lien.

Steel *v.* Henry, 9 Watts, 523.
Alexander *v.* McMurry, 8 Watts, 504.
Agnew *v.* Fetterman, 4 Barr, 56.
Trinity Church *v.* Watson, 14 Wright, 518.
Wallace's Appeal, 5 Barr, 103.

Jerome Carty for Lehman *et al.*, claimants.

The contract or covenant of Mr. Jones in this case was not a personal covenant, or one dependent on his manual or mental labor; therefore it survives.

Campbell *v.* Baker, 10 Wright, 243.
Roberts *v.* Riddle, 29 Smith, 468.

As between a creditor and executors, administrators and distributees a liberal construction of the Acts of 1797 and 1834 should obtain in favor of the creditor. In Pennsylvania real estate is assets for the payment of debts, and any proceeding by suit with the knowledge and consent of the legal representatives of the debtor falls within the spirit of the Acts.

The language of testator's will worked an absolute equitable conversion of his real estate into personalty for the payment of his debts.

February 4, 1884. THE COURT. These are five appeals from the decree of the Court below, distributing the estate of John H. Jones, deceased. I will consider the questions they present without incumbering the opinion by references to the particular appeals in which such questions are respectively raised.

Among the claims presented before the Auditor was one by Edwin W. Lehman and John L. Buzby, executors and trustees of the will of William Crean, deceased, for $5460; and one by Emily Lehman for $3820. Both claims rest upon the same principle and need not be separately discussed. The claim first named arose under the following circumstances: On the 22d of January, 1874, the decedent, John H. Jones, entered into a written agreement with the claimants whereby he covenanted and agreed to be responsible for and guarantee the payment of the interest upon each of ten several indentures of mortgage given and executed by William S. Kite to the claimants, "as the same shall accrue unto the said Edwin W. Lehman and John L. Buzby, executors and trustees as aforesaid until such time as the lots described in said mortgages shall be improved to fully secure the mortgage debts thereon secured." This agreement was signed and sealed by the decedent. The lots of ground described in the agreement have not been improved up to the present time. It was found by the Auditor that the interest on

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these mortgages remaining unpaid up to the first of January, 1883, amounted to $5460. The two principal questions which are involved in this claim may be stated as follows: 1st. Does the decedent's covenant to pay the interest on the mortgages bind his executors and administrators; and 2. If the covenant does extend to the executors and administrators, was the lien thereof continued as to the real estate of the decedent?

As to the first point it was strongly urged by the learned counsel representing some of the appellants that the covenant did not extend to the executors and administrators of the covenantor, and Quain's Appeal (10 Harris, 510) was cited in support of this view. Quain's Appeal was the first Pennsylvania case which squarely decided that a ground-rent covenant does not survive against executors or administrators except as to the rents which accrued in the lifetime of the decedent; and that rents which accrue subsequent to the death of the covenantor are not payable out of his personal estate; and it is not too much to say that that decision was somewhat of a surprise to the profession. For it must be conceded that such covenants are personal and may be enforced against the covenantor during his life even after he has parted with the ground out of which the rent issues. The Court was doubtless driven to that decision by the practical impossibility of enforcing such a covenant, in many instances perpetual against a dead man's estate, and no one at the present day who will take the trouble to read the opinion of the Court as delivered by Justice LOWRIE can doubt its soundness. Quain's Appeal was followed by a decision of the District Court of Philadelphia, in which, in an opinion delivered by the late Judge STROUD, it was held that while the administrator of a grantee in a ground-rent deed is a proper party to an action of covenant for the rent accrued after his death, the judgment will, however, be restricted to the land out of which the rent issues. (See Gardiner *v.* Painter, 3 Phila. Rep. 365.) This case was not brought up to this Court for review, but in Williams's Appeal (11 Wright, 283), it is referred to by the late Chief Justice THOMPSON with approval, and the doctrine thereof as well as of Quain's Appeal affirmed by this Court. We may therefore regard the question at rest.

But we are not prepared to apply the same doctrine to the case in hand for obvious reasons; while there are some points of analogy between a ground-rent and the covenant in question, there are also essential points of difference. In this Court in Quain's Appeal (*supra*): "The grantor of the land cannot be presumed to have then placed any value on such a covenant, for the personal covenant of the original grantee is as nothing in a series of tenants lasting forever. The real security is the covenant running with the land and incumbering it; and this is the essential reliance of the owner of the rent." It is not so with the covenant we are considering. The land in its unimproved condition was not deemed a sufficient security, and the mortgagee declined to take the mortgages without security that the interest should be paid until such time as by improvements placed upon the property his mortgages should be made safe. So that we must assume that the mortgagee looked to the personal security of the covenant, and to that alone, for the interest.

Nor is it a perpetual covenant. It may be regarded as a security for the improvement of the property. This is really its scope, and the decedent could have relieved himself and his estate by doing this, or procuring it to be done by others. The decision in Quain's Appeal was a necessity growing out of the peculiar facts of that case, and we are not disposed to apply it to cases in which no such necessity exists. Were we to do so in the present instance, we would be at a loss where to draw the line. The general rule is, that all personal covenants survive to the executor or administrator of the covenantor, and to take a case out of the rule there must be something more than the mere fact that the covenant is to be performed in future. We are clearly of opinion that the executors of this testator are bound by his covenant to pay the interest on the mortgages in question.

This brings us to the second branch of the inquiry, which relates to the extent the real estate of the testator is bound by the covenant.

The Act of February 24, 1834, section 24 (P. L. 77), provides two ways in which the debts of a decedent can be continued upon his real estate for a longer period than five years after his death; they are:—

First. By the commencement and prosecution of an action against his heirs, executors, or administrators, within the period of five years from his death; and,

Second. Where the debt is not payable within five years, a copy or particular written statement of the bond, covenant, debt, or demand, shall be filed within the period of five years in the office of the prothonotary of the county where the real estate to be charged is situate.

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years, the creditor is bound to file a copy or particular written statement of the instrument of writing by which the debt is secured within five years. These directions being statutory cannot be omitted.

Two suits were commenced in the Courts of Common Pleas against the executors of John H. Jones, deceased, to recover arrears of interest due under this covenant. The first writ was issued on December 1, 1876; the second on January 4, 1883; and in both cases a narr. and bill of particulars were filed; but in neither was a copy of the covenant or instrument of writing filed as required by the Act of 1834, when it is sought to hold the lien for a debt not maturing within five years. The Auditor and the Court below held that to the extent that the arrears of interest were embraced in the first suit, which was brought within five years of the testator's death, the said suit continued the lien thereof as to said arrears, and awarded the claimant a dividend out of the fund in Court. But as to the second suit, inasmuch as said fund is the proceeds of real estate sold over eight years after the testator's death, and no copy of the instrument had been filed in the proper office, it was held that the lien was gone, and no further arrears could be recovered. It is difficult to see how any other conclusion could have been reached. The mere bringing of the second suit without a compliance with the Act of 1834 in filing a copy of the instrument could not prolong the lien beyond five years. This is too plain for argument.

It was urged, however, on behalf of some of the appellants, that the will of the testator worked a conversion of the real estate. The learned Auditor has found that the fund in Court is the proceeds of real estate, and has distributed it as such. If this contention be correct, the fund must be regarded as personalty, and as such distributed.

We are unable to see anything in the will of the testator from which an intent to convert can fairly be drawn. After giving a number of legacies to different persons and institutions, he devises and bequeaths all the residue of his estate to trustees in trust "to let and demise the real estate, and invest and keep invested the personal estate" for the purposes of the trust; and then follows a power of sale in these words, "to sell all or any part of the real estate, without liability on the part of the purchaser to see to the application of the purchase-money, and the proceeds of sale to re-invest from time to time if practicable in irredeemable ground-rents upon the same trusts."

There is no direction here to sell; only a power. It ought to be settled by this time that in order to work a conversion there must be either 1st, a positive direction to sell, or, 2d, an absolute necessity to sell in order to execute the will, or 3d, such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money.

In each of the two latter cases an intent to convert will be implied.

These propositions are settled by a line of authorities. It is sufficient to refer to the late cases of Jones *v.* Caldwell (1 Out. 42), Roland *v.* Miller (11 WEEKLY NOTES, 431), Lindley's Appeal (13 Id. 65).

We have neither of these requirements in the will of this testator. The most that can be said is that he made a mistake as to the extent of his estate, and a sale of his real estate became necessary in order to pay his debts. But this is not to the purpose. The scheme of his will did not contemplate this, and if, by reason of the depreciation of his property, or for other cause, a necessity to sell the real estate arose which was not foreseen by the testator, it will not work a conversion for the obvious reason that a conversion is always a question of intent.

We are of opinion that all of the questions arising in this estate were correctly disposed of by the Court below.

The decree is affirmed and the appeals dismissed at the costs of the respective appellants.

Opinion by PAXSON, J. J. D. B., Jr.

Oct. '83, 230. November 9, 1883.

George Socher's Appeal.

Equity jurisdiction—Evidence—Trusts—Wills.

The rule that the evidence of two witnesses, or of one witness and corroborative circumstances equivalent to another, is necessary to overcome a responsive answer in chancery does not apply when the answer is made on "information received." The evidence of one witness may then be sufficient.

Where as to part of the property in dispute ejectment would be an adequate remedy, yet if the title to the balance could only be settled by bill in equity, the plaintiff will not be compelled to divide his claim, and the entire subject-matter will be adjudicated in equity.

Appeal of George Socher from a decree of the Common Pleas No. 1, of Allegheny County, that he should convey certain lands and pay $2700 to appellees.

Bill in equity, between Xavier Hauber *et al.*, plaintiffs, and George Socher, defendant, setting forth: That the plaintiffs were the heirs-at-law of Alexander Wirth, who died in 1870 testate; that testator, when *in articulo mortis*, devised

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all his estate to his wife, at her request, and upon her express promise to care for his children, the plaintiffs, to give them the benefit of the property, and to convey and assure to them so much thereof as should not be used in her own and their support; that after testator's death his widow and devisee entered upon and took possession of the property in this case; that she afterwards married the defendant and lived with him until her death, testate, in 1881; that testatrix devised to defendant one portion of the land in this case in fee, and the rest of the property until her youngest child, then twelve years old, should attain full age; that under this will defendant entered into possession of said land, and still holds the same; that his testatrix acquired the property devised and bequeathed to him in the special confidence that she would use it for the benefit of plaintiffs, and convey to them such as should not be used in their maintenance, and that her devise to defendant was in violation of her trust and in fraud of plaintiffs' rights; that plaintiffs have no knowledge of the actual amount of the personalty arising from their father's estate in defendant's hands, but that it is large.

The bill prayed, (1) that a trust be declared; (2) that as to any property derived from her first husband, testatrix's will be declared invalid; (3) that title thereto be decreed in plaintiffs; (4) for an account of rents and personalty; (5) that defendant be restrained by injunction from further possession; and (6) for general relief.

Defendant demurred, because, *inter alia*, plaintiffs' remedy, if any, was by caveat and action at law.

The demurrer was overruled, and defendant answered, denying upon "information received" that the property in dispute was devised to his testatrix upon any trust, and further denying that the devise by her to him was in violation of any trust or in fraud of any of plaintiffs' rights.

The cause was referred to a Master, who found the facts (as stated in the opinion of this Court), as follows:—

"In March, 1870, Alexander Wirth, father of the beneficial plaintiffs below, died seised of certain real and personal estate, leaving a widow, Catherine Wirth, and the five children above referred to, some of whom are minors. A few days before his decease he made a will, which was duly probated, whereby he devised and bequeathed all his real and personal estate, with a few unimportant exceptions, to his wife, who immediately took possession of the same, collected the rents, etc., and out of the income maintained and educated the children for a period of two years or more.

"The real estate, thus devised to Mrs. Wirth, consisted of four pieces of property in the city of Pittsburgh, referred to as the homestead lot, on Larimer Avenue, a block of lots on Negley Run Road, five houses and lots at corner of Forty-second and Willow Streets, and lot on Liberty Street.

"In July, 1871, the widow sold and conveyed the last mentioned lot to Frederick Henglesberg, for $1225, part of which was paid in cash, and for the residue, $1000, she took a mortgage which she held until her death in June, 1881. In February, 1872, Mrs. Wirth married the appellant, George Socher, with whom she lived until the time of her decease above stated. In September, 1880, she made a will, afterwards duly probated, by which she devised and bequeathed to her husband, George Socher, in fee simple, the homestead lot, on Larimer Avenue, the use and occupation of all the rest and residue of the estate until her son, Adam Wirth, should attain the age of twenty-one years, and all her personal estate absolutely. Immediately after her decease, appellant, as her devisee, took possession of the real and personal estate above mentioned, collected the rents, the purchase-money mortgage above mentioned, etc., and continued to use and enjoy the same as his own until the date of the decree.

"In March, 1870, when Alexander Wirth was about making his will, he informed the scrivener that he desired to leave the homestead lot to his wife, and the residue of his real estate to his children; whereupon he was urged by the scrivener and his wife 'to leave all the property to her, so as to avoid trouble and expense in case it should become necessary to sell or mortgage any portion of it. She assured him that no part of the property should be lost to the children through her fault; that she would hold the property in trust for the children; that it should be disposed of just as he had intended when he wanted the will made as he first suggested.' After some hesitation the testator consented that the will should be so written, and he accordingly devised all the property to his wife as set forth in the will; but, as to all the real estate, except the homestead lot, the devise to her was upon the distinct promise and agreement, and in trust and confidence that she, the said Catharine, would give their children, the plaintiffs below, the benefit of the property, and convey or devise to them such portion thereof as she should not use in the maintenance of herself and them."

The Master (James C. Doty, Esq.) reported, as to the question of jurisdiction in equity over the subject-matter, *inter alia*, as follows:—

"Assuming that the plaintiffs have established all that they allege, can they assert their rights in a court of equity? The answer discloses that the defendant is in possession of the real estate, and denies the title of the plaintiffs. Is not the remedy, then, an action at law to determine the title and dispossess the defendant? This point

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is urged with great earnestness by defendant's counsel. The question of jurisdiction was promptly raised by demurring to the bill, and when the demurrer was overruled, by setting it up in the answer. The action of the Court in overruling the demurrer does not conclude the Master, for, until the answer was put in, the record did not disclose that the defendant was in possession, disputing the plaintiffs' title.

"It seems clear to the Master, although defendant's counsel denies it, that the plaintiffs' title, if any, to the real estate, is purely equitable. The legal title is in the defendant, by virtue of the devise of his wife. There is nothing in the will of Alexander Wirth to vest the title in his children at any time, nor to limit the title of Catharine Wirth, his devisee and legatee. Catharine Socher did not die intestate. The legal title did not descend to the plaintiffs as her heirs-at-law. She devised and bequeathed the property to defendant by will. It is true that the trust terminated at the death of Catharine Socher, and that the plaintiffs were then entitled to the possession, if the facts are as they allege; but they seek to recover upon an equitable, not a legal title. Their contention is, that Catharine Socher was trustee for them under a parol trust, and that the defendant is affected by the trust; since he was not an innocent purchaser for value.

"The devise of Catharine Socher to the defendant, in the opinion of the Master, was not wholly inoperative. It vested the legal title in the defendant, but cumbered with the trust. At common law, the purchaser of a legal title acquired the absolute property in the subject. In equity, however, if he has notice of an equitable title, he will be considered as a trustee of the legal title for the benefit of the equitable owner. (Bispham's Eq. sec. 25.) In like manner, the defendant in this case, not being an innocent purchaser for value, must be regarded as a trustee of the legal title for the benefit of the plaintiff. . . . . It has also been held frequently that where the title is legal, the case is not within the jurisdiction of a Court of Equity. (North Pennsylvania Coal Co. *v.* Snowden, 6 Wr. 488.) But no case like this has been found, where the plaintiff claimed upon an equitable title, or against the defendant as trustee *ex maleficio*, in which it has been held that a bill in equity would not lie for want of jurisdiction. . . . . The Acts of Assembly unquestionably have conferred equitable jurisdiction, in cases of constructive frauds, upon the Courts of Common Pleas of the several counties of this Commonwealth. (Purd. Dig. 592, pl. 5, 8.) The Courts have long exercised such jurisdiction. The whole system of trusts formerly fell within the exclusive jurisdiction of chancery, although in Pennsylvania this jurisdiction is to a great extent exercised concurrently by the courts of law. (Brightly's Eq. Jur. sec. 314.)

"A trust *ex maleficio* may arise under a will; such trust is not within the Statute of Frauds, and equity will enforce it. (Church *v.* Ruland, 14 Smith, 432; 2 Pomeroy's Eq. Jur. sec. 919.) Where a particular devise or bequest has been obtained through representation and promises that it would be used for the benefit of another, equity will prevent a fraud by treating the devisee or legatee as a trustee for the party intended to be benefited. (Bispham's Eq. sec. 199.) Equity seems the most appropriate remedy for this case. . . . . .

"The conclusion is, that the Court has jurisdiction in equity, and that the whole controversy may there be determined."

Exceptions were filed to the Master's report, which, after argument, were dismissed, and the Court entered a decree that respondent execute and deliver to complainants a conveyance of all the estate, etc., which were of Alexander Wirth, their father, in that certain described land, etc.; that he deliver to them possession thereof; that there is due from respondent to complainants $2700, and that he pay the same to them.

The respondent took this appeal, assigning for error, *inter alia*, the entering of said decree, not dismissing complainant's bill, and holding the evidence offered by complainants sufficient to establish a parol trust.

J. McF. Carpenter, for the appellant.

The appellees claim to recover lands of the appellant, of which he is in, and they are out of possession, and with them an account of rents and profits. They have an adequate remedy at law; and this being merely an ejectment bill, ought not to be entertained.

Church *v.* Ruland, 14 Smith, 432.
Richard *v.* Cherrington, 12 WEEKLY NOTES, 140.
Long's Appeal, 11 Nor. 171.
Frisbee's Appeal, 8 WEEKLY NOTES, 8.
Appeal of Girard Nat. Bank, 13 Id. 101.
Taylor's Appeal, 8 Id. 192.
Fox's Appeal, 11 Id. 236.
Crow *v.* Tyrrell, 3 Maddock's Ch. Rep. 179.
2 Spence's Eq. Jur., 844.

Appellant has a constitutional right to have the questions of fact determined by a court and jury.

Tillmes *v.* Marsh, 17 Smith, 511.
North Penna. Coal Co. *v.* Snowden, 6 Wr. 488.
Hipp *v.* Babin, 19 How. 271.
Lewis *v.* Cocks, 23 Wall. 466.

Assuming the Master's finding to be correct, that Wirth's widow took the land as a trustee, yet the trust terminated at her death, and the full legal title vested instantly in appellees as heirs-at-law of Wirth. Defendant being in possession, their remedy is ejectment.

Mark *v.* Mark, 9 Watts, 410.
Steacy *v.* Rice, 3 Casey, 81.
Cooper *v.* Cooper, 1 Halsted's Ch. Rep. 13.

If appellees' title is equitable only, the facts

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upon which it depends must be established by a jury.

Haythorn *v.* Margerem, 3 Halstead's Ch. Rep. 341.
Lee *v.* Simpson, 29 Wis. 339.
Gray *v.* Tyler, 40 Wis. 579.
Young *v.* Porter, 3 Wood's C. C. Rep. 342.
Sedgwick & Wait's Title to Land, sec. 171.

It was error in the Master to find the trust, and in the Court to sustain the finding, upon the unsupported testimony of one witness.

West McMurray (*S. Schoyer, Jr.*, with him), for the appellees.

The trust in this case is sustained by the authority of the following cases:—

Church *v.* Ruland, 14 Smith, 432.
Hoge *v.* Hoge, 1 Watts, 163.
Middleton *v.* Middleton, 1 Jac. & W. 96.
Mestaer *v.* Gillespie, 11 Ves. 638.
Reech *v.* Kennegat, 1 Ves. Sr., 123.
Oldham *v.* Litchfierd, 2 Vern. 506.

Where a particular devise has been obtained by promises that it should be used for another, equity will prevent a fraud by treating the devisee as trustee for the party intended to be benefited.

Church *v.* Ruland, *supra.*
McKee *v.* Jones, 6 Barr, 425.
Hoge *v.* Hoge, *supra.*

The answer only denied the trust "upon information," and not of the appellant's own knowledge, and therefore the rule requiring two witnesses to overcome a responsive answer does not apply.

3 Greenleaf's Ev. 285, 287.

January 7, 1884. THE COURT. The cardinal question in this case is, whether the facts established by the pleading and evidence fairly bring it within the equity jurisdiction of the Court below.

That question was promptly raised *in limine* by demurring to the bill, and has been strenuously insisted on throughout. If it be true, as claimed by the learned counsel for appellant, that the appellees have a full, complete, and adequate remedy at law, the want of equity jurisdiction must be conceded.

The learned Master's conclusions of fact, and the law applicable thereto, are very fully and clearly stated in his report; and, for reasons that will hereafter appear, the several specifications of error relating thereto are not sustained. The facts, so far as they are essential to a proper consideration of the question of jurisdiction, are substantially these. [The Court here stated the facts, *ut supra.*] A careful examination of the testimony convinces us that the Master was clearly right in finding the facts above stated.

The objection that the alleged trust cannot be established by the testimony of a single witness, is not well taken. Appellant's answer contains no such denial of the trust alleged in the bill, as makes it evidence for himself. In his formal denial of the trust, he speaks not of his own knowledge, but from information and belief only. It is well settled that such an answer is not evidence, it is pleading merely, and puts in issue the facts in dispute. (Eaton's Appeal, 16 P. F. Smith, 483; 3 Greenleaf's Ev. sect. 287.) The well-recognized rule in equity that a responsive answer must be overcome by the testimony of two witnesses, or one witness and corroborating circumstances, has no application to such a case as is here presented. Like every other fact averred in the bill, and not expressly denied by the defendant of his own personal knowledge, the alleged trust might well be established by the testimony of a single witness; and in this case it was fully established by the clear, distinct, and positive testimony of an entirely disinterested, intelligent, and trustworthy witness.

Assuming then that the trust, which is the very essence of the case, was clearly established, it is scarcely necessary to say that a flagrant breach of it has been conclusively shown, and part of the trust property, together with the proceeds of other portions thereof, traced into the hands of appellant, who is a mere volunteer, standing in no better position than the original trustee would occupy if living.

While it is practically conceded that there ought to be and is a remedy for such a wrong as that complained of by appellees, it is said they have mistaken their remedy, that they should have resorted to an action of ejectment, etc. It may be true that as to a portion of the trust property, their rights might be successfully asserted in an action of ejectment, but as to the residue, including the proceeds of the Liberty Street lot, sold by Mrs. Wirth in her lifetime, nothing could be accomplished by a possessory action at law. The legal title to the Liberty Street lot being in Mrs. Wirth, her vendee, for value and without notice of the trust, took a good title, and the only remedy the appellees had was to follow the proceeds in the hands of appellant. It is not a sufficient answer to say that their right to the money collected by him may be asserted in the Orphans' Court against the estate of his deceased wife. The purchase-money mortgage never in fact belonged to her, it was no part of her estate, and hence the jurisdiction of the Orphans' Court never attached thereto. It is very evident, therefore, that as to the entire claim of the appellees, an action of ejectment would be neither a full, complete or adequate remedy, and they should not be compelled to split up their claim because part of it might be successfully asserted in one form of action, and the residue in another. While we think the jurisdiction of the Court should be sustained on the ground above suggested, that is not the only ground upon which it should be based. For the

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reasons given and authorities cited in support thereof by the learned Master, we are of opinion that it is clearly sustainable on the broader ground, stated at length in his report.

We are not satisfied there was any error in stating the account on which the final decree is based, and hence the several specifications of error relating thereto are not sustained.

Decree affirmed, and appeal dismissed at the costs of the appellant.

Opinion by STERRETT, J.

GREEN, J., absent. W. S. P.

July, '83, 8. January 14, 1884.

Lance v. Bonnell.

Practice—Judgment—Verdict—Errors and Appeals.

In the Courts of Common Pleas of Philadelphia County, the rules of Court provide that all motions for new trials shall be made within four days after rendition of the verdict. A verdict was duly rendered in one of said Courts for defendant, and no motion for a new trial being filed, judgment was entered on the seventh day after the verdict. Twenty-three days thereafter, but during the same term of the Court, the Court on petition of plaintiff allowed him to file a motion for a new trial *nunc pro tunc*. Afterwards, after the expiration of the term, the Court made absolute the rule for the motion for a new trial *nunc pro tunc*, and subsequently at the ensuing term made the rule for a new trial absolute. Defendant having taken a writ of error:

Held, that the Court had properly exercised its discretion in allowing the motion for a new trial to be filed within the term at which the verdict was rendered, and that the circumstance that the matter was not finally adjudicated until a subsequent term did not invalidate the action of the Court.

Held, further, that the action of the Court in making the rule for the motion for a new trial absolute substantially set aside both verdict and judgment.

Held, therefore, that there was no judgment or order of the Court to which error would lie, and that the writ of error must be quashed.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by Samuel Bonnell, Jr., against William L. Lance, Jr., on a draft. On the trial, October 21, 1882, a verdict was rendered for the defendant. Judgment was entered on October 28, 1882. On November 20, 1882, twenty-three days after judgment, the plaintiff presented his petition for leave to file reasons for a new trial *nunc pro tunc*. This was granted by the Court, and on November 27 motion and reasons for new trial were entered. The rule was granted on December 8, 1882, and made absolute March 21, 1883.

The defendant thereupon took this writ, assigning for error the action of the Court in allowing the plaintiff to file reasons for a new trial *nunc pro tunc* on the petition filed, and in granting and making absolute the rule for a new trial.

Silas W. Pettit and *David C. Harrington*, for plaintiff in error.

A motion for a new trial was not made within the four days prescribed by the rule of Court. The defendant in error waived his right and he cannot afterwards claim it.

Thomson *v.* McConnell, 1 Gray, 396.
Collum *v.* Andrews, 6 Watts, 518.
Irvine *v.* Bull, 7 Id. 327.
Drexel *v.* Man, 6 W. & S. 346.
Delaware and Hudson Canal Co. *v.* Loftus, 21 Smith, 418.
Elsasser *v.* Hunter, 26 Cal. 279.

The action of the Court below was not within the limits of the sound discretion which by law is confided to it.

Sterrett *v.* Ramsay, 2 Watts, 91.
Catlin *v.* Robinson, Id. 373.
Huston *v.* Mitchell, 14 S. & R. 307.
Oil Co. *v.* Carothers, 13 Smith, 380.

Geo. R. Vandusen and *William Ernst*, for defendant in error.

The granting of a new trial is a matter of pure discretion with the Court of Common Pleas, and the exercise of a discretion cannot be made the subject of error.

Latshaw *v.* Steinman, 11 S. & R. 358.
Philadelphia Library Co. *v.* Ingham, 1 Wh. 72.
Columbia Bridge Co. *v.* Kline, Bright, 320.
Porter *v.* Lee, 4 Harris, 412.
Donaldson *v.* Bank, 8 Id. 245.
Hartman *v.* Ins. Co., Id. 466.

While the entry of a rule *nunc pro tunc* is of favor and not of right, it rests in discretion, influenced in its exercise by peculiarity of circumstances, and its propriety is not, therefore, to be inquired into by writ of error.

Ley *v.* Union Canal Co., 5 Watts, 105.

With leave of the Court it can be entered at any time before the end of the term in which the case is tried.

"The obvious purpose of the rule (requiring a motion to be entered within four days after verdict) is to enable the Judge to examine his notes . . . . while the matter is fresh, and thus to avoid . . . . a conflict of recollection between Judge and counsel as to what took place at the trial."

Mitchell on Rules, 30.

If, then, it is waived by the Court, the parties cannot complain.

February 4, 1884. THE COURT. It is certainly true that the granting of a new trial is a matter for the exercise of a sound discretion merely, and is not reviewable here on a writ of error. There is, however, a just limitation to this remedy; the power of the Court is annulled when the day for discretion is past. The case

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before us does not present the question, whether or not there was error in the discharge of a proper discretionary function, but whether or not the Court, at the time, in this form, possessed any discretionary power in the matter before it It is contended that the action of the Court wa. unauthorized and the question of power is, os course reviewable here.

The rule of practice in the Court below required that the motion for a new trial should be submitted within four days from the rendition of the verdict, and until after the expiration of that time judgment could not be entered. . It must be conceded, however, that it was competent for the Court, upon a proper showing, to waive the limitation imposed by its own rule of practice. The allowance of the motion on November 20, 1882, as of October 21, 1882, which was the date of the rendition of the verdict *nunc pro tunc*, simply dispensed with or waived the restriction of the rule.

It is true that a judgment had been regularly entered upon the verdict, but as the term had not yet expired, the judgment was as much under the control of the Court as the verdict: the whole term, excepting for the rules of practice, is considered as but one day, and the Judges may at any time within the term revise its judgments; the record is incomplete until the term is ended. (Catlin *v.* Robinson, 2 Watts, 379; Mather *v.* Patterson, 9 Casey, 485; Breden *v.* Gilliland, 17 P. F. S. 37; King *v.* Brooks, 22 P. F. S. 363; Com'th *v.* Malloy, 7 P. F. S. 291.)

If, then, it was competent for the Court to entertain the motion *nunc pro tunc*, the effect of that motion when made, it must be conceded, is precisely the same as if made at the proper time. This was the import and purpose of the motion, and the Court certainly could not have intended that it should have other than that effect. It was equivalent to an amendment of the record, and must be so considered. The motion, having been made within the term, no objection can be made that it was not finally disposed of until a subsequent term.

Assuming, therefore, that the motion for a new trial must be taken as made at the rendition of the verdict, it follows, necessarily, that the judgment, although at the first regularly entered, was liable to be set aside, as a judgment may be set aside which was improvidently the Court in so doing as an arbitrary exercise of its discretionary functions, as that action was taken whilst the judgment was fully within its control, and we cannot review the matters which moved the discretion of the Court.

The order for new trial was in this form:—

"November 25, 1882. Rule absolute."

Neither the verdict nor the judgment was set aside by any express words contained in the order, but both were set aside as the necessary effect of the award of a new trial. It would perhaps have been more formal and perhaps in accord with the general practice, that the order should in terms have set aside both verdict and judgment, but we have no doubt whatever that the general form here pursued was equivalent to that indicated.

The fact of judgment entered on the verdict is no barrier against the grant of a new trial, if the motion be made regularly and in time. (Lingenfelter *v.* Coal Co., 3 Norris, 328; Van Vleit *v.* Conrad, 14 Norris, 496.) We have been referred to the case of Huston *v.* Mitchell (14 S. & R. 307); that case, however, differs widely from this; the motion there was not for a rule for a new trial, but to show cause why the judgment should not be opened, and it was not made until the second term after the judgment had been entered. The rule to open being made absolute had the effect to reverse a regular judgment and make an end of the plaintiff's claim; it amounted to a perpetual injunction, as the plaintiff had no judgment, and, as long as the verdict stood, he was not entitled to take out a venire facias. The same question was presented on the record in the case of Conrad *v.* Commercial Ins. Co. (32 P. F. S. 66) and the ruling of this Court in Huston *v.* Mitchell was there followed. The case of the Syracuse Oil Co. *v.* Carothers (13 P. F. S. 379) is also plainly distinguishable from the present. The motion for the new trial there was made after the term and some four months after verdict and judgment, whilst in this, the motion was made within the term and by special allowance as of the date of the verdict. The motion in that case could not not have been made as of the date of the verdict, as, the term being ended, the power of the Court in that form over the judgment was also ended. This Court therefore in ruling that case, very properly said: "No such motion could be made

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within the limit which has been established, and as the verdict and judgment are both set aside, the cause is now open for further proceedings therein. It follows, therefore, that this writ of error cannot be sustained, there is no judgment, decree, or sentence of the Court below, which can be the subject of review here.

The writ of error is, therefore, quashed.

Opinion by CLARK, J. A. B. W.

Common Pleas—Equity.

C. P. No. 2. Jan. 12 & 19, 1884.

Harrison et al. v. St. Mark's Church.

Equity—Practice—Amendment of bill—Joinder of new parties complainant—Joint and several causes of action—Bills filed in behalf of a class.

Sur petition for leave to intervene as parties complainant.

For the prior facts in the case, and the argument on the motion for the injunction, see 3 WEEKLY NOTES, 384. The preliminary decree there reported enjoining the defendants from ringing their bells was affirmed by the Supreme Court, but subsequently modified so as to allow the bells to be rung at certain specified times. After a time a replication was filed. In December, 1883, the defendants, being anxious for a final hearing of the case, applied for the appointment of an examiner. During the interval several of the complainants had withdrawn from the case.

The petition, filed by Charles C. Harrison and others, all residing on Locust Street near the church, stated that:—

"The rights of your petitioners as owners or occupiers of the said premises respectively will be affected by any decree made in this cause, and they pray that they may be admitted to prosecute this suit as parties complainant according to the use and practice of chancery."

George T. Bispham, for defendants.

Before the Act of May 4, 1852 (P. L. 574), an amendment of this sort could not have been allowed under any statute either in Pennsylvania or in England. The statutes of jeofails affected only mistakes in the names of parties or in the averments in the pleadings. The Act of 1852 was the first to allow the names of parties to be added when "a mistake or omission has been made in the name or names of any such party," but this Act can only apply when the action is affected by such mistake. Where, for instance, a right of action exists in three persons jointly, and the action is brought by two only, such action is defective and the Act applies. The Act does not apply, however, where, as here, the right of action exists in a number of persons severally. The right of each is perfect in itself, and can be maintained without the joinder of the others.

Even were this otherwise, the petition does not show a case within the provisions of § 50 of the Equity Rules. By this rule the complainant cannot amend his bill after replication filed without showing that the amendment "could not with reasonable diligence have been sooner introduced into the bill." It is not alleged that these parties have recently moved into the neighborhood, or that they could not have been made parties long ago. Besides, this rule was not framed in order to give parties who had not joined in the action a right to do so, which would be, in effect, to allow a new action. It relates only to material facts, which the complainant, though acting with all diligence, has been previously unable to bring before the Court in his bill.

The petition shows no reason for the amendment. It says that the petitioners' rights will be affected. How can a decree in a suit brought by other parties affect the petitioners' rights? If it is unsatisfactory to them, they can file their own bill.

[HARE, P. J. Although their rights would not be affected in a legal sense, yet they would be affected practically, as it would be much more costly to file a new bill than to intervene in the present case. But I think that the main point is whether this bill could have been filed originally by the complainants in behalf of themselves and any others who might afterwards join in the suit, that is to say, in behalf of a class. If this could have been done at first, its not having been done is a defect which is now amendable, so as to let in the petitioners. If it could not have been done, they cannot, I think, be admitted now.]

Angelo T. Freedley (with whom were *William Henry Rawle* and *R. C. McMurtrie*), for the petitioners.

This is not strictly an amendment. It is a petition by parties in interest to be allowed to be parties to the bill. The petitioners' rights would be most materially affected by a final decree in this case. Should the injunction be refused, their legal right to file their own bill, with an adverse decision staring them in the face, would be of little use. It is a general principle that parties whose interests are identical with those of the complainant are always allowed to come in. The bill says that the complainants are "owners or occupiers of certain residences, situate within

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a radius of an eighth of a mile from the corner of Sixteenth and Locust streets." The petitioners come within this description, and ask to be substituted in the place of certain of the complainants who withdrew from the neighborhood and, necessarily therefore, from this suit. This cannot injure the defendants, as it will give them greater security for costs.

[HARE, P. J. The petitioners describe themselves as "owners or occupiers." Can a non-resident owner, not personally affected by the noise join in such a bill?]

At the former argument, the testimony of dealers in real estate was admitted to show depreciation of property. If a nuisance which directly affects only persons, does, however, thereby result in making property less desirable, a non-resident owner or a remainderman ought certainly to be able to join in asking for an injunction. In respect of these words the petition followed the form of the bill.

[HARE, P. J. I should like a statement as to whether the petitioners are owners or occupiers, and also authorities on the possibility of filing this bill in behalf of the complainants, and all others who may be interested,]

An affidavit was subsequently filed stating that the petitioners were all both owners and occupiers, and the case again came on for argument, January 19, 1884.

Geo. T. Bispham, for the defendants.

The general rule is that all parties in interest must be joined in the suit either as plaintiffs or as defendants. Where, however, the parties having a common interest are very numerous, one or more may file a bill in behalf of themselves and all others similarly interested. In that case the bill must expressly aver that it is so filed: otherwise it is demurrable.

Baldwin *v.* Lawrence, 2 Sim. & Stu. 18. 26 n. (1) Am. ed.
Daniell's Chanc. Pl. and Pr., *406.
Phillips *v.* Hudson, L. R. 2 Ch. App. 243.

In the present case the bill contains no such averment. If it is demurrable, then possibly it may, by adding the averment, be so amended as to let in the petitioners. If it is not demurrable, then it could not have been filed in behalf of a class, and new parties cannot now be added.

When a resident of any neighborhood is annoyed by an offensive trade or other nuisance, he has a complete several cause of action. This may also be joint, and other residents may unite in the same bill (see Brady *v.* Weeks, 3 Barb. which they can assert individually. The bill is therefore not demurrable on the ground above referred to, and hence not amendable in the manner now attempted. Moreover, unless the complainants could show a special individual damage, their bill would not lie. When the injury is purely common, the relief must be sought by the Attorney-General.

Miss. and Mo. R. R. *v.* Ward, *supra.*
Hinchman *v.* Paterson H. R. R., 2 C. E. Greene, 75.
Att.-Gen. *v.* Utica Ins. Co., 2 John. Ch. 379.
Allen *v.* Board of Freeholders, 2 Beas. 68.

Angelo T. Freedley, for petitioners.

The petitioners, being all owners and occupiers of their houses, which are situate within the radius mentioned in the bill, have an interest in this case identical with that of the complainants. They have a right to join in the present bill, and need not be driven to a second action,

Wood on Nuisances, § 783.
Story's Equity Pleading, § 237 b.

A party filing a bill in equity to abate a public nuisance "seeks redress of a continuing trespass and wrong against himself and acts in behalf of all others who are or may be injured."

Miss. and Mo. R. R. Co. *v.* Ward, 2 Black. 485, 492.
Johnson *v.* Drummond, 20 Grat. 419, 428.

"In respect to amendments as to parties, courts are more liberal than in respect to other amendments."

1 Daniell's Ch. Pl. and Pr., *406, n. 2.

This question was decided by this Court in 1877 in allowing new parties to be joined as complainants, and in overruling the defendants' demurrer for misjoinder of parties. This decision was sustained by the Supreme Court and is in accord with—

Rhodes *v.* Dunbar, 7 Sm, 274.
Wier's App., 24 Sm. 230.
Sellers *v.* Penna. R. R., 1 WEEKLY NOTES, 295.
Spencer *v.* L. & R. Ry. Co, 8 Simons, 193.
Umfreville *v.* Johnson, 10 Ch. App. 580.

THE COURT. Prayer of petition granted.

C. C. B.

Common Pleas—Law.

C. P. of Butler Co. November, 1883.

Comstock v. Kilchenstein.

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motion of defendant, although the record shows that one or more executions issued within the five years.

The practice in Philadelphia County, as shown by Shaw *v.* Richards (2 Miles, 103); Landouzy *v.* Seelos (4 WEEKLY NOTES, 151), and Troubat & Haly's Practice, sec. 1043, sustaining such an execution, held to be in conflict with the Act of June 16, 1836, and with the rulings of the Supreme Court.

Sur motion, by defendant, to set aside execution.

The record showed that more than five years had elapsed between the date of the judgment and the issuing of the present writ of execution; that several writs of execution had been issued on said judgment within five years of its date, but no scire facias had issued to revive the judgment *et qu. ex. non.*

Kennedy Marshall, for the motion.

W. H. Martin, contra.

The COURT, after argument, granted the motion, and set aside the execution. Subsequently BREDIN, J., filed the following opinion, December 10, 1883:—

The execution in this case was set aside on motion of defendant, the record showing that it had issued after five years from entry of judgment without previous scire facias, *q. e. n.*

The attorney for the execution creditor contended that because a number of executions had issued on the judgment within the five years, one issued afterwards was not irregular, although no scire facias had issued on the judgment as required by the second section of the Act of June 16, 1836, extended by Act of April 16, 1845 (Purdon, 634, sections 2 and 3).

On examination of the cases to which he referred, viz: Shaw *v.* Richards (2 Miles, 103), and Landouzy *v.* Seelos (4 WEEKLY NOTES, 151), and the rule laid down in Troubat & Haly's Practice, section 1043, which fully sustain his position, we have deemed it advisable to enter our reasons at length why there should be no departure from the practice which, so far as we know, has always prevailed in this district to set aside such an execution as irregular where the application is made by the defendant.

Our practice had, we think, the sanction of the Supreme Court in Hinds *v.* Bell (1 Jones, 25). That case was before the Act of June 16, 1836. Judgment was entered to November Term, 1829. *Fi. fa.* to November Term, 1830. Vend. ex. December Term, 1834. Sheriff's sale of land aside, but it is an irregularity insufficient to avoid the sheriff's sale, and therefore cannot be taken advantage of in this collateral proceeding. Indeed it lies only in the mouth of the defendant himself to take the exception in proper time, for he may choose to and frequently does waive the writ of scire facias. It is intended for his personal protection."

We find no decision of the Supreme Court sustaining the view of the District Court of Philadelphia that the Act of June 16, 1836, was merely declaratory of the law as it stood prior thereto.

Before the passage of that Act the Supreme Court, in sustaining the practice then existing of issuing executions after a year and day had elapsed from date of judgment, where a fieri facias had issued within the time, said: "This practice crept upon the English courts *unawares*, and upon its being first mentioned to them, they were inclined to disregard it, perceiving that the effect was to render a scire facias almost useless. But upon receiving information from their prothonotaries that the practice was of considerable standing, they thought it best upon the whole to support it. Nothing can show more strongly the regard that every Court pays to its own practice." (Lewis *v.* Smith, 2 S. & R. 156.)

In Gemmill *v.* Baker (4 Barr, 233), in sustaining an execution attachment, the Court said: "An execution could not have issued in this case after the expiration of five years, because then the defendant could have had no day in Court to show that the judgment was paid or satisfied," but held defendant's day in Court in the attachment process to be a panacea for the irregularity because "he can have full power to make any defence that he could make in a scire facias."

In Frunken *v.* Trimble (5 Barr, 520) the Court said: "The 10th section of the one hundred dollar Act provides that the prothonotaries shall enter on their dockets transcripts of judgments obtained before justices of the proper counties, which judgments from the time of entry bind real estate; but no fieri facias shall be issued by any prothonotary until a certificate shall be first produced to him from the justice before whom the original judgment was entered, stating therein that an execution had issued to the proper constable and a return had been made thereon that no goods could be found. Some prothonotaries in disregard of the law issue executions when

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the Act, and said: "The law as it now stands prohibits an execution on any judgment after the lapse of five years unless the defendant shall have been warned by scire facias. (Purdon, 330, 1079)." The reference "330" is to "execution" and to Acts of 1836 and 1845. "1079" is to Act of 1854, which provides that "no execution shall be issued on a judgment rendered by a justice after five years, unless it shall have been revived by a scire facias or confession." In that case, as we understand it, an execution had issued within the five years, but the second execution was held to be irregular, having issued when the judgment was more than eight years old. This decision is, we think, irreconcilable with the view of "the law as it now stands" taken by the Philadelphia courts. It is true that on all questions of practice we pay great respect to the decisions of the courts of Philadelphia, and differ from them with great reluctance, but where a statute is plain, unambiguous, and restores a rule of the common law which had been surreptitiously overthrown by a confessedly bad practice, we cannot disregard it to follow their rulings until indorsed by the Supreme Court. No one will contend that the issue of a fieri facias immediately after a judgment is obtained and return of *nulla bona* in any way compensates defendant for the loss of his day in Court to enable him to show that the judgment was paid or satisfied, which the Supreme Court have held to be the intention of the Act. If such issue dispenses with scire facias at the expiration of five years it must dispense with it for twenty years or until the judgment is presumed to be paid. Such a practice it would seem ought to have a statute to support it instead of being in conflict with one. There may have been some excuse for adhering to such practice prior to the Act of 1845 extending the time for issuing executions to five years, but we can see no reason for further continuance of it. As this Court has never adopted such a rule we have no difficulty in refusing to recognize it, and resisting its introduction.

We direct this opinion to be filed as our reasons for granting the motion, in which opinion Judge McJunkin concurs.

[*Cf.* Davis *v.* McHenry, 11 Weekly Notes, 304.]

C. P. No. 1. April 12, 1884.

Brooks et al. v. Salin.

Execution—Practice—Attachment execution—

On March 8, 1884, plaintiff obtained judgment for $72.45, and on the same day issued a fi. fa., which was levied on the goods of defendant. On March 4 and 10, 1884, two attachment executions were served on defendant by certain judgment creditors of plaintiffs, wherein the said sum of $72.45 was attached; the sheriff was afterwards directed by plaintiff's attorney to sell the goods and collect the proceeds.

Defendant's counsel thereupon obtained the present rule.

Henry J. Scott showed cause.

Where a judgment has been attached by a creditor of the plaintiff, the Court will stay proceedings until the plaintiff pays the attaching creditor, or pushes his claim to a final determination.

Daly *v.* Derringer, 1 Phila. 324.
Paxson *v.* Sanderson, Id. 177.

[Biddle, J. Those cases were decided in 1852. The practice now is to rule the sheriff to pay the proceeds of the execution into Court. The matter can then be referred to an auditor, who will determine the respective rights of the parties.]

W. W. Ledyard, contra.

The Court. Rule discharged. H. J. S.

C. P. No. 4. April 19, 1884.

Trust Co. v. Herr.

Sheriff's sale—Misdescription; what is material—Inadequacy of price—When sale will be set aside.

Sur rule to set aside sheriff's sale.

It appeared from the defendant's depositions that the property in question was a stone dwelling-house at Forty-first and Spruce streets, West Philadelphia. It was sold under a judgment on a sci. fa. sur mortgage of $7000 for about the amount of the debt, taxes, and costs; to wit, $8300. It was assessed at $8500. The testimony as to whether or not the sheriff's bill had been posted was conflicting. The improvements were described in the advertisement, as consisting of a *brick* instead of a stone house, as it was described in the writ. The evidence was that the property is worth $13,000. There were no counter depositions.

George H. Earle, Jr., for the rule.

The misdescription is fatal, for it must have

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[THAYER, P. J. Have you any evidence to show that the property will produce more at another sale?]

No; but this may be inferred from the actual value as appearing from the evidence, $13,000.

Frank S. Simpson, contra.

The misdescription was immaterial, and the sale was a fair one. There have been four sheriff's sales within two years; and this time the property brought $1000 more than at any other time. The full value appears further from the fact that the second mortgagee did not even attend the sale to protect himself.

THE COURT. Rule absolute. W. H. W.

Orphans' Court.

April 22, 1884.

Furness Minors' Estate.

Trust for accumulation—Where there is a provision that the fund with its accumulations shall go to the children of minor grandchildren dying in their minority, the grandchildren are nevertheless entitled to a proper allowance out of the fund, and the rights of subsequent takers are subordinate to this provision. Query: Whether such a limitation be void under the Act of 1853.

Sur exceptions to Examiner's report.

This was a petition by the guardian of the minor grandchildren of Evan Rodgers, the testator, praying for an order on the trustees, under his will, to pay over an increase of allowance for their maintenance. The provisions of the will are set out in the opinion of the Court (*infra*).

An Examiner was appointed, who reported in favor of the prayer of the petition, to which report exceptions were filed in behalf of the trustees for the reason also given in the opinion of the Court.

John G. Johnson, for the Pennsylvania Company for Insurance on Lives and Granting Annuities, trustees.

Edward Hopper, for the guardian.

April 26, 1884. THE COURT. It is conceded that the benefit of the accumulations of income directed by the testator cannot be enjoyed by any person taking under the limitations of the will, except the minors for whom the provision was made. But it is contended that as the will directs that the fund with its accumulations shall go to the children of grandchildren dying in their minority, such minor great-grandchildren are equally within the class for whom accumulation is permitted by the Act of 1853, and hence that the accumulations must be suffered to remain in the hands of the trustees to meet this contingency.

It is far from clear that the Act contemplated an accumulation through a succession of minorities; certainly a trust for this purpose which might last, as in the case of the youngest of the present minors, for more than twenty-one years after the expiration of a life or lives in being at the death of the testator, would transgress not only the Act of Assembly, but would be void as creating a perpetuity. But if it be conceded that the minority referred to in the Act is not one in actual existence or incipiency at the death of the testator, and that accumulation for a series of minors is, during twenty-one years from the testator's death, permissible, it is a necessary corollary of the decision in Washington's Estate (25 Sm. 102) that the accumulations during each minority belong to that particular minor. They are intended for each minor in turn; each, if of full age at the time, would be entitled to the entire income as it accrued; and each must therefore be entitled to the corresponding accumulations.

Moreover, the Act provides that "Notwithstanding *any* direction to accumulate . . . for the benefit of *any* minor or minors, . . . it shall be lawful for the proper Court . . . where there shall be no other means . . . to decree an adequate allowance for such purpose;" and accordingly in Washington's Estate (*supra*), it was held, though the minor's interest in the corpus was but for life, that an allowance out of the accumulations was properly made. It would be going very far to so construe this general word "any" as to exclude from the benefit of the provision for maintenance, minors having a present interest, in order to preserve it for persons unborn and unlikely to be born, viz., children who might by possibility be born to the first minors during their minority.

But whatever may be the law in ordinary cases, we think it clear that in this estate the allowance is proper, since the testator has said in express words that the trustees shall have "full, unrestrained liberty with the fund for the benefit of his daughter and her children (the present minors); and the trustees have testified in the most emphatic manner that in their judgment the allowance asked for is essential for the welfare of these children. The rights of all subsequent takers are subordinate to this provision.

Exceptions dismissed, and report of the Master confirmed.

Opinion by PENROSE, J. W. L. S.

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January 22, 1884.

Monestier's Estate.

Decedent's estate—An advancement does not work an ademption of a legacy where it is not "ejusdem generis," and where the bequest is of uncertain amount—Allowance for burial lot—Claim of widow for funds of her own deposited in her husband's name in bank—Evidence.

Sur exceptions to adjudication.

At the audit of the account of Edward Holden, executor under the will of Adolph Monestier, the decedent, a claim for $1223 was presented in behalf of testator's widow, and witnesses were produced who testified that this sum was the proceeds of the sale of real estate belonging to her and deposited in testator's name in the Fidelity, Trust, and Safe Deposit Company. A certified copy of the book-entry according to the Act of June 22, 1883 (Pamph. Laws, 1883, page 154), was offered in evidence, and it was also shown that Mrs. Monestier kept no bank account.

On the other hand, it was urged in behalf of A. Rene Chalumeau, a minor and legatee, that the above sum was intended as a gift by the widow to the testator during his life; that the proceeds of the sale of the property was $4250, of which $2200 went into the purchase of another house, and that Mrs. Monestier now claims $1223, which leaves a considerable sum unaccounted for; that the deed for the house purchased was made out jointly to husband and wife which would have made testator absolute owner had he survived his wife, and consequently a gift was intended.

The substance of the other exceptions filed and their subject-matter is given in full in the opinion of the Court (*infra*).

H. F. Weeks and *H. Haverstick*, for the legatee.

J. F. Goodwin, for the accountant.

W. F. Harrity, for the widow.

February 16, 1884. THE COURT. The testator made equal provision by his will for all his children, and some time after the execution of the instrument, he furnished a house for a daughter upon her marriage at a cost of $2000. Did the latter gift work an ademption of the legacy? The rule is clear that a legacy from parent to child is to be regarded as a portion to the child, and will be adeemed either wholly or in part by a subsequent advancement. (1 Rop. on Leg. 257; Wms. on Executors, § 1143.) But it is subject to two exceptions: where the legacy and the advancement are *non ejusdem generis*, and where the bequest is of uncertain amount. The case of Holmes *v.* Holmes (1 Bro. C. C. 555) illustrates the first exception. The testator having bequeathed to his son a pecuniary legacy afterwards fitted him out with a stock in trade of jewelry; and it was held that a portion for the son could not have been intended by a gift of chattels wholly different in kind from the fortune provided by the will. The principle was affirmed in Ravenscroft *v.* Jones (4 De G., J. & S. 224), and for the same reason, in Swoope's Appeal (3 Cas. 58), the gift of a house and lot to a daughter was declared to be no ademption of a money legacy to the grantee. The gift of a residue or of part of a residue would seem to fall within the second exception, because such a gift is of necessity uncertain in value, and it was so held at one time in England. (Farnham *v.* Phillips, 2 Atk. 215; 1 Rop. on Leg. 263.) The later cases, however, show that this distinction has been abandoned, and our Courts will probably follow the more modern rule. (Miner *v.* Atherton, 11 Cas. 528.) Upon the ground, however, that the legacy differed in its nature from the advancement, the Auditing Judge properly held that it had not been adeemed.

We have passed beyond the small economies of the day when courts declared that it was doubtful if the body of an insolvent decedent was entitled to a shroud or to the services of a grave-digger. (4 Burns's Ec. Law, 348.) Expenses have been allowed, even as against creditors, which are not strictly identified with the burial, as of mourning dresses for the family, the purchase of a lot, and the erection of a monument. (Fairman's Appeal, 30 Conn. 205; Wood's Estate, 1 Ash. 314.) Hence, where no rights of creditors will be affected, considerations drawn from the decedent's station in society, and the known wishes of a majority of his kindred respecting the disposition of his remains, will justify an expenditure which, under different surroundings, would be wasteful. In the present instance, $400 out of a very moderate estate were paid by the executor for two adjoining cemetery lots which were converted into one inclosure. The children, for whose use the lots were in part intended, approved the purchase; and only the grandchild, who would be equally benefited, objects to it. We think that the Auditing Judge was warranted in allowing the credit.

The finding of facts by the adjudication has the force of a verdict. Those which related to the transactions between the testator and his wife certainly raise the presumption that the latter loaned to her husband the proceeds of the sale of her real estate. The exceptions to this finding and the remaining exceptions are dismissed, and the adjudication is confirmed.

Opinion by ASHMAN, J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, MAY 29, 1884.* [NO. 25.

Supreme Court.

July, '83, 13. January 14, 1884.

Kibele v. City of Philadelphia.

Negligence—Notice—Sewers—Illuminating gas—Explosion—Contributory Negligence.

Where injury has resulted from a defect in a sewer or gas main, notice or knowledge will be assumed when the circumstances are such that the municipal authorities, by the exercise of proper and reasonable diligence, might have known of the defect which caused the damage.

If a person knew that illuminating gas was escaping into his house from a main and that it might explode, it was his duty to withdraw from the premises or to take suitable precautions for his safety. Whether he had such knowledge or not was a question for the jury.

An ordinary man is not bound to know that illuminating gas when mixed in certain proportions with the common air is explosive.

A. was injured by an explosion of illuminating gas, which had found its way into his house through an untrapped drain leading from a sewer belonging to the municipality. The sewer received the gas from a gas main whose end, situated near A.'s house, had been stopped by a wooden plug which had rotted out. A patrolman and others testified to noticing the smell of illuminating gas in the street ten or twelve days before the explosion: *Held*, that this evidence should have been submitted to a jury in order to determine the question whether the municipal officials by the exercise of a proper diligence could have discovered the defect in the gas main in time to have had it properly repaired before the explosion.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by Eugene Kibele against the city of Philadelphia, to recover damages for injuries sustained by himself and wife, and for the loss of personal property, caused by an explosion, alleged to have been occasioned by the negligence of the defendant. Plea, not guilty.

The facts of the case as they appeared at the trial before PEIRCE, J., were as follows:—

On July 23, 1881, an explosion of illuminating gas occurred in the kitchen of the house 3610 Haverford Street, occupied by plaintiff as a dwelling house and beer saloon. Kibele and his wife were severely injured and a quantity of furniture was destroyed. Several years previous to the accident the city had laid a gas main along Haverford Avenue running westward from Thirty-sixth Street to Thirty-seventh Street. The dead end of the main at Thirty-seventh Street was closed by a wooden plug which subsequently rotted out and the gas then escaped from the main into the sewer, which was immediately alongside. This sewer had been constructed in 1873 under an ordinance directing the construction of a sewer on the line of Haverford Street, from Thirty-seventh to Thirty-eighth Street. By a mistake of the Highway Commissioner proposals were advertised for a sewer from Thirty-sixth to Thirty-eighth Street. The lowest bidder proceeded with his work before executing the contract. The contract drawn by the City Solicitor was in accordance with the ordinance for a sewer from Thirty-seventh to Thirty-eighth Street. The contractor not noticing the wording of his contract proceeded with his work building eastward. He crossed Thirty-seventh and did not discover his error until he was within sixty feet of Thirty-sixth Street, when he stopped its construction. The owner of the property 3610 Haverford Street, before the plaintiff rented the premises, connected the premises with the sewer, but he did not have the connecting drain trapped, and there was evidence to show that the joints at the time of the explosion were very defective. The gas forced its way from the sewer into the house and accumulated under the back kitchen. From thence it poured into the kitchen and ignited at the range and exploded. The smell of sewer gas had frequently been noticed before the explosion. Dr. Pusey, the plaintiff's physician, testified that he had noticed the smell of gas and had called the attention of the family to it. The plaintiff testified: "Whenever there was a damp day I smelled the sewer gas. I never smelled it in the house. Sometimes you could smell it at the hydrant in the kitchen next to the range, what is called the sink. There was no very great volume of it; there was always more or less smell there. I can tell illuminating gas from sewer gas. I smelled the sewer gas as long as I have been in that house, since 1876. I never tried to remedy it in any way; I did not know how gas could be kept out of the house. I knew sewer gas was escaping from the drain; I knew sewer gas was escaping all the time. I didn't know that the drain was defective; I know it now. I smelled gas all the time escaping from the drain. I didn't know sewer gas could be kept out by traps."

Several witnesses testified to their smelling illuminating gas frequently in the square in which the plaintiff's house is situated. A policeman testified to his smelling it there for a week or so before the explosion.

The Court entered a judgment of compulsory nonsuit, because no actual notice was brought home to the city of the escape of the gas; and because the plaintiff had testified that at various times, since 1876, he had smelled sewer gas in

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small quantities escaping from the drain, holding that as he had smelled sewer gas, it was his duty to have investigated the cause of the escape thereof, even if he had to take up the flooring, dig through the ground, and examine the drain; and that if he had so done, he would have discovered the imperfect construction of the drain, and could then have remedied it, and the explosion would probably not then have taken place. As the city had accepted the sewer, the question of its unlawful construction, in the first instance, was a matter of no moment, and though the plaintiff in error was but a tenant of the premises, entering into possession long after the drain was built, and did not know of the imperfect construction of the drain, nor how he could remedy that imperfect construction, yet he was none the less guilty of contributory negligence if he smelled the sewer gas escaping as above described, though the explosion was, as was admitted at the trial, an explosion of illuminating gas, and not of sewer gas, and though plaintiff in error had never previously thereto smelled illuminating gas escaping.

A motion was made to take off the judgment of nonsuit, but the Court below, in banc, refused so to do.

The plaintiff thereupon took this writ, assigning for error the action of the Court in entering a compulsory nonsuit and refusing to take off the same.

Alex. Simpson, Jr., for plaintiff in error.

The city was negligent either in having used an improper plug to stop the main, to wit, one that was not in good condition; or in permitting the plug to remain so long that it rotted out. Of this, the city necessarily had knowledge and the plaintiff had none. If the plug was in bad condition when it was put in, that was negligence on the part of the city. If it was in good condition and was allowed to remain so many years that in the natural course of events, like other wood underground, it rotted out, that also was negligence on the part of the city, and it was her duty, as decided in Vanderslice *v.* The City (40 Leg. Int. (1883) 172), to have exercised a reasonable degree of care and watchfulness in ascertaining the condition of the gas main, and repairing it. This she failed absolutely to do, and to relieve herself from the effects of this negligence on her part she cannot plead want of notice from the plaintiff.

Besides this, the city was chargeable with constructive notice by reason of the long continuance of the escape of the gas.

McLaughlin *v.* City of Corry, 27 Smith, 109.
Cooley's Constitutional Limitations, *249, and cases cited.
Dillon on Municipal Corporations, 3d ed., § 1017, and cases cited.

Was the plaintiff guilty of contributory negligence? According to the testimony in the case, he knew nothing of the escape of illuminating gas, but only knew that at intermittent periods, sewer gas escaped from the drain. It is submitted, that even if he had known of illuminating gas escaping, he would not have been guilty of contributory negligence in remaining in the premises; but under no view of the law can he be held guilty when he knew nothing of the escape of anything but sewer gas, and illuminating gas caused the explosion. In order to charge a plaintiff with such negligence as to bar his action, the negligence must be of that nature as to be the proximate cause of the injury and not the remote cause; and it must also be such negligence as naturally would result in the exact injury which is the subject of the action.

Oil City Gas Co. *v.* Robinson, 3 Outerbridge, 1.
Thirteenth & Fifteenth Sts. P. R. W. Co. *v.* Boudrou, 11 Nor. 475.
Creed *v.* The Railroad, 5 Nor. 145.
Gray *v.* Scott, 16 Smith, 345.
Gould *v.* McKenna, 5 Norris, 297.

Abraham M. Beitler, Assistant City Solicitor (*Wm. Nelson West*, City Solicitor, with him), for defendant in error.

The plaintiff was grossly negligent. He had frequently smelled gas; his doctor had warned him as did also his wife. A man cannot thus brave danger, and when his foolhardiness has brought injury to himself seek to hold some one else liable for that which he could so easily have avoided. It is the duty of a plaintiff seeking to recover, where the *gravamen* of the action is the alleged negligence of the defendant, to show a case clear of contributory negligence on his own part.

City of Lancaster *v.* Kissinger, 11 WEEKLY NOTES, 151.
Strawbridge & Clothier *v.* The City, 7 Id. 537.
Holly *v.* The Boston Gas Light Co., 8 Gray, 123.
Holden *v.* The Liverpool New Gas & Coke Co., 54 Eng. C. L. R. 3; 3 M. G. & S. 1.

February 18, 1884. THE COURT. We think the evidence in this case was sufficient to require its submission to the jury. The immediate cause of the injury to the plaintiff was undoubtedly the defective gas-pipe, and the material question was, whether of this defect the city had either actual or constructive notice. There can be no serious question of its liability for damages to a citizen when resulting from its wilful neglect in a particular of this kind. Admitting, then, that the main was in all respects properly constructed and secured, and this was a question for the jury, yet if the city officials did know, or ought to have known, previously to the time of the explosion, that it was in a defective condition, and failed to have it properly repaired, that would be such a default as would fix the liability of the city; but notice or knowledge will be assumed where

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the circumstances are such that the municipal authorities, by the exercise of proper and reasonable diligence, might have known of the defect which caused the damage complained of. (McLaughlin *v.* The City of Corry, 27 P. F. S. 109; Fritsch *v.* City of Allegheny, 10 Nor. 226.) In the latter case, Mr. Justice MERCUR, in delivering the opinion of the Court, says: "Negligence is the absence of proper care, caution, and diligence; of such care, caution, and diligence as under the circumstances reasonable and ordinary prudence would require to be exercised. It may consist as well in not doing the thing which ought to be done, as in doing that which ought not to be done, when in either case it has caused the loss and damage to another. Hence, in this case, one question to be determined is, whether the municipality, acting through its officials, failed to exercise such care and diligence in not ascertaining the nuisance, and in not removing it prior to the injury sustained by the plaintiff." In the case under consideration, as in the one cited, the question is, could the city officials, by the exercise of a proper diligence, have discovered the defect in the gas-main in time to have had it properly repaired before the explosion? Several witnesses, and among them one of the city's patrolmen, speak of smelling the escaping gas a week or ten days before the accident. Here, then, was the certain indication of a broken pipe and the need of immediate repairs. It might well be supposed that within the space of a week or ten days the proper officers ought to have discovered a gas leak, which was alike offensive and dangerous to a whole neighborhood, and it might also be supposed that it was part of the business of a patrolman, on discovery of such a leak, to have informed those officers. All these, however, were questions for the jury, and to that body this evidence ought to have been submitted.

The question of contributory negligence was also one for the jury. If the plaintiff knew that illuminating gas was escaping from the main, and also knew that from it an explosion might reasonably be expected, it was his duty to have withdrawn from the premises, or to have taken other precautions for his safety, until the leak could be discovered and stopped. He could not knowingly take upon himself such a risk as this, the risk of an explosion, and for its consequences charge the city. In such case both parties would be chargeable with negligence; both contribute to the accident; hence, one could not charge the other with the resultant damages. A good deal has been said in the argument of this case about the defectiveness and untrapped condition of the plaintiff's sewer, and an endeavor has been made through it to charge him with contributory negligence. But this matter has nothing at all to do with the case. If he had a bad or imperfect branch sewer, he must run the risk of the deleterious effects of sewer gas, for that must be expected in a common sewer; but he had no right to expect that it would become a conduit for illuminating gas; as well might he expect that it would be made a storehouse for gunpowder. Again, it is urged that the plaintiff ought to have notified the authorities. Undoubtedly he ought so to have done, if he knew that his house was being filled with illuminating gas, and if he also knew the dangerous character of that article. But he was not bound to know that when mixed in certain proportions with the common air it was explosive. As was said in the case of the Oil City Gas Company *v.* Robinson (3 Out. 1), such knowledge might be presumed of an expert, or of one whose education would necessarily involve some knowledge of chemistry, but it would be going too far to presume such knowledge of a saloon-keeper. The city, however, as a manufacturer and vendor of gas was bound to know all about its character, and take care that, through the default of its officers or servants, the article which it manufactured and sold was the occasion of harm to no one.

The judgment of the Court below is now reversed, and a new venire ordered.

Opinion by GORDON, J. A. B. W.

Jan. '84, 87. January 24, 1884.

McCullough v. Shoneman.

Negligence—Master and servant—Actual relation of, must exist in order that the one should be liable for the negligent acts of the other.

Where the owner of a property refused to allow the servants of a third party to carry down through his store some heavy bags of paper, which the said third party had purchased from him, and which were stored in the upper part of the building, but told them they could throw them out of the window, the fact of such instruction does not create such a relation between the owner and the said servants as to render him liable when they do this in such negligent manner as to injure one passing by in the street below.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by John McCullough against William Hemingway and Louis Shoneman to recover damages for personal injuries alleged to have been sustained by plaintiff through defendants' negligence. Plea, not guilty.

The facts of the case, as they appeared at the trial, before ARNOLD, J., are fully set out in the

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report of the proceedings on a motion for judgment on a point reserved in the Court below, *ante*, p. 14; and also in the opinion of this Court, *infra*.

The jury having found a verdict of $4000 against both defendants, subject to a point reserved as to the liability of defendant Shoneman, the Court subsequently entered judgment in favor of Shoneman on the point reserved, and judgment for the plaintiff against Hemingway alone for the amount of the verdict.

Whereupon plaintiff took this writ, assigning for error the action of the Court in entering judgment for the defendant, Louis Shoneman, *non obstante veredicto*.

John G. Johnson, for plaintiff in error.

Shoneman is liable because he directed the men to remove the bags by the window, knowing that this act was one fraught with danger to those passing on the street.

The act complained of was done by Hemingway's servants, under the direction of an agent of Shoneman, sent by the latter to show the servants how to get the bags out.

Shoneman and Hemingway might jointly have undertaken personally to remove the bales, and if they had done this negligently they would undoubtedly have been jointly liable. The same responsibility is incurred when they do a negligent act by their several servants.

Wray *v.* Evans, 30 Smith, 105.
Painter *v.* The Mayor, etc., 10 Wr. 220.
Shearman and Redfield on Negligence, § 788.
Wilson *v.* Peto, 6 Moore, 47.
Wright *v.* Wilcox, 19 Wend. 343.
Klauder *v.* McGrath, 11 Casey, 129.

R. P. White (*Mayer Sulzberger* with him), for defendant in error.

No man is liable for the negligence of another unless that other is his instrument in doing the act which causes the injury. A direction given by a stranger controls no one.

Ardesco Oil Co. *v.* Gilson, 13 Smith, 150.
Joslin *v.* Ice Co., 50 Mich. 517.
Holmes *v.* Halde, 74 Maine, 29.
Stevens *v.* Armstrong, 6 Selden, 435.
Peachey *v.* Rowland, 13 C. B. 182.
Butler *v.* Hunter, 7 H. & N. 826.
Gray *v.* Pullen, 32 L. J. Q. B. 169.
Painter *v.* The Mayor, etc., 10 Wr. 223.

The test of service is this: Who paid for the doing of the work? To whom would the men be liable for default in the doing of it?

Even had Shoneman's direction, not to bring the bags down through the store, been a cause of the accident, still it would have been only the remote and not the immediate cause.

Wharton on Negligence, §§ 134 and 143.
Ins. Co. *v.* Tweed, 7 Wallace, 52.
Carter *v.* Towne, 103 Mass. 507.

There cannot be two superiors severally liable for the same wrongful act.

Wray *v.* Evans, 30 Smith, 102.

February 4, 1884. THE COURT. The defendant was sued with William Hemingway, and a verdict rendered against both. The Court below reserved the question of Shoneman's liability, and subsequently entered judgment in his favor *non obstante veredicto*. As the jury have found that Shoneman took part in the work and was negligent, the case requires an examination of the testimony to see whether there was sufficient evidence of his participation in the act complained of. If there was, the verdict must stand.

The plaintiff was injured by a large bale of waste paper falling upon him as he was passing along Birch's Place, a small, narrow street. It was thrown from one of the upper windows of defendant Shoneman's store under the following circumstances: Shoneman had a large quantity of waste paper in the upper story of his building. He sold it to the defendant Hemingway, who is a dealer in waste paper and rags. Hemingway sent two men, Dickson and Williams, to Shoneman's store to pack and tie the paper up in bags, and a few days after to take it away. They dropped the bags out of a window, in the side of the store, down to the street, and put them on a wagon. One bag had been thrown down safely, and then a second bag was dropped, which struck and injured the plaintiff. The bags were about six feet high, and weighed about one hundred and seventy-five pounds. It appeared that this was the usual way of getting out the paper. Shoneman told the men not to take it down the stairway; in view of the size of the bags, it was inconvenient if not impracticable to do so; the only way left was for the men to throw it out the window, and Shoneman knew it had been thrown out upon former occasions. He sent his cash-boy, a lad of about sixteen years of age, upstairs with them, and there was evidence that the boy told the men to throw the bales out of the window.

This statement of Shoneman's share in the transaction is stated as strongly as it will bear for the plaintiff. Is it sufficient to render Schoneman liable for the injury?

There are three facts here about which there can be no dispute: (1) The building in which the paper was stored belonged to defendant, Shoneman; (2) He had sold the rags to Hemingway, who was to take them away; and (3) Dickson and Williams, the two men who went to Shoneman's store for that purpose, were the servants or agents of Hemingway, and were in his employ at the time the accident occurred.

When, therefore, Dickson and Williams called at Shoneman's store, and were shown the paper, and instructed to take it away, there was a delivery in law and in fact to Hemingway; the title passed to him, and the mere fact that it was

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still on Shoneman's premises would not make him responsible for the conceded negligence of Hemingway's servants in removing it, unless he (Shoneman) in some way interfered with or directed the manner of said removal. Did he do so? The whole case narrows down to this single point. It is alleged that he either directly, or through the boy that he sent up with the men, directed the bales to be thrown out of the window. Granted. But he did not direct the men to throw them upon the heads of passers-by. They might have been thrown out with perfect safety, and had been upon former occasions. Had he directed the men to take them down the stairway, and an accident had occurred, would he have been responsible? This is not pretended, yet there would be as much reason to hold him in the one case as in the other. Shoneman had no reason to suppose that the bales would be thrown out of the window carelessly, and so as to injure any one. He had given no such direction, and he was not responsible for the manner of the removal, for the reason that the property was no longer his, and the men were not in his employ. All that Shoneman did was to point out the place of exit from his premises, and surely a property-owner may do this without making himself liable for the negligence of another man's servants in the manner of the removal of the articles.

The case of Stevens *v.* Armstrong (6 Selden, 345), is in point. There the defendants were merchants in the city of Troy, N. Y. They sold to the Messrs. Plum a box which was in the upper loft of the defendants' store. The Messrs. Plum sent their porter for it. The latter went upon defendants' premises to remove it, and while engaged in lowering the box with a tackle, an accident occurred through the porter's negligence, by means of which the plaintiff was injured. The Court of Errors and Appeals ruled that "the defendants could not be held liable for the negligent acts of the porter, by virtue of the principle applicable to the relation of master and servant, unless that relation in fact subsisted. Knowing and permitting the porter to go into the loft to get the box, being, in fact, at the time the servant of Plum, and actually acting in his employment, did not constitute the porter in any degree the agent or servant of the defendants while engaged in removing the box. The relation of master and servant box by means of the tackle, they would not have been responsible for his negligence in doing so any more than Mr. Shoneman is liable for having directed Hemingway's servants to remove the bales by way of the window. I concede that if Shoneman had directed the manner of throwing the bales out of the window, and that if this particular bale had been thrown in accordance with such direction, he would have been responsible. This is as far as the cases go.

The doctrine of *respondeat superior* is at best a severe rule. Were we to give it the construction claimed for it by the plaintiff, we would extend it beyond the authority of any adjudicated case, and further than a sound interpretation of the law requires.

We are of opinion that the learned Judge of the Court below was right in entering judgment *non obstante veredicto* in favor of the defendant, Schoneman, and the

Judgment is affirmed.

Opinion by PAXSON, J. W. M. S., Jr.

Jan. '84, 268. March 11, 1884.

Transue v. Sell.

Deed—Implied covenants—Lots described as bounded by an alley—Plan referred to in a deed—Limitations.

On the sale of a lot bounded by a street the title passes to the centre of the street, if the grantor had title to the land covered thereby, unless he reserved it either expressly or by clear implication.

When one who is the owner of land sells and conveys lots according to a plan which shows them to be on a street or alley, this creates an implied covenant of the existence of the street or alley, and operates as a dedication to public use. The fact that it does not appear on the borough maps or plans is immaterial as between parties claiming under the original owner and affected with knowledge of his plan.

In the absence of the original draft or plan employed by the grantor, its place may be supplied from other evidence from which the jury are to determine the location of the disputed street or alley.

Mere different and disconnected acts of trespass extending over parts of several years are clearly insufficient to establish any right to obstruct an alley under the Statute of Limitations or to bar the public character which has been stamped on the land by its dedication to public use as an alley.

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Plaintiff was owner of three lots in the borough of South Bethlehem. For these lots he had two deeds: in one the description was, *inter alia*, "extending 114 feet *to a 16 feet wide alley*," in the other "that the lot extends easterly between parallel lines, at right angles to said Northampton Avenue, 114 feet *to an alley*." In 1875 defendant bought the land east of plaintiff's lots; and in 1880 he bought of C. A. Luckenbach (the original owner of the entire tract) his interest in an alley running along defendant's lot, if any he had. Plaintiff then brought this action. It appeared that he had no grant of an alley at this point, but he claimed that as his deeds called for an alley as the eastern boundary of his lots he had a right of action against defendant for disturbing it.

Plaintiff offered in evidence a number of deeds showing his title and also defendant's title from Wolle, the common grantor, all of which described the lots as bounded by this alley. One of plaintiff's deeds called for "a plan of lots of Aug. Wolle, merchant, in the southern addition to the borough of Bethlehem, in Saucon Township, Northampton County, Pennsylvania, 1858." A map of Wolle's lots was offered, not as the identical plan called for in the deed, defendant's counsel saying, "We have no objection, but we do not admit its sufficiency." Wolle's son testified that his father had used this map, and had never to his knowledge used any other in the sale of lots.

After the evidence was all in plaintiff's counsel admitted that the map testified to was not the map referred to in the deed, and defendant's counsel moved that the map, and all the evidence relating thereto, be ruled out of the case, and subsequently requested the Court to charge that it was the first duty of the plaintiff to produce the identical map called for in the deeds. The application was denied and the point refused. (Second, seventh, and sixteenth assignments of error.)

The defendant also offered to show that the disputed alley had never appeared upon the borough maps and books of South Bethlehem. Objected to; objection sustained. (Thirteenth assignment of error.)

A considerable portion of the defendant's evidence was devoted to showing that plaintiff had [illegible] that point also my opinion of the law is against the defendant, and I say to you that, in deliberating upon your verdict you have no right to inquire upon that subject." (Fourth and ninth assignments of error.)

The Court refused to affirm defendant's first point, which was that the easement claimed arose by implication, not by grant, was never opened, and existed merely on paper, and charged: "Now I say to you that under these two deeds the plaintiff is entitled to an alley on the eastern boundary of his lot, whether it is a public or private alley is a matter of no concern. He is entitled by virtue of the covenants in these deeds to an alley on the eastern end of his lots. The question for you to determine is whether this alley to the use of which he is entitled under these deeds is the alley which the defendant has obstructed; if you find such to be the fact then your verdict will be in favor of the plaintiff for six cents damages, and that will end the suit. . . In determining the question whether the alley referred to in these two deeds is the alley upon which these obstructions exist, you will take into consideration the deeds themselves, as well as the other deeds that have been offered in evidence, together with this draft or plot that you see here rolled up on the table, if that will throw any light on the subject, as it may, provided you find that it is a genuine plot of the property in dispute. . . . You will have the draft before you, and if satisfied of its correctness you will take that draft in connection with these deeds, and locate this alley if you can, and if you locate it so as to bring these obstructions upon it, then, as I have already said, your verdict will be in favor of the plaintiff. . . . . That is all you have to pass upon; you will leave out everything else in your consideration of the case, and confine your deliberations simply to the inquiry I have indicated." (First, tenth, and eleventh assignments of error.)

Verdict for plaintiff for six cents damages, and judgment thereon. Defendant thereupon took this writ, assigning for error the refusing of his offers of evidence and of his points, and the portions of the charge of the Court above cited.

W. E. Doster (*L. R. Myers* with him), for plaintiff in error.

A map or plan referred to in a deed becomes

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Parker *v.* Kane, 22 How. 18.
Thomas *v.* Patten, 1 Shepley, 333.
Conway *v.* Taylor, 1 Black, 603.
Com. *v.* McDonald, 16 S. & R. 391.
Davis *v.* Ranisford, 17 Mass. 211.
Wolf *v.* Scarborough, 22 Ohio St. 361.
Kennebec Purchase *v.* Tiffany, 1 Greenl. 219.
Robinson *v.* Meyers, 17 Smith, 17.

We should have been allowed to show by the borough maps that this alley, which plaintiff in his declaration claimed to own "in common with all the owners of other lots abutting on said alley," had never been recognized or known publicly as having any existence.

Spackman *v.* Steidel, 7 Norris, 453.

Robert L. Cope, for defendant in error.

The map sent to the jury was proved to be the one which Wolle used to sell lots from. It was never claimed to be the one called for in the deed, aud was merely submitted as any other draft of the locality would have been. Only one of the deeds to plaintiff's three lots contained any reference to a plan.

A right of way is implied in a grant of land described as bounded on an alley or street. This right cannot be lost by disuse or non-user.

Spackman *v.* Steidel, 7 Norris, 453.
Crow *v.* Wolbert, 7 Phila. 178.
Van Meter *v.* Hankinson, 6 Wharton, 307.
Cope *v.* Grant, 7 Barr, 491.
Erb *v.* Brown, 19 Smith, 216.
Waite on Actions and Defences, vol. 6, p. 348.

The rights of the parties as between themselves could not be affected by the borough maps.

March 24, 1884. THE COURT. It is well settled law that on the sale of a lot bounded by a street, the title passes to the centre of the street, if the grantor had title to the land covered thereby, unless he reserved it either expressly or by clear implication. (Paul *v.* Carver, 2 Casey, 223; Cox *v.* Freedley, 9 Id. 124; Trutt *v.* Spotts, 6 Norris, 339; Spackman *v.* Steidel, 7 Id. 453.) When one, who is the proprietor of the portion of the town in which the lands lie, sells and conveys the lots according to a plan which shows them to be on a street or alley, it creates an implied covenant of the existence of the street or alley. (Trutt *v.* Spotts, *supra*.)

When Wolle laid out the plan of lots on the alley now in contention, he was the undoubted owner of the land covered thereby. When he sold and conveyed the lots according to the plan and bounded them on the alley, he not only conveyed the use of the alley as appurtenant to the lots bounded thereon, but he thereby dedicated it to public use.

In this case the evidence is clear that the grantor made a plan and by it sold lots. The omission to produce the draft on the trial, under the other evidence, was not error. The jury has found the true location of the alley to be as claimed by the defendant in error. It was actually opened and used for several years as a public alley. The fact that it was not entered on the books or maps of the borough of South Bethlehem was unimportant to the rights of the parties in this action.

The defendant in error showed title derived from Wolle, and was entitled to all the rights, privileges, and appurtenances flowing from his deed of conveyance. Thus holding, the defendant in error had a right to the free and uninterrupted use of the alley. The plaintiff in error had acquired no right from any person by grant or conveyance to obstruct the alley, but sought to protect himself from liability by proving different and disconnected acts of trespass extending over parts of several years. All the evidence was clearly insufficient to establish any right to obstruct the alley under the Statute of Limitations, or to bar the public character which had been stamped thereon by the former owner of the land. The assignments are not sustained.

Judgment affirmed.

Opinion by MERCUR, C. J. J. D. B., JR.

Jan. '84, 53. January 31, 1884.

McGlue v. City of Philadelphia.

Practice—Act June 16, 1836—Voluntary arbitration—Errors and appeals—Judgment irregularly entered cannot be validated by consent after removal of record to Supreme Court, on writ of error.

When, after a voluntary submission of a cause to arbitration, under the Act of June 16, 1836 (P. L. 715), and the filing of exceptions to the referee's report, the Court sustains the exceptions, but enters no judgment, files no opinion, and makes no order referring the cause back to the referee, a subsequent entry of judgment by the Prothonotary, as of the day the exceptions were sustained, is unauthorized, and the cause must be considered as still pending.

Under these circumstances, an agreement of counsel, submitted to the Supreme Court, to waive all technical defects as to the sufficiency of the pleadings, in order that the judgment may be reviewed by the Supreme Court, is not sufficient to establish a judgment in the Court below which the Supreme Court can affirm or reverse, and the writ of error was quashed.

Error to the Common Pleas No. 1, of Philadelphia County.

Debt, by Edward S. McGlue, Sr., against the City of Philadelphia, to recover a sum of money alleged to be due him upon a contract for repairing a certain street.

By agreement of the parties, and according to the provisions of the Act of June 16, 1836,

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the matters in controversy in this case were submitted to Samuel Gormley, Esq., as referee. On December 8, 1882, the referee filed his report, awarding in favor of the plaintiff $470.88, with interest, etc. On the same day the defendant filed exceptions to the report of the referee, which exceptions the Court below sustained, but filed no opinion and entered no judgment.

Subsequently, by agreement of the parties, but without an order of the Court, the Prothonotary entered judgment. Thereupon the plaintiff took this writ, assigning for error the action of the Court in sustaining the exceptions to the report of the referee, and in refusing to enter judgment for the plaintiff.

Appended to the plaintiff's "History of the Case" was the following statement: "In order to avoid any amendments of the pleadings, it is understood that all technical defects as to the sufficiency of the pleadings are waived, and that no error in said pleadings shall prevent a recovery by plaintiff, and an entry of judgment in error against the defendant, if, under the facts before the Court and the law, a recovery could be had on the plaintiff's claim herein under any other form of action."

J. Levering Jones (with him *William A. Redding* and *Hampton L. Carson*), for plaintiff in error.

William H. Addicks (with him *Wm. Nelson West*, City Solicitor), for defendant in error.

February 11, 1884. THE COURT. This contention arises from an agreement to submit all matters of controversy in a pending suit to a referee under the Voluntary Arbitration Act of 16th June, 1836. The agreement fails to specify whether the reference is under the third or the sixth section of the Act. The party against whom the award is made may file exceptions thereto under either section for plain mistake in matter of fact or matter of law. If, on exceptions so filed to an award, it shall appear that such mistake has been made, the seventh section of the Act makes it lawful for the Court to refer the cause back to the same referee for further proceedings. We do not think, however, this is obligatory on the Court; but if the award be substantially defective, it may be wholly set aside. It was so held on a similar statute in Etter *v.* Edwards (4 Watts, 63).

In the present case, the award was in favor of the plaintiff for a sum specified. The defendant filed seven exceptions thereto. Some of them alleged mistakes of fact, others mistakes of law. Each of them struck at the validity of the whole award. The Court sustained the exceptions. There its action stopped. It filed no opinion. It made no order referring the cause back to the same referee; nor did it make any other order.

The effect of the decision of the Court was to set aside the report of the referee, but not to direct or authorize any judgment to be entered. It left the cause pending.

Afterwards, the Prothonotary, without any order from the Court, made an entry of "judgment" as of the day the exceptions were sustained. We cannot treat this as a judgment of the Court. It is not only without authority of the Court, but is in conflict with the clear intent and purpose of the decision which it did make. On application to the Court below, the entry will be stricken from the record.

We have not overlooked the statement made at the end of the "History of the Case" as to the understanding relative to the pleadings and amendments thereto; but all therein contained is wholly insufficient to establish a judgment in the Court below, and therefore there is none for us to either affirm or reverse here.

Writ quashed.

Opinion by MERCUR, C. J. J. H. M.

June, '84, 135. March 26, 1884.

Ellis et al. v. Cadwallader.

Covenant sur ground-rent deed — Execution — Right of terre-tenant to intervene and enter stay of execution — Practice.

Where in an action of covenant sur ground-rent deed judgment has been recovered against the original covenantor, a terre-tenant may subsequently obtain leave to enter security for stay of execution.

Error to the Court of Common Pleas No. 1, of Philadelphia County.

Covenant sur ground-rent deed, by Anna M. Ellis and Charles E. Ellis, executors of Amos Ellis, deceased, against Cyrus Cadwallader, who was the original covenantor.

The writ was served, and judgment was entered against the defendant for want of an affidavit of defence.

A fi. fa. was issued under which the premises were levied on and condemned. Thereupon, one T. W. Smaltz filed a petition alleging that he was the owner of the premises out of which the ground-rent issued, and prayed for a rule to show cause why he should not be allowed to enter security for stay of execution. The rule was granted and subsequently made absolute. Smaltz thereupon entered security. The defendants never applied to enter security for stay. Plaintiffs thereupon took this writ, assigning for error the action of the Court in making the above rule absolute.

John H. Sloan, for plaintiffs in error.

The party claiming to be terre-tenant never interposed until after judgment had been entered

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and execution issued. He could not properly have been made a defendant, being originally not a party to the proceedings, without, first, showing a right to interpose, and, second, some defence. There is no pretence of the latter. At the expiration of the stay entered by him there would be no remedy against him personally.

The Act of June 16, 1836 (1 Purd. Dig. 634), gives the right to a *defendant only*, in certain judgments therein prescribed, to plead his freehold or enter security. The right to enter security being in derogation of the ordinary right to execution, must be strictly construed.

Erie City Bank *v.* Compton, 3 Casey, 195.
Ellis *v.* Cadwallader, 12 WEEKLY NOTES, 304.

The Act of June 16, 1836, does not apply to action of covenant to recover arrears of ground-rent. Certainly, since the Act of June 12, 1878 (P. L. 205), there is no personal liability of the terre-tenant, and as to him the proceeding is *in rem* only.

J. Cooke Longstreth, for defendant in error.

The owner of land bound by a judgment in an action of covenant for arrears of ground-rent against the former owner and original covenantor, can, on making himself a party defendant on the record, by an affidavit of ownership, enter security for stay of execution.

Jackson *v.* Juvenal, 1 Tr. & H., sec. 1039.
Ellis *v.* Cadwallader, 40 Leg. Int. 474.

April 7, 1884. THE COURT. It is true Smaltz is not technically the defendant in the judgment; yet he is the real party in interest. He is terre-tenant and owner in fee simple of the land charged with the ground-rent for the non-payment of which the judgment was obtained. He therefore comes within the reason of the Act of Assembly permitting a defendant to obtain a stay of execution on entering the necessary security therefore. There was therefore no error in making the rule absolute.

Judgment affirmed.

PER CURIAM. J. H. W.

July, '83, 104. January 18, 1884.

Yeaton's Appeal.

Injunction—Deed—Covenant not to build—Construction of.

A. conveyed part of his ground in the city of Philadelphia, their successors and assigns, and contained this covenant:—

"And it is expressly understood, conditioned, and agreed by and between the parties to these presents, that the trustees of the Sixth Presbyterian Church in Philadelphia, their successors and assigns, shall have the full right, liberty, and privilege of placing windows in the east and north wall of the building to be erected by them on the hereby granted lot of ground, the base of the windows in the east wall thereof to be at least six feet from the surface of the ground, and the base of the windows on the north wall thereof to be at least five feet from the

A provision was added that if at any time the building ceased to be used as a place of religious worship, then the right of placing the windows in the east wall should cease, and the grantee, his heirs and assigns, might thereupon close the same.

The trustees erected the building, and after using it for many years as a church, sold it to the city of Philadelphia in 1872, since which time it has been used as a public school.

C., having in the mean time acquired title to the remaining ground subject to the easement, began the erection of a brass foundry, the wall of which was distant ten feet from the east wall of the public school building, whereupon the city prayed for an injunction to restrain the erection of such wall:

Held, that though the building erected by the trustees of the church had ceased to be used as a place of religious worship, and the right to maintain windows in the east wall thereof accordingly ceased, nevertheless the covenant not to erect any building within fourteen feet remained unimpaired. And that the injunction prayed for should be granted accordingly.

Held, that the value of such covenant does not consist in furnishing light and air alone, security against fire, and annoyance from noise being additional reasons for upholding it.

Appeal of William N. Yeaton and Wharton E. Harris, trading as Yeaton & Harris, and Ellwood Thompson from a decree of the Common Pleas No. 1, of Philadelphia County, enjoining the applicants from erecting a wall on certain premises in the city of Philadelphia.

Bill in equity between the city of Philadelphia complainants, and William N. Yeaton and Wharton E. Harris, trading as Yeaton & Harris, owners, and Ellwood Thompson, contractor, defendants, setting forth that the complainants were owners of the Horace Binney Public School-house on Spruce Street west of Fifth Street in said city. That the title to a portion of it was derived from Frederick Brown, who also owned other property adjoining. That the deed from Brown conveying the property owned by complainants was made May 1, 1840, to the Trustees of the Sixth Presbyterian Church in Philadelphia, their successors and assigns, and contained this covenant:—

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terian Church in the city of Philadelphia, their successors or assigns, as a place of religious worship, then and in such case the right, liberty, and privilege of placing windows in the east wall thereof as aforesaid, shall cease and determine, and the said Frederick Brown, his heirs and assigns, may thereupon close the same without interruption, molestation, or hindrance on the part of the said 'The trustees of the Sixth Presbyterian Church in the city of Philadelphia,' their successors or assigns, anything hereinbefore contained to the contrary notwithstanding."

That Brown conveyed the balance of his ground in 1854 to Parsons, whose executor conveyed to defendants, Yeaton & Harris, in 1882. That notwithstanding the covenant the defendants were proceeding to erect a brass foundry, the wall of which was distant only about ten feet from the east wall of the school building. Complainants therefore prayed for an injunction to restrain defendants from erecting said wall.

The answer of defendants admitted the facts as set forth in the bill, but alleged that the building was no longer used for religious worship, and that defendants were consequently entitled to build within the fourteen feet, the value of the covenant, so far as concerned the east wall, to wit, light and air, having been destroyed.

A preliminary injunction having been granted, the matter came on subsequently to be heard on bill, answer, and proofs, whereupon the Court continued the injunction, BIDDLE, J., delivering the opinion. Thereupon defendants took this appeal, assigning for error the action of the Court in granting the prayer of the bill.

John B. Uhle, for appellants.

The discontinuance of religious worship having deprived the owner of the building of the right to windows in the east wall, the object of the restriction, to wit, light and air, is removed, and it would be unreasonable to maintain it for the benefit of a blind alley.

Connery *v.* Brooke, 23 Sm. 80.
Cox *v.* Freedley, 9 Casey, 124.
Richardson *v.* Clements, 8 Norris, 503.

To warrant the interposition of equity an irreparable injury must be made to appear.

High on Injunctions, § 848.
Richard's Appeal, 7 Sm. 105.

Chas. B. McMichael (with him *W. Nelson West*, City Solicitor), for appellee.

The obvious intent of the covenant was to give the premises, in addition to light and air, the advantage of space as a protection from fire, a relief from noise, and all the benefits which arise from "elbow room."

January 28, 1884. THE COURT. This case arises under the covenant in a deed wherein the grantor declared it was expressly understood, conditioned, and agreed that no wall, building, or obstruction whatever should thereafter be built, erected, or put by him, his heirs or assigns, on his adjoining grounds within fourteen feet of the east line of the lot thereby granted and conveyed. It is true it was stated that this was for the purpose of securing light and air to the building the grantees were about to erect on the lot, and if it ceased to be occupied and used as a place of public worship the right to maintain windows in the east wall thereof should cease and determine, and the vendor, his heirs and assigns, might close the same. There was, however, no covenant or agreement whereby the vendor reserved the right under any circumstances of putting any building or obstruction within the said fourteen feet of the east line of the building. It has ceased to be used as a place of public worship, and is occupied and used as a public school. The right to maintain the windows in the east wall thereof is terminated, but the right to insist that no building shall be erected on the adjoining fourteen feet remains unimpaired. Its value does not consist in furnishing light and air alone. Fourteen feet of adjoining ground unoccupied by any structure furnishes considerable security against fire to the school building of the appellee, and will very much lessen the disturbing sound of machinery, that may be operated in the building of the appellants, to the annoyance of teachers and scholars. We discover no error in the conclusion at which the learned Judge arrived.

Decree affirmed, and appeal dismissed at the costs of the appellants.

PER CURIAM.

Common Pleas—Law.

C. P. No. 1. February 9, 1884.

The Commonwealth ex rel. The Schuylkill River Passenger Railway Co. and The Phila. and Gray's Ferry Passenger Railway Co. v. Smedley et al., members of the Board of Surveys.

Passenger railways—Municipal corporations—Board of Surveys—Mandamus—Where the charter of a railway company gives a clear right to lay a track upon a street of the city, the Board of Surveys is bound to furnish a plan—A mandamus lies to compel the Board to perform such a duty.

Sur demurrer to the return of the Board of Surveys to a writ of alternative mandamus.

The petition set forth that the relators have by their charter the right to lay out and construct a railway along certain designated streets, and *inter alia* along Twenty-second Street from South to Hamilton, and to use such portions of any

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adjacent streets as might be necessary to avoid the elevated roadway of the Pennsylvania R. R. Co. existing at Twenty-second and Market Streets when the charter was granted. The consent of the City Councils to the use of the streets named in the charter was given by resolution approved June 29, 1866. The obstruction of the elevated roadway at Twenty-second and Market having been removed, the relators now wish to exercise their right to construct a railway on Twenty-second Street from Filbert to Walnut Street, but the Board of Surveys refuse to permit them to lay a track parallel to that of the Phila. City Passenger Railway Co. already existing.

The return to the alternative mandamus set forth a plan by which the relators are to run their cars on the track of the said The Philadelphia City Passenger Railway Company from Chestnut to Walnut, in the opposite direction, passing by means of a switch at Sansom Street. That the Philadelphia City Passenger Railway Company refuses to move its track eastward sufficiently to allow another track to be laid, and leave room for vehicles to pass on each side of the tracks. And that Twenty-second is wider than the other streets running north and south, except Broad Street, and has been laid out at special expense as a drive to and from the Park.

To this return the relators demurred.

Baird & Hopkinson, and *Geo. W. Biddle*, for the demurrer.

The relators are expressly authorized to lay down a separate track on Twenty-second Street between Chestnut and Walnut in accordance with the plan submitted by them.

Phila. and Gray's Ferry Pass. Rw. Co.'s Appeal, 13 WEEKLY NOTES, 105.

If it were possible, still it would be extremely dangerous for both companies to use the same track in opposite directions.

Should we fail in our present proceeding, and attempt to lay our road according to suggested plan, we would at once be met by an injunction, and the Phila. City Co. could argue against our right: (1) That the words in our charter "and such other tracks as may be laid" do not refer to their tracks as already laid. (Maris *v.* Union Pass. Rw. Co., 30 Leg. Int. 153.) (2) Admitting that the words "that may be laid" refer to all time, past, present, and future, still it was not the intention of the Legislature to authorize us to use the tracks of such companies as run their cars in a contrary direction to ours, as that would be a substantial interference with the franchises of other companies.

Penna. R. R. Co.'s Appeal, 8 WEEKLY NOTES, 315.

The Philadelphia City Company has under its charter and the decision in North Branch Rw. Co. *v.* Rw. Co. (2 Wright 367), exclusive right to use and occupy this among other streets named. The grant of exclusive privileges must have a reasonable construction. Effect can be given to our grant of the right to use "such other tracks" and no harm done to the previous grants of other companies by construing it to apply only to the tracks of such companies as run their cars in the same direction as ours. The only way we can use the rails of The Phila. City Co. is under our power of eminent domain. The Board of Surverys cannot exercise this power. Neither the Board nor the city can take from us, under the police power reserved to the city, our charter right to lay out and construct a railway

Cooley, Const. Lim. 577.

A. M. Beitler, and *C. E. Morgan, Jr.*, Asst. City Solicitors, contra.

The board is undoubtedly vested with a discretion. Where the complaint is against a person who has a discretion to do or not to do an act according to the dictation of his own judgment, such person cannot be coerced by a writ of mandamus.

Comm. *ex rel. v.* The City, 2 WEEKLY NOTES, 125.
Runkel *v.* Commonwealth, 2 Out. 332.
Perkins *v.* Slack, 5 Nor. 274.

A private corporation claiming franchises against public rights must show clearly that they are entitled to the claim. If the charter leaves the right doubtful, it will be resolved in favor of the public.

Comm. *v.* C. P. Rly. Co., 2 P. F. S. 506.
R. R. Co. *v.* City, 10 Phila. 70.
Penna. R. R. Co.'s Appeal, 12 Nor. 159.
Comm. *v.* Gas Co., 2 Jones, 320.
Trenton Water Co.'s Case, 6 Pa. Law Journal, 32.
N. P. R. R. Co. *v.* Stone, 3 Phila. 421.
R. R. Co. *v.* City, 2 WEEKLY NOTES, 639.
R. R. Co. *v.* City, 13 Id. 487.
R. R. Co. *v.* Rly. Co., 6 Phila. 142.
Commonwealth *v.* Rly. Co., 2 P. F. S. 518.

The Commonwealth owns the highways, but the city has a supervisory power over, and a kind of ownership in them.

Duncan *v.* R. R. Co., 13 Nor. 435.
R. R. Co. *v.* City, 2 WEEKLY NOTES, 639.
Commonwealth *v.* P. & C. R. R. Co., 2 P. F. S. 517.
R. R. Co. *v.* City, 10 Phila. 70.

It is true that a franchise is property, and as such can be taken by a corporation having the right of eminent domain.

Penna. R. R. Co.'s Appeal, 12 Nor. 159.

The city has ample power over its highways; this includes the right to see that the free and common right to an unobstructed passage is secured to the public.

West Phila. R. R. Co. *v.* City, 10 Phila. 71.
West End Pass. Rly. Co. *v.* City P. R. Co., 10 Phila. 75.

A reasonable regulation of the use of a privilege is not a denial of the right.

Frankford and Phila. P. R. Co. *v.* Phila., P. F. S. 119.

In respect to care, regulation, and control of the highways within its corporate limits, the city of Philadelphia exercises a portion of the power of the Commonwealth.

Branson *v.* Phila., 11 Wright, 329.

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All legislative grants of power to private corporations to carry on business in the city of Philadelphia are made upon the implied condition that they shall be subject to such reasonable regulations as the city shall think necessary to enact.

Phila. *v.* Western Union Tel. Co., 2 WEEKLY NOTES, 455.

C. A. V.

March 15, 1884. THE COURT. In the matter of the application for a mandamus to the Board of Surveys to approve of the plan of the Schuylkill River Railroad Company for a track on Twenty-second Street, our first impression was that the companies should change streets, and the Chestnut and Walnut Street Company take Twenty-third Street. But there are two difficulties in the way of this plan: (1) That they could not make so good a curve at Twenty-third Street, that being only 50 feet wide, while Twenty-second Street is 60 feet wide; and (2) that Twenty-third Street meets Chestnut Street at the greatest depression of the latter near the bridge, so that cars going westward would begin the ascent to the bridge just as they were coming round the curve. Now they go down a slope from Twenty-second Street upon Chestnut, and start up the ascent with the advantage of the impetus so gained. So this arrangement is not regarded as feasible, at least by the Chestnut and Walnut Company. If we must decide the matter upon the law, and it cannot be amicably settled as suggested, we think there can be no doubt of the right of the Schuylkill River Company to lay its track on Twenty-second Street. We have delayed the decision because we thought an arrangement might be made.

We have no doubt of the right of the Schuylkill River Company to lay out a track on Twenty-second Street, and that it was not a proper exercise of the discretion of the Board of Surveys to say, "We will give you a plan whereby you shall run upon the track of the other company." This company have a right by law to a track of their own, and it is clear that they have a right to lay one down if the exchange cannot be effected. But there ought to be a readjustment of the track of the Chestnut and Walnut Street Company. It should be shifted to the eastward, and then there would be an equal space (about 9 feet) on the west side of the other track. It is perhaps to be regretted that there should be a double track upon this street, which has been prepared as a drive. The Board of Surveys are bound, at all events, to give the Schuylkill Company a plan which will give them a track of their own. But the other company ought to act in a spirit of accommodation, and adjust their track so as to cause the least possible inconvenience to the public.

The order for a mandamus is granted.

Oral opinion by ALLISON, P. J. J. H. W.

C. P. No. 1. February 2, 1884.

Schaecterlein v. Knabe.

Bills and notes—Indorsement of credits—Statute of Limitations—Affidavit of defence law—Insufficiency of copy filed—Items of credit indorsed are not part of a promissory note, and do not require to be denied in an affidavit of defence setting up the Statute of Limitations.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, on a promissory note dated March 29, 1876, payable in twelve months, and signed by defendant, on which (as appeared by the copy filed) two credits were indorsed, one March 31, 1877, and the other May 18, 1878.

The affidavit of defence set up, *inter alia*, the Statute of Limitations, and denied the sufficiency of the copy filed, but the affidavit contained no averment that defendant never paid the sums credited.

Hillman, for the rule.

An affidavit of defence should distinctly and positively aver every fact necessary to constitute a defence. Nothing should be left to inference.

Brick *v.* Coster, 4 W. & S. 494.
Peck *v.* Jones, 20 Sm 83.
Harris *v.* Mason, 2 Miles, 270.

This affidavit is insufficient because it contains no averment that defendant never paid the sums credited.

H. K. Fox, contra.

Such an averment is unnecessary, because the credits are not part of the instrument in suit, and will not take the case out of the statute unless proved.

Addams *v.* Seitzinger, 1 W. & S. 243.
Cremer's Estate, 5 Id. 331.
Shaffer *v.* Shaffer, 5 Wr. 51.
Guillou *v.* Perry, 1 WEEKLY NOTES, 39.
Kinsloe *v.* Baugh, Id. 147.
Rowe *v.* Atwater, Id. 149.
Hull *v.* Mooney, 5 Id. 511.
Newton *v.* Smith, 6 Id. 56.

Feburary 16, 1884. THE COURT. Rule discharged.

Per PEIRCE, J. F. M. L.

C. P. No. 3. March 29, 1884.

McHenry v. The Union Passenger Railway Company.

Case against a corporation for damages resulting from alleged negligence—Judgment for want of a plea—Writ of inquiry under the Act of May 22, 1722—Sheriff's jury—Practice in assessing damages upon judgments by default.

Rule to show cause why the Court should not make an order, in the nature of a writ of inquiry, to charge the jury attending the next Court to

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inquire of the damages and costs sustained by the plaintiff, in accordance with the Act of May 22, 1722, § 27. (Brightly's Purdon's Digest, p. 1168, § 30; 1 Sm. L. 144.)

Case, against the Union Passenger Railway Company, for damages alleged to have been sustained by the plaintiff, while riding as a passenger in one of defendant company's cars, by reason of the negligence of the company in causing its collision with a locomotive and train of cars upon the Philadelphia and Reading Railroad Company's track, at the corner of American Street and Susquehanna Avenue, on September 25, 1883. The writ was returned "served," the first Monday of December, 1883, narr. and rule to plead filed, and on February 12, 1884, judgment was taken against defendant for want of a plea; subsequently the above rule was taken.

Henry S. Hagert, for the rule.

Under the Act the duty of the Court to grant an application, such as this, is imperative. In the case of Bell *v.* Bell (9 Watts, 48), from Indiana County, in 1839, Judge GIBSON held that it was a matter of right of the plaintiff. In Wright *v.* Crane (13 S. & R. 447), error to the District Court of Philadelphia, in 1825, Judge TILGHMAN had held that the Act was still in force, and was beneficial in its provisions. The Act was also recognized as in force in the following cases:—

Tuttle *v.* The Loan Co., 6 Wh. 216 (Nisi Prius, Phila. 1840).

Ridgely *v.* Dobson, 3 W & S. 118 (Bucks Co., 1842).

Kohler *v.* Luckenbaugh, 3 Norris, 258 (York Co., 1877).

The Act being generally followed in all the counties of the State other than Philadelphia, even if the question of awarding the order under it were discretionary with the Court, instead of being, as it is, imperative upon it, the practice in this county should be made to conform as far as possible to the practice in the other counties.

Art. 5, sec. 26, of the Constitution of 1874.

Rufus E. Shapley, contra.

In the one hundred and sixty-two years which have elapsed since the passage of this Act, but *two* reported cases can be found in which it has been followed in the courts of this county. The first was Wright *v.* Crane (13 S. & R. 447, 1825), where judgment had been given against the defendant by the District Court for not complying with an order to produce certain books. In Tuttle *v.* The Loan Co. (6 Wh. 216, 1841), judgment had been given at Nisi Prius, for the same cause, and the damages were ordered to be assessed under this Act, at the request of the *defendant*, and "because of the peculiar circumstances of the case."

In Philadelphia it is the uniform practice not to assess damages under this Act, except where, judgment having been taken by default against one or more defendants, issue is joined as to the others; or where, as in the two cases above cited, judgment is given at the trial for not complying with orders for the production of books and papers.

1 Tr. & H. Pr. § 447.

Sully *v.* Baum, 1 WEEKLY NOTES, 115 (District Ct. Phila. 1874).

Farley *v.* Hare, 1 Id. 115.

It was because of the notorious tendency of juries to give excessive, and almost prohibitive, damages against corporations, that the corporation defendant, relying upon the uniform practice of our Courts to refer the assessment of damages in such cases to a sheriff's jury, composed of intelligent and responsible citizens, preferred to allow judgment to be taken for want of a plea, rather than run the risk of extortion under the forms of law.

It is submitted that if the practice in Philadelphia, in this respect, is to be changed, the change should be made by the Supreme Court of the State, which has the power to protect the plaintiffs, if the full measure of their legal rights is not accorded them; but to which the defendant cannot go for redress if this rule should be made absolute.

Hagert, in reply.

The case of Farley *v.* Hare, 1 WEEKLY NOTES, 115, referred to in Sully *v.* Baum (cited for defendant, *supra*), was decided on the ground that a writ of mandamus would not lie in such a case, as the plaintiff had his remedy by writ of error to the action of the Court in refusing to make the order under the Act of 1722.

C. A. V.

April 19, 1884. THE COURT. It has been no easy task to arrive at a conclusion in this case. On the one hand, we are confronted with an Act of Assembly, in terms as imperative as language can make it, and on the other, with a practice said to have grown up for years in this judicial district, and which had been sanctioned by the late District Court of this county, and was recently adopted by the Court of Common Pleas No. 4.

We have the highest respect for the opinions of the tribunals named, and in ordinary cases would incline to follow them, and the Judges of this Court have deliberated long, and some of us have hesitated much, before we have reached the conclusion about to be stated, especially as it seemed to conflict with the practice already referred to. Undoubtedly, where a judgment has been taken by default, the common law writ of inquiry to ascertain damages issued. As a matter of course the sheriff alone summons the jury, and he may select the requisite number of jurors as he pleases; the power is in his hands alone, and the direction and control of the whole proceeding, before the jury, is apart from and entirely out of the presence of the Court. In

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ordinary cases, this system is admirably adapted to the dispatch of business, and was intended, we take it, to reach a class of cases wherein to assess damages was not a complicated thing, and was not embarrassed by a multitude of questions which would seem to require the control of an officer presumed to be learned in the law, and clothed with supervising power of a law Judge of a court of record.

These are some of the reasons which would, in any event, cast a doubt upon the advisability of a practice not adapted to a case like the one in hand, and which was not intended to reach a cause involving disputed questions, at least of fact, and where the measure of damages cannot be settled as well anywhere as in a Court under the direction of a judge.

The reasons stated, strong as they are, would not alone, it must be confessed, determine our judgment in this matter, but when coupled with an Act of Assembly, which it is impossible for us to overlook, we feel we are not at liberty to adopt any other course than the one we are about to pursue. On the 22d of May, 1722, the Legislature declared "that the justices who give any interlocutory judgment *shall*, at the motion of the plaintiff or his attorney in the action, make an order in the nature of a writ of inquiry to charge the jury attending at the same or next court . . to inquire of the damages and costs sustained by the plaintiff." (Brightly's Purdon, 1168, sec. 30.)

It is admitted that this Act has not been repealed, and that it is not obsolete is certain, for it was recognized by Chief Justice TILGHMAN, in Wright *v.* Crane (13 S. & R. 447), in 1825; in Bell *v.* Bell (9 W. 47), by GIBSON, C. J., in 1839. So also in Tuttle *v.* Bank (6 Wh. 216); Ridgely *v.* Dobson (3 W. & S. 123). And as late as 1877, by Mr. Justice GORDON, in Kohler *v.* Luckenbaugh (3 N. 261), who declares, speaking for the Court, that the practice of directing "a writ of inquiry to the sheriff . . is orderly and regular, notwithstanding the Act of 1722;" and also adds "that Act but gives *the plaintiff the power, if he so chooses*, to have the Court make an order for such assessment." Not only does it thus appear that the Act is not obsolete, but Bell *v.* Bell, *supra*, decides that "what is discretionary in the English practice, *is matter of right in ours;*" a view strengthened by the opinion of the Court in Kohler *v.* Luckenbaugh, *supra*, where, as we have already said, the Court declares the *power* to be in the plaintiff if he chooses to exercise it.

In Sully *v.* Baum (1 WEEKLY NOTES, 115), and the case of Farley *v.* Hare, referred to in a mandamus was refused; the report of that case is very meagre, and the ground of the decision is not stated, though we are informed by counsel the mandamus was refused, because the party had his remedy by writ of error.

Whatever may have been the reason assigned by the Court in Farley *v.* Hare, it is true that the same tribunal, three years later, in 1877, declared the *power*, under the Act of 1722, to be in the plaintiff if he sees fit to exercise it.

If the law is not repealed, is not obsolete, and has been distinctly recognized as an existing operative statute, how are we to disregard it, and to declare that an alleged practice has repealed a law of the State?

Entertaining these views, we have but one course to pursue, and that is to grant this motion.

Complaint is made to us of what are called "excessive and almost prohibitive damages against corporations and even individuals in all accident cases," and therefore we are asked to sanction the practice said to exist, and to discharge this rule; to all this we reply that, as a matter of public policy, it is better to trust to the jury taken by lot from the wheel, and in attendance in open Court, than to place cases of this description in the control of men selected by any one man. At the present time, and with the present sheriff, we have no doubt that the jury would be honestly and fairly selected. That is not the question to be solved; the law gives the plaintiff the power, with which we ought not to interfere, especially as the selection of the jury from the panel in open Court is more consistent with our idea of right in cases of this description, and when it is also remembered that a corrective power is lodged with the Judges, and is freely exercised where it is apparent that a jury have rendered a verdict in any just sense "excessive" or "prohibitive."

Rule absolute.

Opinion by LUDLOW, P. J. A. M. B.

Orphans' Court.

February 19, 1884.

Storey's Estate.

Petition for order on executrix to mortgage for

The facts shown by the petition of Edwin A. Storey, an adult son of decedent, were that decedent, by his last will and testament, devised his real estate to his wife for life, remainder to his heirs, and appointed his wife, Ann Storey, executrix with power of sale of said realty. In the Court of C. P. No. 3, of Sept. Term, 1881, a judgment was entered against the executrix, and on April 16, 1883, a sci. fa. had been issued on this judgment against the heirs; that the executrix had filed her account, and appropriated to herself the balance of decedent's personal estate, and that if the real estate was not mortgaged to pay off the judgment, the accumulating interest would make it in time exceed the value of the property. The answer filed contained a denial of many of the statements in the petition.

William A. Grissinger, for petitioner.

William Hopple, Jr., contra.

March 1, 1884. THE COURT. It was at one time the doctrine in England that the Court, looking to the interests of *cestuis que trust*, would assume the discretion and exercise the power which had been committed to a trustee, where the latter had neglected or refused to act. That doctrine has given place to the safer rule, which leaves the discretion with the trustees, but relieves against the consequences of its non-use or abuse. (Hill on Trustees, 486–9.) The principle in its later phase has been accepted in Pennsylvania (Pulpress *v.* Church, 12 Wr. 204; Williams's Appeal, 23 P. F. S. 285), and is epitomized in the language of STRONG, J., in Naglee's Estate (2 P. F. S. 159): "We do not say that if the trustees acted capriciously, and in wanton disregard of the interests of the estate and the children of the testator; if, in other words, they did not exercise their discretion, but acted wholly without reason, a Court of Equity should not interfere." Whether the circumstances of the present case disclose an occasion for this equitable control is not, however, within our province to determine. The party in remainder seeks to compel the executrix, who is also the tenant for life, to raise a sufficient sum by mortgage to pay off a judgment, the interest of which, by the consent of the creditor, remains unpaid, and will in time, when added to the original debt, swamp the property. It is not easy to see how the substitution of one interest-bearing debt for another will mitigate the peril to the estate; but passing this criticism, we must dismiss the petition for want of jurisdiction to entertain it. We have no control over the real estate of a decedent, and therefore no control over its management in the discretion of the executrix, except for the payment of debts and the protection of minors; and neither creditor nor minor seeks our interposition. If, by collusion with the plaintiff in the judgment, the respondent purposes to destroy the interest of the owners of the fee, she may be thwarted in that policy by the filing of a bill and the appointment of a sequestrator, who shall keep down the incumbrances during her life; but the steps to that end must be taken in a Court of Equity.

The petitition is dismissed.

Opinion by Ashman, J. E. F. H.

February 18, 1884.

Pickens's Estate.

Partnership interest—An administrator is not entitled to commissions for determining and winding up the same if he be himself a copartner —An interest allowed to remain in the firm draws six per cent. per annum in the absence of proof as to what are the profits—Where no demand is made for twenty years by a sister of a brother for board, there can be no presumption that any was expected or intended.

Sur exceptions to adjudication.

At the audit of the account of Robert Dornan, administrator of John Pickens, it appeared that the decedent died in October, 1882, unmarried and without issue. Up to the time of his death he was partner in the firm of Dornan Brothers & Company, his interest therein being appraised at one-fourth. The administrator, who was also a member of the firm, deeming it injudicious to put up this interest at public sale, and desirous that it should produce as much as possible for the distributees, prepared an agreement by which they were to permit whatever amount was coming to them to remain in the firm at the end of the year at five per cent. He went to Ireland to see two of the parties. These negotiations, which took up several months, were never carried out. Decedent's entire estate was appraised at $53,668.22, which, with the exception of $1500 arising from the sale of personal effects, constituted his interest in the firm. The Auditing Judge refused to allow $2683.41, the sum charged by accountant for commissions. He also charged the accountant with interest at six per cent. per annum upon decedent's one-fourth in the aforesaid firm.

To these findings exceptions were filed in behalf of the accountant. Exceptions were also filed in behalf of Mrs. Dornan, a sister of decedent, to the disallowance of a claim presented by her, the substance of which sufficiently appears in the opinion of the Court.

E. C. Shapley, for Mrs. Dornan.

J. M. Pile, for the accountant.

April 26, 1884. THE COURT. It must be a very rare case in which it can be proper for one

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indebted or bound to account to a decedent to become the administrator of his estate. As was said in Kellberg's Appeal (5 Norris, 129), there is "not only incongruity, but hazard of delay, mistake or wrong, in leaving such an one to represent a claim to which his business relations render him directly adverse." The policy of the law upon this subject is indicated by the Act of Assembly which forbids the appointment by the Court to the office of guardian of an administrator or executor of any estate in which the minor has an interest; and an administrator or executor whose relations are inharmonious with the interests of the estate will be discharged. (Kellberg's Appeal, *supra*.)

In the present case, the principal asset of the decedent was his interest in the firm of which the accountant is a surviving member. The duties of the administrator appear to have been discharged with fidelity; but the trouble which now arises with regard to his compensation and that of his counsel is the result of the difficulty of determining in what capacity the services were performed. As partner, he was bound to wind up the business and ascertain the decedent's share; and for this, as is perfectly well settled, he could demand no compensation. The decedent was not entitled to an aliquot part of each item of property belonging to the firm, but merely to his share of what remained after payment of debts and balances; and hence it would seem the making of a detailed inventory and appraisement was required, not so much for his estate as to enable the surviving partners to determine what they would pay for his interest. The sale was undoubtedly for the benefit of all concerned—quite as much so for the surviving partners as the next of kin; and the visit to Ireland to procure the assent of those living there cannot be said to have been made exclusively for the latter.

Under all the circumstances of the case we think the accountant has no right to complain of the action of the Auditing Judge upon the question of compensation.

Of course, so long as the moneys of the decedent remained in the business, the estate was entitled to share in the profits, and in the absence of proof of what these were, the right to demand legal interest cannot be doubted.

The exceptions on the part of the accountant are dismissed.

We dismiss also the exceptions filed on behalf of Mrs. Dornan. Claims which on their face have been accruing for years, but which are delayed in their presentation as legal demands until after the death of the alleged debtor, come before the Court discredited by the claimant's own acts, and every fair intendment will be made against them. The mere relationship of brother and sister is not, of itself, sufficient to give rise to a presumption that no compensation was to be made for board furnished by one to the other; but coupled with other circumstances, and especially in the light furnished by the conduct of the parties themselves, through a long course of years, it may turn the scale. The question in all cases of this kind is, were the circumstances such that it is reasonably to be inferred that the parties expected compensation to be paid on the one side and received on the other. The evidence here showed that the decedent came to this country when a young man, and went at once to live with his sister, the claimant, who was considerably his senior. He was then without means, but for more than six years before his death his circumstances were prosperous, and he was abundantly able to pay, and could have been compelled to pay board. He lived with his sister during a period of about twenty years, and until his death; and at no time while he lived was there any demand for the payment of board. It seems very clear that at least in the beginning he was regarded as one of the family, and not in the light of a boarder, and a relation thus established is presumed to continue until proof of a change. (Greenl. on Evidence, sect. 41; Cousty's Estate, 12 Phila. Rep. 100.) There is no such proof here.

In Amey's Appeal (13 Wright, 126) the claim of a father-in-law for services rendered during four years was disallowed because there had been "no recognition of liability on the part of the decedent or assertion of right on the part of the claimant, and no demand of compensation, either in whole or part, . . . during the life of the decedent." Here there was no such recognition or demand during a period of twenty years.

That the parties did not understand that one was to pay and the other to receive compensation, is shown affirmatively by the testimony of one of the sons of the claimant, that at "various times," when she had said in the presence of the decedent that she would have "to move to a smaller house because no one was paying board," the decedent merely laughed and said "it was all right." An explanation of this testimony is perhaps furnished by the fact that afterwards the claimant moved into a house belonging to the decedent, for which he had given $20,000, and occupied it, rent free, for eighteen months, and until the time of his death. Certainly if the parties stood in the relation of debtor and creditor, the rent during this period should be set off against the claim for board; but it is clear that such was not their relation, and the Auditing Judge was right in disallowing the claim altogether.

Opinion by PENROSE, J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JUNE 5, 1884.* [No. 26.

Supreme Court.

Jan. '84, 198. February 26, 1884.

Sanderson v. City of Scranton.

Taxation—Lands—Surface—Minerals in place—Coal—Severance—Separate ownership—Lease.

Where the surface of lands and the minerals in place thereunder have been severed by the agreement or conveyance of the owner, and the respective divisions have become vested in different owners, the municipal authorities are bound to levy their taxes according to the ownership and value of these divisions. And each owner can be made responsible only for the tax on his interest, whether underlying strata or surface.

A. made an agreement with B., leasing to him all the coal beneath the surface of a certain tract of land, of which A. was the owner. The lessee was to mine and remove in each year at least a certain number of tons, which he was to pay for monthly, at a certain rate per ton, whether mined or not, unless mining should be prevented by certain specified contingencies. In case of neglect for thirty days to pay the said royalty, it might be distrained for. And for continued default the lease might be forfeited. The letting, however, was not for a term certain with reversion to the grantor, but without reversion and to be perpetual, until all the coal under the surface had been mined. And the rights and privileges therein conferred, were extended to the heirs, executors, administrators, and assigns of the respective parties:

Held, that this agreement was not merely a license or lease to mine coal to become the lessee's when mined, but that it operated as such a severance of the surface and subjacent strata, and a sale or assignment of the coal in place, as would relieve the owner of the surface from responsibility for taxes levied upon the coal.

The liability of the owner of coal or mineral in place for taxes levied thereon, results from the nature of his estate or interest, and, therefore, he is not relieved from this responsibility, on the principle *inclusio unius est exclusio alterius*, by an express covenant in the instrument of severance that he shall pay all taxes levied upon the coal mined, without recourse to the lessor to refund the same.

Error to the Common Pleas of Lackawanna County.

Amicable action in debt and case stated between the city of Scranton, plaintiff, and George Sanderson, James M. Robb, Samuel Robb, William O. Robb, Thomas Robb, trustee for Ann Eliza Cope, Thomas Robb, and Charles Du Pont Breck, trustee for G. S. Kingsbury, defendants, to recover for taxes assessed by the municipal authorities against certain coal in place which George Sanderson and the devisees of Charles Robb had conveyed by an agreement alleged by the city to be merely a license or lease to one John Jermyn.

By the case stated it appeared that George Sanderson and the devisees of Charles Robb, being on the tenth day of May, 1875, the owners of a certain tract of land underlaid with coal, and containing about one hundred and seventy acres, situate in the thirteenth ward of the city of Scranton, entered into an agreement with John Jermyn, to lease to him all the coal beneath the surface of said tract of land, excepting and reserving, however, certain specified portions necessary for the support of buildings, etc., erected on the surface. By subsequent assignments the interest of said John Jermyn was assigned to the Delaware, Lackawanna, and Western R. R., and the President and Managers and Company of the Delaware and Hudson Canal Company. The said tract of land, including and subject to said agreement was conveyed, assigned, and transferred to defendants.

The city of Scranton caused the coal conveyed by said agreement, and the surface under which it lies, to be assessed separately as the property of the defendants as follows:—

Third class land surface . .	$33,903.
Third class land coal . .	4,400.

The collection of the taxes on both was sought from the defendants, who resisted the collection of that on the coal, claiming that said agreement operated as a sale or assignment of all the coal, and not merely of that mined.

The said agreement let unto John Jermyn all the coal beneath the surface of said tract of land, except certain reserved portions. The said lessee at his own expense and in a good and workmanlike manner, was to mine the coal and pay to the attorney in fact of the parties of the first part, twenty-five cents per ton for each ton of coal mined. The maximum quantity was unlimited, but the lessee was to mine and remove each and every year thereafter not less than sixty-five thousand tons, this being established as "the minimum quantity of coal to be mined yearly, and paid for whether mined or not." In case of fault in the veins, casualties to the mine, hindrances to transportation, or in the event of a strike that may prevent the operation of the mine, then the regular payments may be excused for a period not exceeding six months; but except for these causes, a failure to make payments for the minimum monthly quantity of coal required to be mined, "shall at the option of the parties of the first part be taken as an abandonment by the party of the second part of all his rights under this lease to mine said coal."

The lease also contained the following clauses:—

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"And should the royalty herein agreed to be paid remain unpaid for thirty days, the said parties of the first part shall have the right to distrain any of the goods and chattels of the party of the second part, or his assigns found upon the said premises or adjoining premises in possession of said party of the second part, and should the same remain unpaid for a period of sixty days after it is payable, and there is no property liable to distress sufficient to pay the royalty due, then the parties of the first part shall have the right to declare this lease wholly and absolutely forfeited, and may enter and repossess themselves of said coal hereby leased, either with or without legal proceedings."

"The said party of the second part also covenants and agrees to pay all government imposts, United States, State, county, and local taxes upon the coal mined under this lease, without recourse or claim on the parties of the first part to refund any part of the same."

"And it is also understood and agreed by the parties hereto, that the words 'All coal beneath the surface,' expressed herein, wherever they occur, are intended to include only such veins of coal as are sufficiently remote from the surface to make the mining of them practicable and safe with regard to the preservation of the surface."

"The true meaning of this lease is to make it perpetual, until all the coal under the tract of land herein described is mined subject to the foregoing limitations and restrictions."

The agreement then provides that the final determination of the exhaustion of the coal to an amount less than sufficient to make the minimum, shall be left to expert arbitrators to be appointed by the parties.

"The rights and privileges herein conferred shall extend to the heirs, executors, administrators, and assigns of the respective parties hereto, and the covenants and obligations herein shall be binding on them as well."

If the Court was of opinion on the case stated, that the defendants were liable for the tax levied on the coal, then judgment was to be entered for the plaintiff in the sum of fifty dollars, but if not, then judgment to be entered for the defendant. The costs to follow the judgment and either party reserving the right to sue out a writ of error.

The Court entered judgment for the city of Scranton, HAND, J., delivering the following opinion:—

"After an examination of the lease in the case stated, and of the authorities in this State from Caldwell *v.* Fulton, 7 Casey, 475, down, we do not consider that the instrument in this instance is so drawn by apt words of conveyance as to constitute a full conveyance of the coal, and a vesting of the same in the lessee. A fair construction of the lease only passes title to so much coal as may be mined or paid for. It is true there is the right to mine all the coal, but the instrument does not convey it. It only becomes the property of Jermyn when either mined or paid for when not mined."

"Another clause in the lease provides that the lessee shall pay taxes for coal mined. This upon the principle *inclusio unius est exclusio alterius*, we think raises a very strong presumption that the lessee was not to be liable for the taxes on unmined coal."

The defendants thereupon took this writ, assigning for error the entry of judgment as aforesaid.

George Sanderson, Jr., for plaintiffs in error.

A lease of all the coal under a certain tract of land with unlimited time to mine it, though in words a lease, is really a grant of a complete freehold interest in the land, and should be assessed to the lessee not to the owner of the surface.

Scranton *et al.* *v.* Phillips, 8 WEEKLY NOTES, 425.
Harlan *v.* The Lehigh Coal and Navigation Co., 11 Casey, 287.
Palmer *v.* Edwards, 1 Douglas, 187, note by BULLER, J.
Blackstone's Commentaries, vol. i. book 2, p. 317.

The owner of the land and the owner of the coal are each taxable according to their respective interests.

Logan *v.* Washington County, 5 Cases, 373.

Ira H. Burns, City Solicitor, for defendant in error.

A careful examination of the instrument shows that it did not convey the land itself at the time the instrument was executed but only a right to detach and carry away a portion of it in compliance with certain specified conditions.

Caldwell *v.* Fulton, 7 Casey, 475.

If the principle *inclusio unius est exclusio alterius* does not apply to the construction of the clause mentioning the payment of taxes, then it is difficult to imagine a case where it would.

In the case of Logan *v.* Washington County (5 Casey, 373), there was a sale and not a lease of the coal; all this Court decided was that the owner of the coal was the proper party to pay the tax.

April 7, 1884. THE COURT. The single question, which arises upon the case stated, is whether the instrument of writing, bearing date the 10th day of May, 1875, between George Sanderson and the devisees of Charles Robb, deceased, of the one part, and John Jermyn, of the other part, is a lease, properly so called, or virtually a sale of the minerals in place. What is termed a mineral lease, is frequently found to be an actual sale of a portion of the land; it differs from an ordinary lease in this, that, although both convey an interest in land the latter merely conveys the right to its temporary use and occupation, whilst the former conveys absolutely a portion of the land itself. It is one of the essential properties of a lease, that its duration shall be for a determinate period, shorter than the duration of the estate of the lessor, hence the estate demised is called a "term," and necessarily implies a reversion. If the entire interest of the lessor is conveyed in the whole or a portion of his land, the conveyance cannot therefore be properly regarded as a demise but as an assignment.

Upon examination of this instrument we find, that the lease is not of the mine with its ap-

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proaches and appliances, and the right to use, occupy, and operate the same, but it is a lease of "all the coal beneath the surface of the tract," with the right "to mine the coal and remove the same."

The maximum quantity to be mined and removed in each year is unlimited, but the minimum average quantity is fixed and certain, and that minimum quantity must be "paid for" in each year "whether mined or not." Provision is made for delays which may be caused from "faults" found, casualties, want of adequate transportation, strikes of employés, etc., but these hindrances are only to afford temporary excuse for non-payment; the rule of the contract is that 65,000 tons of coal shall be paid for in each year, "whether mined or not." The duration of the interest is not for any determinate period of time; it is not for years, for life, or at will; "the true meaning of the lease," as expressed therein, "is to make it perpetual until all the coal under the tract of land, herein described, is mined," that is to say, it is a lease of the coal, until no coal remains. In what respect, then, does this transaction lack the essential qualities of an actual sale. The language of this lease is in most respects similar to that referred to in the case of Scranton *v.* Phillips (8 WEEKLY NOTES, 425), which was "of all the coal in and under said lot and other lands for and during the term and period of time, as shall be required therefor to mine and remove all said coal." The further stipulations bear a close analogy to the contract now before us. In delivering the opinion of the Court in Scranton *v.* Philips, the present Chief Justice says, although called a lease it was virtually a sale of all the coal, with unlimited time to remove it, with the right at their election to yield it up, after the expiration of ten years, etc. It is certainly true that a lease, properly so called, always conveys an interest in land, and in this respect it is to be distinguished from a mere license (11 Casey, 287), but where that which purports to be a lease conveys the interest of the lessor, it differs in no respect from a sale. (Palmer *v.* Edwards, 1 Doug. 187, note; 2 Black. Com. 317.) When the purposes and objects of this instrument are perfected the coal will be exhausted, and the lessor can have nothing by the reversion. It is true, in general, that Jermyn covenanted to pay monthly for the coal, as it was mined, at the rate of twenty-five cents per ton, but he also agreed to pay monthly for a certain quantity whether it was mined or not, and the legal obligation to pay continued when all mining operations should cease. It cannot be said that Jermyn owned only the coal which he mined and paid for. It is true, the payments were to be according to the yield of the mine, but the consideration of the contract depended upon the quantity of coal which the mine upon measurement might be found to contain, and that measurement was made, as the mining progressed. The mere fact, that the indenture contains a reservation of rent, with the right of distress, will not change its legal operation and effect.

We are of opinion, therefore, that there was such a severance of the surface from the underlying strata, as created a divided ownership in these distinct portions of the land.

It is the duty of the assessors, in the several counties, to take an account, in the form directed by law, of all houses, lands, etc., and to assess and value the same, at the rate or price for which they would sell, at a *bona fide* sale, after full public notice. Land has an indefinite extent, upwards as well as downwards, but the law recognizes horizontal divisions of land. A severance of the surface from the underlying strata may be created, either by reservation or express grant; after severance a mineral right is an independent interest in land, it forms a distinct possession, is held upon a distinct title and is as much the subject of sale, devise, or inheritance, and of separate taxation as the surface land. (Caldwell *v.* Copeland, 1 Wright, 427.)

A mineral right is taxable as land; the owners of the surface and of the mine are each taxable, according to the value of their respective interests: where there is a divided ownership there must be a divided taxation. (Logan *v.* Washington Co., 5 Casey, 373.) The owner of surface land can no more be held for the tax upon the mineral strata, after a severance, than can the owner of the mine be held for the taxes upon the surface.

The case is certainly not free from doubt; the paper purports to be a lease, provides for a forfeiture upon violation of its conditions; the price of the coal is denominated rent, and the remedy for its collection is by distress. Yet the considerations we have stated have forced us to the conclusion that it was an actual sale, rather than a mere demise of the coal. The provision, made for the payment, by Jermyn, of all "government imposts, United States, State, county, and local taxes, upon the coal mined under the lease, without recourse or claim on the parties of the first part to refund any part of the same," is, we think, not important in the determination of this question. The mined coal is admittedly the property of Jermyn, or his assigns, and why provision was made for the payment of the taxes upon it, is as difficult to explain, upon one hypothesis, as it is upon the other. It follows without stating it that the purchasers of the coal in place, must pay the taxes upon it; to avoid uncertainty, however, as to the discharge of such burdens as then were, or thereafter might be, imposed upon the coal

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mined, this clause was doubtless inserted; in the event of a distress levied for the rent, this provision might become important, in connection with the clause of forfeiture, contained in the contract. The interest of John Jermyn under the contract, before suit brought, was assigned to the Delaware, Lackawanna and Western Railroad Company, and the President, Managers, and Company of the Delaware and Hudson Canal Company: subject to their title, the land and the agreement had been conveyed and assigned to the defendants below. The former, we think, are liable to taxation for the coal, the latter for the surface according to the valuation of each respectively.

The judgment is therefore reversed, and judgment is now entered for the defendant below on the case stated with costs.

Opinion by CLARK, J. H. L. N.

Oct. '83, 105. November 9, 1883.

Brown v. French.

Negligence—Contributory negligence.

No one is chargeable with negligence who has acted upon his best judgment, or, who not having time for reflection and determination, has failed to act. Such act, or such omission, may be a mistake, but it is not negligence.

Error to the Common Pleas No. 1, of Allegheny County.

Case, by Margaret Jane French against Samuel S. Brown *et al.*, to recover for the loss of the life of the plaintiff's husband.

The material facts, as they appeared on the trial, before COLLIER, J., are stated in the opinion of this Court as follows:—

"On the morning of the 28th of October, 1878, the steamer Charlie Brown, owned by the defendants below, with a tow of seven boats, was about to ascend a somewhat swift and narrow part of the Ohio River, a little above the borough of Sewickley, called the trap. Some fifty or seventy-five yards in advance of this craft was the steamboat Ben Wood, which had already reached the swift water, and was exerting her full power in order to gain the head of the ripple. The Brown seems to have been using only steam enough to maintain her position against the current, or if to advance at all, but slowly. Then, some fifty or one hundred yards below this vessel, came the Joe Nixon with its tow. Thus we have three powerful steamers with their tows, as we may say, in a line; one already ascending the swift water, and the other two waiting until the way was cleared in order to do the same thing, and thus reach the upper part of the river. Just at this time, when the river was thus occupied, William French, the deceased, attempted to pass in a skiff between the forward boats; about twenty-five yards below the stern of the first, and about the same distance above the tow of the second. As might have been expected, with no great exercise of prescience, as soon as he struck the swell of the Ben Wood his oars were unshipped, one of them being lost or broken, and he was thus left to drift helplessly down upon the forward boat of the Brown's tow. His skiff, after striking as described, swung around and lodged under the rake of a second boat, hung there for a few moments, and was then, with its occupant, swallowed up in the water. Some efforts were made to save his life, but time, not over two or three minutes, was too short to insure success. Indeed, the period was scarcely sufficient in which to form a plan of rescue, much less to carry it into effect."

The defendants requested the Court, *inter alia*, to instruct the jury that there was no sufficient evidence that the death of William French was caused by the negligence of the defendants or their agents. *Refused.*

In the charge, the Court submitted to the jury the questions of negligence and contributory negligence.

Verdict and judgment for the plaintiff for $3045. The defendants took this writ, assigning for error, *inter alia*, the refusal of their point, and the charge of the Court.

D. F. Watson (*H.* and *G. C. Burgwin* with him), for the plaintiffs in error.

The act of the deceased in exposing himself to danger did not impose upon the defendants' servants any duty of extraordinary care. There was not sufficient evidence of a want of ordinary care by defendants' servants to warrant the submission of the question to the jury.

Howard Express Co. *v.* Wile, 14 Smith, 206.
Railroad Co. *v.* Yerger, 23 Smith, 124.
Adams Express Co. *v.* Sharpless, 27 Smith, 517.
Hyatt *v.* Johnston, 7 WEEKLY NOTES, 562.
Baker *v.* Fehr, 1 Outerbridge, 72.
Railroad Co. *v.* Schertle, Id. 454.
Bemus *v.* Howard, 3 Watts, 256.
Good *v.* Mylin, 8 Barr, 55.
1 Chitty's Pleadings, * pp. 391, 392.

H. W. Wier, for defendant in error, contended that the question of negligence was properly submitted, because there was evidence that the steamboat was run upon and over the deceased.

January 7, 1884. THE COURT. From the evidence on the part of plaintiff below, we gather the following facts. [The Court here

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stated the facts, *ut supra.*] Having thus made a statement of the facts as they are related by the witnesses of the plaintiff, we next in order turn to the legal principles governing cases of this kind. These are few and simple, and need the citation of no authority for their support.

(1) The plaintiff, in order to sustain her case, was obliged to show that French lost his life through the negligence of the servants of the defendants. (2) If it appeared that the deceased by his own carelessness contributed in any degree to the accident which caused the loss of his life, the defendants ought not to have been held to answer for the consequences resulting from that accident. Applying these rules to the facts as above stated, we cannot see how the defendants can be held responsible for the loss of French's life. Their boat was in its proper place in the river; it had the right of way; nothing can be said against the skill with which it was navigated; and without the direct intervention of French himself, there could have been no accident. He voluntarily placed himself in the way of danger, and his death was the result of his own act. It is possible that he might have accomplished his purpose and passed in safety the head of the Brown's tow, had his oars not been unshipped or broken, but this resulted from no act of the crew of the Charlie Brown; it was not by their act that he was thus cast helpless upon the current of the river; it was by the swell and wash of the Ben Wood, into which he had voluntarily put himself, that his oars were unshipped and his skiff cast upon the advancing tow. That his undertaking was an exceedingly reckless and dangerous one, the event proves, but there was no one to blame for it but himself. He had the right to try the experiment, obviously dangerous as it was, but then, also, upon him rested the consequences of that experiment, and upon no one else. He may have been, and probably was, ignorant of the risk which he was taking upon himself, or knowing it, and trusting to his own skill, he may have regarded it as easily superable. But in either case, the result of his ignorance, or of his mistake, must rest with himself and his friends, and cannot be charged to the defendants. Under circumstances such as these, it is very clear that the crew of the Charlie Brown legally owed no duty to French; they might have left him to reap the fruit of his own folly.

Nevertheless, as we have said, an attempt was made to save his life; unfortunately it was unsuccessful, and it is now said that the effort was misdirected, or not properly seconded by the pilot of the steamer; that the boat ought to have been backed. Well, let it be so, that by a manœuvre of that kind this man's life could have been saved. Does it follow that it was an act of carelessness not to have done so? Certainly not. Here was an accident sprung upon the pilot for which he was wholly unprepared. In order to avoid the consequences of it, he must first understand accurately its nature and probable effect; he must then determine what was best to be done, and this determination must be had in view of all the circumstances by which he and his craft were surrounded. All this required time; but the time allowed in this case was too short for any but an exceptionally active mind to entertain and execute a successful plan of rescue. Under such circumstances as these we cannot agree that a mistake in judgment is an act of carelessness. No one can be charged with carelessness when he does that which his judgment approves, or where he omits to do that of which he has no time to judge. Such act, or omission, if faulty, may be called a mistake but not carelessness.

So the pilot of the Charlie Brown may have made a mistake in not backing his boat, but he cannot be charged with negligence. Supposing, then, this case to rest wholly on the alleged default of the defendants' agents, we cannot see that any such default has been proved; we cannot see but that the crew of the steamboat did all that ordinary men ought to be required to do in an emergency so sudden and alarming.

But without dwelling upon this matter, or considering particularly any of the assignments of error, we may sum up the whole case by saying, that in the Court below, the defendants seem to have been charged rather with the failure of their servants to save French's life, than with carelessness in the production of the accident which led to its loss. This was wrong, and yet, I suppose, this theory was adopted as the only one possible on which to charge the defendants at all.

As we have seen, there was no evidence of negligence on part of the crew of the steamer, and even if there had been, the defendants were exempted from the consequences of it by the contributory negligence of French. That he voluntarily put himself in a place of great danger cannot be denied, and that others should give more heed to his safety than he himself did, could neither be expected nor required.

The judgment of the Court below is reversed.

Opinion by GORDON, J.

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July, '83, 212. January 25, 1884.

Neilson's Appeal.

Ecclesiastical law—Protestant Episcopal Church—Rector—Vestry—Election—Equity—Corporations.

Where the vestry of a Protestant Episcopal Church in voting upon a question, stand six to five, the rector cannot claim to vote as a member of the vestry with the minority, and also to give a casting vote as presiding officer.

The charter of a Protestant Episcopal Church provided that its temporal affairs should be managed by a rector, churchwardens, and vestry. Subsequent provision was made as to the mode of choosing the rector, and it was also provided that the vestry should consist of twelve persons, to be elected in a specified manner. The wardens were to be chosen from among said twelve persons. The vestry was authorized to fill vacancies occurring in its own body:

Held, that upon the occurrence of a vacancy in the vestry the rector was entitled to a vote as a member of the vestry in choosing a person to fill the vacancy.

Appeal from the Common Pleas No. 1, of Philadelphia County.

Bill in equity, wherein Richard W. Sommers, and nine others, were complainants, and Robert H. Neilson, and eleven others, were defendants, to restrain the latter from acting as vestrymen of a certain church known as the Church of the Evangelists.

The case was heard on bill, answer, and affidavits on an application for a preliminary injunction. The facts were substantially as follows: At the election for vestrymen of the Church of the Evangelists, held Monday, April 10, 1882, Richard W. Sommers, Dr. H. Yale Smith, and ten others were duly elected to serve as vestrymen until Monday, March 26, 1883. At the regular meeting of the vestry, held June 13, 1882, there was a vacancy caused by the death of Dr. H. Yale Smith. The remaining eleven vestrymen were present, Mr. Percival, the rector, presiding. William A. Chew and Robert H. Neilson were nominated to fill the vacancy. Six of the vestrymen voted for Chew, and the remaining five, with the rector, voted for Neilson. The rector claiming the right upon a tie to cast the deciding vote, voted for Neilson, and declared him elected.

Chew, however, took his seat as a member of the vestry, and Neilson did not. The rector and four members of the vestry thereafter absented themselves from all its meetings. Subsequently William J. Mullen, a member of the vestry, died, and Benjamin Bickerton was duly elected in his place and stead.

At a stated meeting, held February 13, 1883, eight members of the vestry, including Chew and Bickerton, were present, who elected Brown, Tomlin, and Bickerton, judges of the election for vestrymen, to be held on Easter Monday, March 26, 1883. Bickerton afterwards declined to act, and C. P. Fowler was appointed in his place. The annual election was accordingly held on Monday, March 26, 1883, conducted by the above-named judges. Twenty ballots were cast for the complainants by male adults, members of the corporation duly qualified to vote at the election. After the close of the polls, the judges announced the result of the election, and declared that the complainants, together with Joseph Hilferty and Jesse W. Tittermary, were duly elected to serve as vestrymen for the term of one year, from Monday, March 26, 1883. Upon the same day and at the place of the above election, the rector's warden, having given notice that the pretended appointment of the above-named judges of election was void for want of a quorum of the vestry at the time of the alleged appointment, and averring that they were disqualified to act because they were not pewholders, opened polls at which thirty-three votes were cast for the defendants, who at the closing of the polls were declared elected. Notice of the election of the two different bodies of vestrymen was given to the rector, who, however, announced to the parish the election of the defendants, and acted with them. The complainants filed this bill to restrain the defendants from acting as vestrymen.

The following are the material articles of the charter and by-laws in controversy:—

Charter of Incorporation of the Church of the Evangelists.

The temporal affairs of this corporation shall be under the management of a vestry to be composed of the rector, churchwardens, and vestrymen, chosen in the manner hereinafter provided. . . . .

The rector of this church shall be elected by the churchwardens and vestrymen in such manner as the statutes and by-laws shall ordain. The vestry of said church shall consist of twelve persons, who shall be elected on Easter Monday of each year in the following manner, namely: Every male adult, who shall appear by the church books to have paid one dollar or more per annum towards the support of the said church for two years next before the election, and is a worshiper at the said church, shall be entitled to vote; *Provided*, that in case of failure to elect vestrymen on that day the corporation shall not on that account be dissolved, but the election shall be holden on some other day in such manner as the by-laws may prescribe. The vestrymen continuing in office until others are chosen, and having authority to fill vacancies in their own body.

The vestry, or a majority of them, shall and may convene from time to time, and make such and so many rules, by-laws, ordinances, and regulations as they may deem expedient for the good government and support of the church, and shall have power to fill all vacancies in their own body: *Provided always*, that such by-laws, rules, ordinances, and regulations be not repugnant to the constitution and canons of the Protestant Episcopal

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Church of the State of Pennsylvania, or the Protestant Episcopal Church in the United States of America, or to the constitution and laws of the United States, or of the State of Pennsylvania.

BY-LAWS.

The vestry may choose three pewholders as judges of the election, and if from any cause whatever, the vestry shall fail to appoint said judges, or they or either of them shall neglect or refuse to act under such appointment, it shall become the duty of the wardens to supply the vacancy or vacancies thus created, by making a new appointment, or if that cannot be done conveniently at the time, then the wardens themselves shall act as judges of the election.

The vestry shall have power to fill all vacancies that may occur in their body. All elections shall be by ballot, unless the same shall be dispensed with by unanimous consent.

The Court, ALLISON, P. J., was of opinion that Chew and Bickerton had been duly elected members of the vestry; that the judges of election had therefore been properly appointed, and that complainants had accordingly been duly elected. The preliminary injunction as prayed for was granted accordingly.

Defendants thereupon took this appeal, assigning for error the action of the Court.

Henry C. Olmsted and *Richard C. McMurtrie*, for the appellants.

Although the rector claimed in good faith that he had the right to cast two votes at the election, it is not now contended that he had such right, though authorities are not wanting for such action.

Baum's Rights and Duties of Rectors, etc., 76.
Cripps's Law of the Church and Clergy, 804.

Such right is sanctioned by English ecclesiastical law, and the law of New York.

Life of Wilberforce, vol. iii. p. 392.
Hoffman's Ecclesiastical Law of New York, 79.

It was contended by the other side, and held by the Court below that the rector had no right at all to vote, because he was not a vestryman. But such a construction is not in accordance with the charter and by-laws. By Article III. of the charter it is provided that the temporal affairs of the corporation shall be under the management of the rector, churchwardens, and vestrymen. Art. V., after mentioning the qualifications of electors provides that "the vestrymen shall continue in office until others are chosen and have authority to fill vacancies in their own body." The latter provision does not take away the rector's right to vote as a member of the vestry. Though the rector does not become a member of the vestry from the fact of his being a member of the corporation, it is incomprehensible that he should be a member of the vestry and not have the right of a vestryman to vote. But all doubt as to the rector's right to vote is set at rest by Article II. section 4, of the by-laws, in which it is provided that "the vestry shall have power to fill all vacancies in their own body."

Furthermore, the right of a rector to vote at a vestry meeting is the universal law of the Episcopal Church.

Baum on the Rights of Rectors, etc., 75.
Richey's Churchman's Book, 61.

The election in this case was void because the plaintiffs' judges of election were not properly qualified, because they were not pewholders as required by Article I. section 2, of by-laws. Nor were they appointed by a vestry having a lawful quorum. Moreover, the question here is not one within the jurisdiction of a court of chancery. The proper procedure would have been by *quo warranto*.

Gilroy's Appeal, 4 Out. 5.

Or if there was irregularity in the conduct of the election, the remedy was by a new election.

Com. *ex rel.* Claghorn *v.* Cullen, 1 Harris, 145.

Tidewater Pipe Co. *v.* Satterfield (12 WEEKLY NOTES, 457), cited on the other side, is inapplicable, because that was not a case of a contested election and not the case of a corporation, but of a limited partnership association.

Wm. S. Lane, *J. Henry Williams*, and *Hon. Amos Briggs*, for appellees.

The question is narrowed down to this, Has the rector the right under this charter to vote for vestrymen? Appellants contend that the word "vestry" in Article III. has the same force as in Article V. But the words are entirely different. The word "vestry" in Article III. is simply a vestry of management. The vestrymen are to be considered as the servants of the corporation. The churchwardens and vestrymen fill the vacancy if it occurs. In Article VIII. there is no mention of the rector, who has no voice in the election of vestrymen. A majority of the vestrymen, that is, six, voted for Chew, and that clearly elected him. Article V. states that the "vestry" shall consist of twelve persons, and then proceeds to declare how they shall be elected. It is to be observed that the rector is not of the twelve persons constituting the vestry. By long custom, a mere renter of a sitting is sufficiently qualified to hold the position of a judge of election. The plaintiffs were the *de facto* vestrymen, were in possession, and as the defendants sought to interfere with the exercise of their rights as vestrymen, they were clearly entitled to the equitable jurisdiction of the Court.

Tide Water Pipe Line Co., Limited, *v.* Satterfield, 12 WEEKLY NOTES, 457 (affirmed by Supreme Court).

February 4, 1884. THE COURT. It was conceded by the learned Judge below that if this bill had presented the question of the legality of the election of vestrymen it could not be sus-

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tained. He held, however, that the plaintiffs below having shown a *prima facie* right to the office which they claim, the case comes within the provisions of the Act of 13th June, 1836, which confers on the Courts of Common Pleas the supervision and control of corporations, as well as of unincorporated associations and societies, and that pending any contest growing out of said election, the plaintiffs have the right to invoke the equity powers of the Court to restrain their adversaries from interfering with their right to act as *de facto* vestrymen.

Assuming for the purposes of this case the position above stated to be correct, we will consider how far the plaintiffs are apparently at least in the right," and the defendants "apparently in the wrong."

The second and third assignments of error raise the only questions which in our view of the case require discussion. The second alleges that the Court erred in holding that the rector had no power to vote upon the question of filling the vacancy occasioned by the death of H. Yale Smith, and the third that the Court erred in holding that William A. Chew was elected vestryman of the corporation.

The second assignment is involved in the first. This will be understood when it is stated that the rector's vote, if received, creates a tie, and that its rejection as illegal by the Court below gave to Mr. Chew a majority of one over Mr. Neilson.

The election to fill the vacancy created by the death of Mr. Smith was participated in by the eleven surviving vestrymen and the rector. Six of the vestrymen voted for Mr. Chew; the other five and the rector voted for Mr. Neilson. This made a tie, whereupon the rector claimed and exercised the right of giving an additional vote in favor of Mr. Neilson. This right, although claimed in good faith and not without some color of authority in the Episcopal Church, cannot be sustained. This was conceded upon the argument, and need not be discussed. It is manifest Mr. Neilson was not elected to fill the vacancy referred to.

The learned Court below was clearly right in holding that the rector had not the right to vote twice, but the denial of the rector's right to vote at all is not so apparent. The position of the learned Court upon this point is tersely stated as follows: "But the rector, though a member of the body termed the vestry, is in no sense a vestryman, nor is he entitled to perform the functions as a member of the body which the charter restricts to the vestrymen alone."

It is not necessary to consider the practice of the English Church, nor even the general rule in the Episcopal Church of this country, though it is believed the latter at least is not in accord with the rule as laid down by the Court below, for the reason that the question before us is one of power in the charter. The third article in said charter provides that: "The temporal affairs of this corporation shall be under the management of a vestry, to be composed of the rector, churchwardens, and vestrymen chosen in the manner hereinafter provided, who shall have power, etc. The fifth article provides how they shall be chosen. It says: "The rector of this church shall be elected by the churchwardens and vestrymen in such manner as the statutes and by-laws shall ordain. The vestry of said church shall consist of twelve persons, who shall be elected on Easter Monday. . . . *Provided*, That in case of the failure to elect vestrymen on that day the corporation shall not on that account be dissolved, but the election shall be holden on some other day in such manner as the by-laws shall prescribe. The vestrymen continuing in office until others are chosen, and having authority to fill vacancies in their own body."

It will thus be seen that the vestry is composed of the rector, churchwardens, and vestrymen. The vestrymen consist of twelve persons, who are elected on Easter Monday; the two church wardens are selected from the vestrymen. The rector being therefore an essential part of the vestry, what is there in the charter of this church to prohibit his voting at any meeting of that body? Unless such prohibition can be found, such right cannot be denied.

It was contended that because the fifth article declares "the vestry of said church shall consist of twelve persons, who shall be elected on Easter Monday," and that said vestrymen shall have "authority to fill vacancies in their own body," the rector had no right to vote in filling any such vacancy. The fifth article was not intended to conflict with the third article, which declares who shall compose the vestry. The word "vestry" in the fifth article was plainly intended to designate the number of vestrymen and provide for their election on Easter Monday. The article prescribes the manner of their election and the qualifications of voters. This view is strengthened by the fact that neither the rector nor church wardens are referred to in the fifth article as belonging to the vestry, while they are expressly designated as members of the vestry by the third article.

But it is said the vestrymen, and not the vestry, are to fill all vacancies in their own body, and as this was the case of such vacancy the rector could not vote. The fifth article standing alone might seem to favor such a construction, but when we turn to the eighth article we find that "The vestry, or a majority of them, shall and may convene from time to time, and make

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such and so many rules, by-laws, ordinances, and regulations as they may deem expedient for the good government and support of the church and shall have power to fill all vacancies in their own body." When we examine the by-laws which the vestry have made in pursuance of this power we find in article second, section 4, the following: "The vestry shall have power to fill all vacancies that may occur in their own body."

We therefore regard it as entirely clear that it is the vestry as a whole, and not the twelve vestrymen as a portion of the vestry, that have the power under the charter and by-laws of this church to fill vacancies in that body, and as the right of the rector as a member thereof to vote is not denied by the charter or the law of the church, he was entitled at the election for vestryman occasioned by the death of Mr. Smith, to vote for Mr. Neilson. This made a tie, and neither Mr. Neilson nor Mr. Chew was elected. As the election for twelve vestrymen on Easter Monday, 1883, depends for its validity to a considerable extent upon whether Mr. Neilson or Mr. Chew was elected to fill the vacancy caused by Mr. Smith's death, it is evident the plaintiffs have no such apparent right to act as vestrymen as entitles them to the interference of a court of equity. The whole difficulty can and probably will be settled on the ensuing Easter Monday, when it is hoped wise counsels will prevail and the just rights of all parties be respected.

The decree is reversed, and the bill dismissed at the costs of the appellees.

Opinion by PAXSON, J. F. J. A.

Jan. '84, 33. January 31, 1884.

Arthur et al. v. Sylvester et al.

Trover—Lien—Conveyancer—Set-off.

Where a real estate broker has had placed in his hands a plan and deed of property for the sole purpose that he shall undertake to sell the property, he has no lien on the deed and plan for his charges and expenses in attempts to make the sale.

In such a case the retention of the papers is a tort, and in an action of trover for the alleged wrongful conversion, the real estate broker cannot defalk or set off his charges against damages arising from his own wrong.

Error to the Court of Common Pleas No. 3, of Philadelphia County.

Trover, by Rebecca J. Arthur *et al.*, administrators of Charles J. Arthur, deceased, against Frederick Sylvester and Charles Sylvester, trading as F. Sylvester & Bro., for a deed and plan of real estate in Montgomery County, placed in the hands of defendants (real estate agents), for the purpose of effecting, if possible, a sale of said real estate.

Upon the trial, before LUDLOW, P. J., the following facts appeared: The plaintiffs, administrators of the estate of Charles J. Arthur, deceased, desiring to effect a sale of a tract of land in Montgomery County, placed in the hands of the defendants, who are real estate agents, a plan and deed of the said land, for the purpose of effecting, if possible, a sale thereof. The sale was not accomplished, but the land was afterwards sold on an order of the Orphans' Court of Montgomery County. The plaintiffs requested a return of the papers for the purpose of making title. Defendants refused, upon the ground that their bill for expenses (advertising, etc.), incurred, in attempting to find a purchaser, had not been paid. The plaintiffs replied that they had no funds of the estate with which to pay, but would settle the account out of the proceeds of the Orphans' Court sale. Defendants still refused, and plaintiffs brought this action.

The following facts were admitted at the trial: (1) That defendants were real estate brokers for plaintiffs. (2) That a sum was due defendants for cash expended as brokers in attempts to sell the property. (3) That defendants had possession of the deed and plan in suit, and refused to deliver them to plaintiffs without payment of claim.

Verdict for the plaintiffs for $48, the following points being reserved by the Court:—

First. Whether the defendants had a lien on this deed and plan for their charges.

Second. Whether the defendants have a right in this action to defalk from plaintiffs' damages the amount of their charges.

Subsequently the Court entered judgment for the defendants upon the first point reserved. Thereupon the plaintiffs took this writ, assigning for error the entry of judgment as above.

John Dolman (with him *J. Dolman, Jr.*), for plaintiffs in error.

Charles Henry Hart, for defendants in error.

March 3, 1844. THE COURT. Upon the admitted facts: "(1) that defendants were real estate brokers for plaintiffs; (2) that a sum was due them for cash expended as brokers in attempts to sell property; (3) that defendants had possession of the deed and plan in suit, and refused to deliver them to plaintiffs without payment of claim"—two points of law were reserved: "1st, whether defendants had a lien on this deed and plan for their charges; 2d, whether the defendants have a right in this action to defalk from plaintiffs' damages the amount of their charges."

No evidence was adduced that, by custom or usage, a real estate broker is entitled to a lien for his services or expenses in attempts to sell the property, on the title papers in his possession; nor has the able counsel for the defendants cited

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a precedent where such claim of lien was sustained. The claim appears novel. This is not the case of an attorney-at-law intrusted with papers by his client, and it would be a mere *dictum* to say that an attorney may have a lien on such papers for fees in business to which the papers had no relation. Nor are the defendants conveyancers, as this case comes; but if they were, it does not appear that they did anything upon the deed or plan. A certificated conveyancer is not entitled to a lien upon deeds delivered to him, and with and in respect to which he has done business, the business not having been done upon the deeds or their value thereby increased. (Steadman *v.* Hockley, 15 M. & W. 552.)

The defendants contend that the position of a real estate broker or conveyancer in regard to papers placed in their hands for professional services by a client, is precisely the same as that of an attorney or solicitor, or other bailee, who expends time and money upon the property of the bailor.

This may be conceded, if meant to apply only to cases of particular lien, where the claim is for labor bestowed or money expended on the papers so placed. By the common law, where a man receives from the owner an article for a purpose involving labor or expense upon such article, he may detain it until he is paid for his labor or expenses. How far the right of lien extends in favor of an attorney in Pennsylvania, perhaps, is unsettled. Attorneys and conveyancers do not seem to stand on the same footing in England; there, it has been said that if a deed be delivered to a conveyancer, he may have a lien for anything done upon that particular deed, but an attorney may have the benefit of the custom if it were another deed than that on which the operation is performed. (Hollis *v.* Claridge, 4 Taunton, 807.) Where a mortgage was delivered to an auctioneer for the purpose of obtaining the money due thereon, and he made several applications to the mortgagor, but received no money, it was held that he had no lien on the deed in respect of the charges for making the applications, and this was applying the like principle as applies to conveyancers. "The distinction is, that when the work is to be done on a chattel to improve it or to increase its value, the lien attaches, but where it is merely delivered, as in this case, to make a demand upon it, no such right can be supported." (Sanderson *v.* Bell, 2 Compt. & M. 304.)

We are of opinion that when a deed and plan are placed in the hands of a real estate broker, for the sole purpose that he shall undertake to sell the property, he has no lien on the deed and plan for his charges and expenses in attempts to make the sale.

This action is founded on an alleged wrongful conversion of the plaintiff's property. It would fall if the defendants had a lien on the property, for then they would have the right of possession until paid. Their charges cannot be defalked or set off against damages arising from their tort.

Judgment reversed, and judgment is now entered upon the verdict for forty-eight dollars, with interest from January 11, 1883.

Opinion by TRUNKEY, J. J. H. M.

Common Pleas—Equity.

C. P. No. 1. March 11, 1884.

Huston et al. v. Clark et al.

Equity—Practice—Plea of lis pendens—Discontinuance—Conclusiveness of record—When the record of a Court of competent jurisdiction shows that a suit has been discontinued, the entry will be presumed by another Court to have been properly entered.

Exceptions to Master's report.

This was a bill in equity to compel the defendants to furnish an account of the affairs of The Midvale Steel Works, of which complainant was a part owner. The defendants pleaded that a bill for the same cause of action was already pending in Common Pleas No. 4.

The case being referred to a Master, he reported:—

That while originally the cause of action in the two bills was the same, yet owing to a change which had taken place in the status of the company since the filing of the first bill, there was now a substantial difference, and he reported further that it was proved as a fact before him that since the filing of the plea in the present case, the suit in Common Pleas No. 4 had been discontinued, and as it appeared from the record that a discontinuance had been entered and the costs paid, it was conclusive, and must be presumed to have been done correctly, and therefore that there was no other suit pending at this time.

To this report defendants filed exceptions:—

Geo. M. Dallas and *John G. Johnson*, for the exceptant, cited as to the question whether the bills were for the same matters—

Story's Eq. Pl., §§ 336 and 738.
Brooke *v.* Phillips, 6 Phila. 392.

As to the effect of the discontinuance—

1 Danl. Ch. Pr., *794.

Wm. Henry Rawle, for the complainants.

The difference between the two causes of action is exactly that between contract and tort.

Huston *v.* Clark, 9 WEEKLY NOTES, 316.

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March 29, 1883. THE COURT. This case arises upon exceptions to the Master's report. The Master passed upon two questions: *First*, as to the identity of the causes of action; *second*, as to the effect of the discontinuance. With regard to the first point, the Master reports that as the new bill took up the cause of action where it was dropped by the first bill, and contained matter occurring since that bill was filed (both matter of the same nature as the first bill, and consequent to the course there complained of, and also matter of an entirely different nature), it was for a new and separate cause of action. The view we take of the second point renders it unnecessary for us to decide the first. The learned Master was entirely correct in his disposition of this question. It is not for this Court to take to pieces the record of No. 4. We cannot undertake to say there was no valid discontinuance when the record of that Court says plainly that there was. If the discontinuance were obtained without leave, why did not the defendants have it stricken from the record? This they have not attempted to do. The fact, therefore, that there is no other suit pending between these parties is conclusive of the question. That there *has been* such a suit is of no consequence, and as we cannot review the proceedings of No. 4, we must consider that suit as never having been brought. The Master was perhaps right on both points, but certainly as to the second.

Exceptions dismissed and report confirmed.

Oral opinion by ALLISON, P. J.

PEIRCE, J., absent. E. A. B.

C. P. No. 1. March 11, 1884.

Brady v. Standard Loan Association.

Equity—Pleading—Demurrer — The rule that equity will not relieve against an executed contract does not apply in case of fraud or mistake—A demurrer to a bill on the ground of being uncertain and contradictory must allege the particular sections in which the alleged faults occur.

Sur demurrer to bill in equity.

This was a bill in equity by Brady against the Standard Loan Association and Jennings and Clothier, officers of the same, setting forth that complainant in 1871 became the owner of ten shares of stock in the defendant association, on which she had paid all the dues, assessments, and fines for ten years, amounting to over $1200. That her share "ran out" in 1881, and on demanding payment from Jennings, an officer in plainant being unlettered and unable to engage in litigation finally consented to receive three houses in payment of her claim; that Jennings afterwards refused to carry out the agreement, but agreed to pay $200 in cash, and convey two other houses to complainant. The conveyance was subsequently made, but the payment of the $200 has never been; that Jennings and Clothier had appropriated to their own use large sums of money belonging to the association.

The bill prayed (1) That the conveyances, or pretended conveyances, be set aside, and the complainant declared a member of the association. (2) That the defendants be enjoined from disposing of the assets. (3) That a receiver be appointed.

Defendants demurred on the grounds that the bill showed no cause for equitable relief; that complainant was estopped by her voluntary acceptance of the conveyance, and although she is in possession, the bill contains no offer to reconvey, besides being multifarious and contradictory.

Aaron Thompson, for demurrer.

The contract being executed, a Court of Equity will not interfere.

Jordan *v.* Woodhouse, 5 Luz. Leg. Reg. 141.
Penna. R. R. *v.* Lehigh Nav. Co., 12 Casey, 204.

Grady, contra.

C. A. V.

March 29, 1884. THE COURT. The demurrer to this bill in equity rests upon the general ground that the bill shows no ground for equitable relief, and, further, that it is uncertain and contradictory in its statements. If the demurrer had alleged the particular sections in which these faults appear, it might have been sustained. It is, however, general, and although the bill contains much foreign matter, and what is pertinent is poorly expressed, the Court cannot dismiss it, as there does appear to be ground for its intervention.

It is also insisted by counsel for the respondents that this Court will not relieve against an executed contract. This, as a general rule, is true; but there is an exception equally general in cases of fraud or mistake, and this case seems to come within this exception.

Demurrer overruled.

Oral opinion by ALLISON, P. J.

PEIRCE, J., absent. E. A. B.

C. P. No. 4. May 17, 1884.

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dant proceeds at his peril—Preliminary injunction shall be taken to be dissolved unless continued on motion, with notice and hearing within five days—May be dissolved within the five days—Will not be granted before hearing, when it may do greater injury to defendant by granting it, than is done to plaintiff by refusing it—No length of adverse user will deprive an adjoining owner of his right to close windows in a party-wall.

Sur motion for a preliminary injuction. Hearing on bill, answer, and affidavits.

The plaintiff's bill averred that he was the owner of the lot on which was the house No. 1315 Walnut Street, occupied as a private dwelling, and that the defendant owned the adjoining house and lot on the east, No. 1313 Walnut Street; that the defendant was erecting a factory building, to be used as a printing establishment, on the rear of his lot, to be six stories in height, and about 177 feet deep; that the west wall of defendant's building was built upon a party-wall, the foundation of which extended over and upon the plaintiff's ground, and was built as a solid party-wall to the height of about 16 feet from the ground, at which height three openings had been made, at the distances of 40 and 50 feet apart, the first opening being about 20 feet, and the second and third about 12 feet in extent; that the wall between these openings was a solid wall; that at each of these openings the wall receded within the line of the defendant's land about nine feet, so as to form an open space or well, with three sides, for supplying light and air to the defendant's building; on each of which three sides were windows, and that a skylight was to be made at the bottom of the well to light the first floor. The plaintiff averred that the openings in said wall were unlawful, and disturbed the privacy of the occupants of his house, and injured and diminished its usefulness and value; and that on May 5, 1884, he notified the defendant that he was infringing upon the plaintiff's rights. The prayer of the bill was for an injunction, and that the defendant be ordered to build up the openings in said wall, or to take it down.

The defendant filed an answer, in which he admitted that he is building a party-wall, not of uniform height, but without any unlawful openings in it, and set up that what the plaintiff called openings in the wall were only differences in the altitude of different parts of the wall; that there was nothing in the wall to prevent the plaintiff from building upon it, and from raising it to a uniform height, if he should so desire; that the wells give light and air to both properties; that they were wholly upon defendant's property, and were supported by brick piers and iron girders wholly upon his property, and which were no part of the party-wall; that the wall was begun on April 10, 1884, and no complaint was made until May 5, 1884; that defendant expected to occupy the building on June 15, 1884, and that an injunction to prevent its completion would cause him a heavy pecuniary loss; that the plaintiff was estopped by acquiescence and laches, and therefore was not entitled to an injunction.

The bill and answer having been printed, notice was given that a preliminary injunction would be applied for on Saturday, May 17, 1884. On that day the hearing of the regular motion lists and other cases having occupied the entire session of the Court until the hour of adjournment, THAYER, P. J., after looking at the bill and answer, and a model and photographs of the wall, said that this case would have to be continued until the following Saturday.

Francis Rawle (with whom was *Walter George Smith*), for the plaintiff.

I ask for a five days' injunction to restrain the defendant from proceeding with his building. The wall may be completed, and we will have to endure the nuisance for one or more years. The plaintiff has a good tenant, and may lose him.

C. Stuart Patterson, for the defendant.

I am prepared to go on with the argument now, or I will come in next Saturday for that purpose, but I object to an injunction being granted without a hearing. The wall is being properly built, the spaces unbuilt are lawful, and the plaintiff is not entitled to an injunction.

Francis Rawle, in reply.

It is the usual practice, I understand, to grant a five days' injunction on filing a bill and affidavits. We may be charged with laches.

[THAYER, P. J. No; that is not the practice. An *ex parte* injunction is granted in cases of emergency only, where delay would cause irreparable injury, or where notice would defeat its purpose. It is a preventive remedy and not a corrective. (Mammoth Vein Cons. Coal Co.'s Appeal, 4 Smith, 183; Audenried *v.* P. and R. R. R. Co., 18 Smith, 370.) The bill having been filed and notice given, the matter is *lis pendens*, and if the defendant goes on, it will be at his own peril. (Warren and Franklin R. W. Co. *v.* Clarion Land and Imp. Co., 4 Smith, 28.)]

[ARNOLD, J. There is no such process as a five days' injunction. When an *ex parte* injunction is granted, it shall be taken to be dissolved if a motion to continue it be not made and argued within five days after notice, unless otherwise specially ordered by the Court. (Equity Rules, § 75.) It may be dissolved on motion and counter affidavits, with notice, within the five days. (Dull *v.* Holl, 1 Phila. 258.) We may do greater injury to the defendant by issuing an *ex parte* injunction than we do to you by giving him an opportunity to be heard. (Richards's Appeal, 7

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P. F. S. 105.) Even if, after argument, we should conclude that this is not a case for a preliminary injunction, you may get full relief at the final hearing, when we may order the defendant to take down his wall, if that be necessary, or fill up the open spaces. (Clark *v.* Martin, 13 Wr. 289; Vollmer's Appeal, 11 P. F. S. 118.) No length of adverse use will deprive you of your right to close unlawful openings made without your consent. (Roudet *v.* Bedell, 1 Phila. 366; Milne's Appeal, 31 P. F. S. 54.)]

THE COURT. *Ex parte* injunction refused, and motion for preliminary injunction continued.

W. H. W.

Common Pleas—Law.

C. P. No. 1. December 20, 1883.

Lawrence v. The City.

Municipal claim—Involuntary payment—What constitutes—Suit to recover—Estoppel—A property owner who pays a claim for water-pipe in front of his premises, under a threat to cut off the supply, does so involuntarily, and may recover the amount on showing the claim to be bad. The city is estopped by an entry of satisfaction of a claim of record.

Rule for a new trial and in arrest of judgment.

This was a suit brought to recover the amount paid by plaintiff on a claim by the city for water-pipe laid in front of his premises. The city threatened to cut off the plaintiff's supply of water unless the claim was paid, whereupon plaintiff paid under protest.

On the trial the following facts appeared in evidence: In January, 1871, the city filed a lien against certain premises in the Twenty-second Ward for water-pipe laid in front of the same, and subsequently issued a sci. fa. and obtained judgment for want of an appearance. Defendant took a writ of error, and the City Solicitor being of opinion that the service of the sci. fa. was, under the ruling in Wistar *v.* City (5 Norris, 215), and Simons *v.* Kern (11 Norris, 455), clearly defective, and that the claim could not possibly be saved, satisfied the same of record January 31, 1881, and by the order as filed directed the Water Department to refuse all supply after the current year until the claim was paid.

On July 30, 1881, the plaintiff acquired title to the premises against which the lien had been filed, and at the expiration of the year was refused further water-service until the bill for the water-pipe was paid; thereupon he paid the bill under protest, and seeks to recover the same in the present suit.

The Court directed a verdict for the plaintiff, reserving the point whether, under the circumstances, the plaintiff is entitled to recover.

Beitler and *West*, City Solicitor, for the rule.

The city has power to make any condition it sees fit in supplying water to the citizens.

Girard Ins. Co. *v.* City, 4 WEEKLY NOTES, 557.
Smith *v.* Philadelphia, 31 Smith, 39.

A payment of taxes to prevent a sale, even under protest, cannot be recovered.

Union Ins. Co. *v.* Allegheny, 13 WEEKLY NOTES, 440.
Federal Ins. Co. *v.* Robinson, 1 Norris, 357.
Thomas *v.* R. R. Co., 1 WEEKLY NOTES, 621.

Where the demand is unfounded, a payment without restraint cannot be recovered.

Finnel *v.* Brew, 31 Smith, 364.
Natcher *v.* Natcher, 11 Wright, 496.
Lachey *v.* Mercer Co., 9 Barr, 318.
Colwell *v.* Peden, 3 W. 327.
Hospital *v.* Philadelphia, 12 H. 231.
Allentown *v.* Saeger, 8 H. 421.
Taylor *v.* Board of Health, 7 C. 73.
City *v.* Cooke, 6 C. 56.

A payment is not the less voluntary because it is a hardship to demand it.

Real Est. Sav. Inst. *v.* Linder, 24 Smith, 371.
Boas *v.* Updegrove, 5 Barr, 516.
Edgar *v.* Shields, 1 Grant, 361.
Lamborn *v.* County Com's, 7 Otto, 181.
Railroad Co. *v.* Coms., 8 Id. 541.
Ege *v.* Koontz, 3 Barr, 109.
Espy *v.* Allison, 9 W. 462.
Irvine *v.* Hanlin, 10 S. & R. 219.

Hall and *Thompson*, contra.

The action of the City Solicitor, in entering satisfaction, estopped the city from afterwards demanding payment from the plaintiff.

Bigelow on Estoppel, p. 387.
Gray's Appeal, 10 WEEKLY NOTES, 458.
Continental Bk. *v.* Bk. of Commerce, 50 N. Y. 575.
Water's Appeal, 11 C. 525.

As the city had no right to demand payment of the claim, it could not be made a condition to supplying the water. The plaintiff had a right to the supply.

Sheppard *v.* Milwaukee Gas Light Co., 6 Wis. 539.
Gas Light Co. *v.* Colliday, 25 Md. 1.
Ten Brook *v.* The City, 7 Philada. 105.

The payment was made to release what was, in some sense, a detention of property.

Fulham *v.* Down, 6 Esp. 26.
Cartwright *v.* Rowley, 2 Id. 723.
Mowatt *v.* Wright, 1 Wend. 355.
Steele *v.* Williams, 8 Exch. 625.
Morgan *v.* Palmer, 2 B. & C. 729.
Lowry *v.* Bourdieu, 2 Douglass, 472.
Taherne *v.* Gardner, 5 E. & B. 913.

December 29, 1883. THE COURT discharged the rule, and entered judgment on the point reserved in favor of plaintiff.

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C. P. No. 2. May 10, 1884.

Elkins v. Bremer et al.

Married women who have secured to them their separate earnings under the Act of 1872, may be sued without joining their husbands.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, on three promissory notes signed "The Louis Gross Brewing Company," in the margin of each note were written, The Louis Gross Brewing Company; Mrs. Theresa Bremer, John A. Gross.

The suit was brought against Theresa Bremer and Charles Bremer in right of said Theresa and J. Adolph Gross, trading as the Louis Gross Brewing Company, defendants.

The affidavits of defence of Theresa Bremer and of her husband, Charles Bremer, set forth that the said Charles Bremer was not a member of the firm defendant, and did not owe the plaintiff Elkins anything. That he had signed the articles of co-partnership simply to show his consent to his wife's contract; and that she had taken the benefit of the Act of April 3, 1872, securing to married women their separate earnings. It was further set forth that a receiver of the partnership defendant had been appointed.

Colesberry, for the rule.

THE COURT made the rule absolute, referring to Bonard *v.* Kettering, 12 WEEKLY NOTES, 345.

T. B. S.

C. P. No. 2. March 15, 1884.

In re Jos. Johnston Theil.

Adoption—Petition to rescind decree of—Rescission of the contract not being contemplated by the Act of May 4, 1855, will not be allowed.

Sur petition to revoke decree of adoption. The following were the facts:—

On April 28, 1883, Gustavus F. Theil presented a petition setting forth petitioner's desire to adopt Jos. Johnston, then nineteen years old, as his child, and the usual decree was thereupon made. On March 14, 1884, the petitioner presented the present petition in which he set forth that "the child had refused to be subject to the duties of a child, that he left the college where he had been matriculated, and left petitioner's home and removed to another State, where he engaged in a marriage contract against the kind but earnest protest of the petitioner, and has become a prodigal and undutiful son." The petitioner, therefore, prayed that the decree of adoption be revoked. The consent of the next friend (the brother), which had been given to the first petition, was likewise given to the second.

Keaton, for the petition, cited—

In re Blair, 11 WEEKLY NOTES, 239.

C. A. V.

March 17, 1884. THE COURT. The statute contains no provision for a rescission of the contract of adoption. After the child comes of age, perhaps he and his adopted parent may agree to rescind, but until then the child cannot consent, nor can any one waive his rights for him.

R. H. N.

C. P. No. 2. March 22, 1884.

Henderson v. Miller.

Practice—Appeal from Alderman—Non pros. for want of a narr.—Plaintiff must signify his election within a year from the taking of the appeal.

Sur rule to strike off judgment of non pros. for want of a declaration.

Appeal by defendant from judgment of a magistrate, entered September 1, 1880.

On October 25, 1881, the defendant filed a non pros. under Rule XXIX. (§ 122).

James P. Townsend, for the rule.

The plaintiff has the right to treat the transcript as a narr, and may rule the defendant to plead at any time after it is entered.

Nathans *v.* Cummings, 1 WEEKLY NOTES, 416.
Simons *v.* Kutz, Id. 553.

If the transcript has been filed, a non pros., entered under the rule of Court at the expiration of a year, will be struck off.

Allison *v.* McFadden, 14 WEEKLY NOTES, 210.

W. C. Hannis, contra.

The plaintiff must make his election within the year.

Paris *v.* Hein, 6 WEEKLY NOTES, 124.
Seidel *v.* Brecker, Id. 135.

THE COURT. Rule discharged. C. C. B.

[NOTE.—On an appeal from the judgment of a magistrate's court, the plaintiff may either file a declaration, or treat the transcript as such. In the latter case, he must signify his election within the time prescribed by Rule 29, either by giving notice of his intention to rely upon the transcript, or by ruling the defendant to plead to it. Where the appeal has been taken by the defendant, Courts of Common Pleas No. 3 and 4, and now Common Pleas No. 2, by the foregoing case, have held that notice to the plaintiff to make his election is not necessary before judgment of non pros. is entered; Ellis *v.* Pennington, 2 WEEKLY NOTES, 29; Paris *v.* Hein, 6 Id. 124; Snyder *v.* Hensel, 7 Id. 280; but Court No. 1, contra; Simons *v.* Kutz, 1 Id. 553; Allison *v.* McFadden, 14 Id. 210. As to notice of intention to treat the transcript as a declaration, see Gamble *v.* Graves, 7 Phila. 433; Paris *v.* Hein, *supra*; Ellis *v.* Pennington, *supra*; Govett *v.* Wiley, 13 WEEKLY NOTES, 98. In the last case an election to treat the transcript as a declaration was filed and held sufficient without notice to the defendant.

As to ruling the defendant to plead to the transcript, see Seidel *v.* Brecker, 6 Id. 135; Doerle *v.* Johnson, 7 Phila. 393; Levy *v.* Mustin, 3 WEEKLY NOTES, 220;

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Nathans *v.* Cummings, 1 Id. 416; Union Transfer Co. *v.* Copeland, 11 Phila. 365. After a rule to plead has been filed, the plaintiff may be compelled to serve the defendant with a copy of the transcript; Union Transfer Co. *v.* Copeland, *supra;* Nathans *v.* Cummings, *supra;* and if the defendant considers the transcript an insufficient statement of the cause of action, he may demur; Levy *v.* Mustin, *supra.*

As to waiver of right to enter judgment of non pros. by acts of the defendant, compare Wright *v.* Henry, 4 WEEKLY NOTES, 347; and Wilson *v.* Kelley, 2 Id. 482; with Snyder *v.* Hensel, *supra;* as to a declaration filed and judgment of non pros. entered on the same day, see Ellis *v.* Donaghy, 6 WEEKLY NOTES, 541.

See, also, Prichett *v.* Moss, 9 Id. 558; and Faries *v.* Weisel, 7 Id. 213.] W. S. R.

C. P. No. 4. March 29, 1884.

Geyn v. Clark.

Practice—Rule of Court—Attorneys—Notaries public—Affidavits made before attorney of affiant are null.

Rule for judgment for want of sufficient affidavit of defence.

Suit was brought upon a book account, and the affidavit of defence filed, which admitted a portion of the claim and made defence to the rest, was attested by counsel for the defendant as notary.

S. W. Cooper, for the rule, cited—

Rules C. P. 1884, Rule II. page 7.

F. C. Brewster, contra, asked leave to file a supplemental affidavit.

[THAYER, P. J. The rule is a new one, and leave should be granted.]

S. W. Cooper. All that is desired is judgment for the amount admitted.

THE COURT. Rule absolute, for the amount admitted to be due. S. H. T.

Orphans' Court.

Oct. 17, 1883.

Patrick Kelly's Estate.

Decedents' estates—Claim for services rendered—Where the claimant has rendered menial service to decedent, and no demand has been made for a long period of time, the law presumes payment—What proof of such claims is required.

Sur exception to adjudication.

At the audit of the account of decedent's executor it appeared that Mary Hammill, the claimant, was the grandniece of decedent's wife. About four years before decedent's death he wrote to her in Ireland to come to Philadelphia and live with him; she was at that time about sixteen years old. The claimant for four years performed menial services for decedent, and nursed him in his last illness. The decedent said to a witness, that he had sent for the claimant to live with him and to do by her as his own child. He added that his wife was not as liberal as she might be in buying clothes for the claimant, who was dissatisfied in consequence, and that "he thought it would be better to give her a little money as she went along to buy her clothing." That he did give her money was proved by the fact that on one occasion while claimant lived with him she sent a draft for $75 home to her parents.

In passing upon this claim, the Auditing Judge (ASHMAN, J.) found as follows: "It was objected to the claim that it was barred by the Statute of Limitations, the decedent having died more than six years before it was presented. The objection has often been refuted by the cases that decide that the executor or administrator is a trustee for creditors. (McClintock's Appeal, 5 Casey, 360.) The declaration of the testator that "he did not want her to leave him under any considerations," that "he would do by her as his own child," and that "it would be better to give her a little money as she went along," though made to third parties, were all competent to rebut the presumption that the claimant was there simply as a member of the family and a relation of his wife." $2 per week for 202 weeks, $404 was allowed as a "*quantum meruit.*"

To this ruling exceptions were filed.

Dolman for exceptions.

The decedent died in 1876. His widow and executrix died in 1882. This claim was not made until after the death of both.

The claimant was a domestic servant; there is a presumption in England that they are paid periodically.

Sellen *v.* Norman, 4 Carr J. P. 80.
Gough *v.* Findon, 7 Exch. p. 50, is followed in McConnell's Appeal, 10 WEEKLY NOTES; 1 J.
Houck *v.* Houck, 11 Id. p. 262.

Farley, contra.

The Auditing Judge found facts which show a contract, and the relationship is too remote to afford a presumption that her services were rendered gratuitously.

Kidder *v.* Boom Co., 12 Harris 193.
Gordner's Admrs. *v.* Heffley, 13 Wright, 163.
Smith *v.* Milligan, 6 Wright, 107.

October 27, 1883. THE COURT. The claimant is no doubt disappointed by the failure of testator to include her among his beneficiaries,

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when she was induced to believe the contrary, if the testimony as to his intention to "do by her as his own child," is to be relied upon. But this in no wise relieves her from the burden which the law casts upon all claiming as creditors of a decedent, of sustaining by clear and satisfactory proof the validity of the alleged indebtedness, and the liability of the decedent. The necessity for strict proof is nowhere more obvious than in cases like the present; a claim for menial services and attendance upon the decedent during a period of more than four years, never presented to him for payment during his life, and no effort made to render his estate liable for nearly seven years after his death. It is needless to say that such claims against decedents' estates are always to be regarded with the utmost suspicion, and they have been repeatedly disallowed by the courts, particularly where, as here, the circumstances show the existence of the family relation between the parties. The decedent was a granduncle of claimant, and she, by his invitation and request emigrated to this country, became an inmate of his household, and resided with him and his wife until he died. Claimant was about fifteen years of age when she arrived and entered the family of decedent, and she continued a member of his family during four years or more. It is for these years she now claims compensation for services as a domestic. The testimony shows that claimant was not considered as a household servant by decedent and his wife, who were childless, but in the light of one of their kindred, who was receiving a home, clothing and maintenance, and in return for which she assisted in and perhaps performed the greater part of the labor of the household. On one occasion, decedent, in conversation with a witness, stated that he had sent for the claimant "to live with them, and to do by her as his own child." Such a declaration would certainly not be made respecting one who occupied the position in his family of a hired servant. It was also shown that claimant was provided with money to purchase her clothing, and sufficient to send a draft home to her parents. It thus sufficiently appears, that, from the relations existing between claimant and decedent, she should be obliged to prove an express contract by the latter to pay her wages for her services. Hollowbush's Estate (36 Leg. Int. 149), Hess's Estate (Id. 451), and Houck *v.* Houck (1 Chester Co. Rep. 370; 11 Weekly Notes, 262), where it was held that a daughter who had rendered services to her parents as maid of all work, without an express promise by them to pay for the same, married, and after her marriage continued to render similar services as before, could not recover therefor, without evidence of an express contract made after the marriage. Nor will it be sufficient to prove mere loose declarations of the decedent. (Candor's Appeal, 5 Watts & Serg. 513.) It is not pretended in this case there was any express promise by decedent to pay wages, but the effort is made to render his estate liable as upon a *quantum meruit.* We think we have already shown that the claim cannot be sustained. The relationship *per se* would be insufficient to rebut the presumption of a promise to pay the law implies, where services are rendered and accepted with the expectation of receiving and rendering compensation therefor; yet, when accompanied by other facts and circumstances, it tends to rebut the presumption, and in many cases is held sufficient. (Horton's Appeal, 13 Norris, 62; Welch's Estate, 1 Pennyp. 9; Walker's Estate, Chester Co. Rep. 445.) The claimant is met, however, by the further difficulty, that, admitting she was employed as a domestic servant, she has offered no proof to overcome the presumption that she was paid her wages by decedent as they from time to time accrued. (McConnell's Appeal, 38 Leg. Int. 364, and Houck *v.* Houck, *supra.*) In the former case it was held that "in this country, as in England, where a person serves in the capacity of a domestic servant, and no demand for payment of wages is made for a considerable period after such service has terminated, the inference is either that the wages have been paid, or that the service was performed on the footing that no payment was to be made." The principle here laid down is directly in the way of any recovery by the claimant. Of course it is to be remembered this presumption is one of fact, and may be rebutted. But the claimant has failed to do so, and her claim must be disallowed. As was observed in Houck *v.* Houck, *supra*, by PAXSON, Justice, in regard to the claim in that case, so we may say respecting the present, there was no reason why claimant could not have collected her wages during the lifetime of her uncle, as he was in good circumstances, the owner of real estate, and abundantly able to pay. Instead of that she waits until after the death of decedent and his wife, the only parties who would in all probability be able to successfully oppose her claim, and then proceeds against the estate in the hands of the executor. It seems to us that such a claim is an afterthought, and was never contemplated by the claimant during the lifetime of decedent.

The exception to its award is sustained, and the adjudication corrected in the decree filed herewith.

Opinion by HANNA, P. J. E. F. H.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JUNE 12, 1884.* [NO. 27.

Supreme Court.

Jan. '84, 128. March 26, 1884.

McDermott's Appeal.

Husband and wife—Gift—Decedents' estates.

The earnings of a wife belong to her husband, save in those exceptional cases specified by Acts of Assembly. Such earnings do not therefore belong to the wife, unless the husband has made a gift of them to her.

A widow, carrying on a butchering business in premises belonging to her late husband, married again. Husband and wife continued to carry on the business, in which the husband was not versed. It was chiefly through her skill, industry, and economy that profits were realized. A portion of those profits were put aside in a savings fund in the wife's name, but there was no evidence to show that the husband knew of the existence of such deposit. Immediately after the wife's death the husband inquired for the deposit-book, and declared that the money was or ought to be his. On the settlement of the account of the wife's administrator:

Held, that the profits of the business all belonged primarily to the husband; that there was no sufficient evidence to show that he had made a gift of them to his wife, and that the husband was entitled to the sum in question accordingly.

Appeal of John McDermott from a decree of the Orphans' Court of Luzerne County distributing a fund in the hands of H. R. Hughes, administrator of Mary McDermott, deceased, wife of appellant.

The appellant claimed the sum of $4840.73 as his own property, this being the amount of a deposit which his wife at the time of her death had in the Miners' Savings Bank of Pittston. (See McDermott *v.* Miners' Savings Bank of Pittston, 12 WEEKLY NOTES, 13.)

The account was referred to an Auditor, by whom the facts were found to be as follows: The decedent married John McDermott in 1866 and died in 1875, leaving to survive her as heirs her said husband and six children, one by a husband named Rouse, four by one named Gerrity, and one by McDermott. Her husband, Gerrity, left her by will the use of all his property during widowhood, but the estate consisted almost entirely of the house and lot in Pittston, where McDermott's business was carried on, as hereafter stated. After Gerrity's death she kept up a thrifty business of some sort, until her son Martin had learned the business of butchering, and then she joined him as an assistant in the house left her by her husband. She and her son ran the butchering business until her marriage with McDermott, and the son continued in the same place for some time, and until McDermott and his wife moved in and took it off his hands, which was in 1869; they then ran the business until her death, in 1875. When they embarked in the business he was without experience as a butcher, having been a carpenter by trade; and he was also without any capacity to keep books, or do anything else requiring the ability to write. She assisted him in the shop, waiting on customers, kept the books, deposited the money, and drew the checks and notes—all in his name. There was kept at the same bank two accounts, one called a "business account," which was in his name, and one a deposit or "savings account," drawing interest, which was kept in her name. It was from this last account that the fund in dispute came. The bank books show that the business account commenced in December, 1869, with a deposit of $470, and from that time the deposits ran something like $200 per month. The savings fund account opens in November, 1872, with a deposit of $1400, followed by one January 2, 1873, of $400; March 19, $600; and at the end of 1873 this fund amounted to $2800. In June of 1874 the fund had reached $3873, when $500 was withdrawn by the wife; and at the time of her death the fund was $4840.73, as reported by the administrator in his account. During the first two of the six years that McDermott and wife occupied the Gerrity premises as a residence and butcher shop the rent was paid by her application of the sum on Gerrity's debts, and at her death the rent owed by McDermott on a lease from the guardian of the Gerrity children was $975, for which the administrator has been attached. It does not distinctly appear that Mrs. McDermott had any money or property of her own separate estate at the time of the marriage, except as above stated. It does appear that McDermott had at the time he went into business real estate valued at about $2000, which he sold. At the death of his wife he had a special certificate of deposit at bank in his own name of $1300, accounts on book, since collected, amounting to $1000, and a balance on the business bank account of $143.58. Except the rent account, his debts amounted to something like $1000, which were nearly all contracted in the business. Some of the creditors have attached the fund, but this will more fully appear in the report of the audit figures. Of the savings fund account $700 was deposited by the wife in checks drawn by her on her husband's business account, and the source of the balance of the fund is not directly proven, but we feel safe in finding as matter of fact that it came from the business, and was deposited by her in her

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own name, with his knowledge and consent, and that he intended it as a provision for his wife in case of misfortune in business. The savings bank book was found a short time before her death by her daughter in his chest, which was not under lock and key. The daughter gave the book to a friend, by whom it was delivered to the administrator. One of the terms printed in the savings bank book reads as follows: "Deposits made by married women, and by minors, of their own money and in their own names, cannot be withdrawn by their husbands, fathers, or guardians."

The Auditor was of opinion that the evidence showed that McDermott had made a gift of the fund in question to his wife. He awarded the sum to McDermott accordingly. Exceptions filed by McDermott to the Auditor's report were dismissed by the Court, and a decree of distribution entered as reported by the Auditor. McDermott thereupon took this appeal, assigning for error the decree of the Court.

H. P. Bayne and *Q. A. Gates*, for the appellant.

As there is no direct or positive evidence of any gift by John McDermott to his wife, the case falls within that class of cases "where the questions decided are inferences from other facts or conclusions from reasoning," which this Court may decide as well as the Court below.

Phillips's Appeal, 18 Smith, 130.
Sproull's Appeal, 21 Id. 137.
Moyer's Appeal, 27 Id. 482.
Hindman's Appeal, 4 Norris, 467.
Ulrich's Appeal, 2 Pennypacker, 455.

The intent to create this separate property, whether the gift be from a stranger or the husband, must be clearly established.

Rogers *v.* Fales, 5 Barr, 157.
Bradford's Appeal, 5 Casey, 513.
Crawford's Appeal, 11 Smith, 52.
Hill *v.* Earnes, 13 WEEKLY NOTES, 464.

There must be some positive, unequivocal act of gift and a mere permissive use by the wife will not divest the husband's title.

Mews *v.* Mews, 15 Beav. 529; 21 Eng. Law and Eq. 556.
Marshal *v.* Cruntwell, L. R. 20 Eq. 328.
Grant *v.* Grant, 34 Beav. 623; 11 Jur. N. S.
Dilts *v.* Stevenson, 2 C. E. Green (N. J.), 407.
Walter *v.* Hodge, 2 Swanston, 97.
Hanson *v.* Millett, 55 Me. 184.
Jennings *v.* Davis, 31 Conn. 134.
Shuttleworth *v.* Winter, 55 N. Y. 625.

No rules of the bank could protect the wife if she placed the money of some one else to her own credit. Equity will follow the fund.

Frazier *v.* Bank, 8 W. & S. 18.
Bank *v.* Jones, 6 Wright, 536.
Bank *v.* King, 7 Smith, 202.
McDermott *v.* Bank, 4 Outerbridge, 285.

John Lynch and *H. W. Palmer*, for appellees.

Where a man expresses an intention to give a thing, the subsequent possession of the thing by the donee is sufficient to authorize the presumption that the gift was actually made.

McCluney *v.* Lockhart, 1 Bailey (S. C.), 117.
Rhodes *v.* Childs, 14 Smith, 18.

A near relationship of the parties and certain other circumstances may be regarded as favoring a transfer as a gift.

Hepworth *v.* Hepworth, L. R., 11 Eq. 10.
Rhodes *v.* Childs, *supra*.
Bland *v.* Macculloch, 9 W. R. 65.
McDonald *v.* Crockett, 2 McCord (S. C.) Ch. 130.
Carter *v.* Buchanan, 9 Ga. 539.
Nichols *v.* Edwards, 16 Pickering, 62.
Betts *v.* Francis, 30 N. J. Law, 152.
Henry *v.* Harbison, 23 Ark. 25.
Towers *v.* Hagner, 3 Wharton, 51.

A gift fully performed cannot be revoked without the consent of the donee.

Ellison *v.* Ellison, 6 Vesey, 656.

A man who deposits money in a savings bank in the name of his wife and has the bank book made in her name and delivered to her cannot maintain an action against the bank for its refusal to pay the money to him, the reason being that the money is hers and not his.

Sweeney *v.* Bank, 116 Mass. 384.
McGraw *v.* Tatham, 84 N. Y. 677.

When a man invests money in the name of a wife or child the presumption is one of gift.

Dummer *v.* Pitcher, 2 M. & K. 262.
Gosling *v.* Gosling, 3 Drewry, 335.
Kingdon *v.* Bridges, 2 Verner, 67.
Marshal *v.* Crutwell, L. R., 20 Eq. 328.
Bowser *v.* Bowser, 1 Norris, 57.

The credit on the book of the bank is *prima facie* evidence of ownership.

Bank *v.* Mason, 14 Norris, 117.
Bank *v.* Tyler, 3 W. & S. 373.
Frazier *v.* Bank, 8 Id. 18.
Jackson *v.* Bank, 10 Barr, 61.
Bank *v.* Jones, 6 Wright, 541.
Stair *v.* Bank, 5 Smith, 368.
Arnold *v.* Bank, 21 Id. 290.
Egbert *v.* Payne, 3 Outerbridge, 239.

A husband may consent that his wife's earnings shall be hers.

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the husband save in certain exceptional cases specified in various Acts of Assembly. Unless, therefore, it can be shown that there was a gift of the money by the appellant to his wife, the decree of the Court below cannot be sustained.

In the report of audit the learned Judge came to the conclusion that it was a gift, and in his opinion upon the exceptions says: "Was it a gift? Why not conclude that it was? What is there unreasonable about it?" We answer, we cannot conclude it was a gift because there was no evidence of it, and money which confessedly belongs to a man cannot be taken from him without evidence.

We do not differ from the learned Judge as to any of the facts found, but we cannot concur in his deductions from those facts. The reasons upon which he based his conclusions may be summarized as follows: That the business was carried on at the old place of business of the wife; that it was chiefly through her skill, industry, and economy, aided by her friends, that the money was acquired; that he had a special deposit of his own, and that she did not conceal from him the fact that she was keeping the particular deposit in question in her own name; that immediately after her death he inquired for the savings bank book and said to the daughter something about the money of right should belong to him; and lastly, assuming that he knew the fact of deposit in her own name, he could not have placed the fund more completely under her control and exclusive possession.

Upon such weak and inconclusive facts as these, we are asked to hold that the appellant intended that the amount of this deposit, $4840.73, by far the larger part of his estate, should become the absolute property of his wife, so as to be entirely beyond his control, and go to her next of kin in case of her death. There is no evidence that he knew of this deposit in his wife's name until after her death; there is evidence that he was an ignorant man and could neither read nor write; that his wife was an active business woman; that she attended to the shop, kept the books, and did most of the bank business. Even had the fact been that the proceeds of the business were kept by his wife in her own name with his knowledge, it would afford no presumption under the circumstances that he intended an irrevocable gift to her of the money. Her possession of it was his possession, as much so as if she had kept the money in a safe or a bureau instead of in the bank. It is a common thing in every-day experience for a woman to have the possession and control of her husband's money and the husband of the wife's, and if from such fact we were to draw the conclusion that the custodian was the owner of the money, it would lead to unexpected results. But in this case there is no satisfactory evidence that he ever knew the deposit was in his wife's name; on the contrary, the presumptions are all the other way. And, as before observed, no matter how much the wife's aid may have contributed to make the money, that circumstance did not change the fact of its ownership, nor does it raise any presumption of a gift, while the claim he made when inquiring for the bank book tends to negative such presumption.

That the mere possession of money by the wife is not sufficient evidence of her ownership was settled by Parvin *v.* Capewell (9 Wr. 89), where it was said: "A mere gift of money to a wife is not a settlement of it as her separate estate, for it may be for safe keeping and deposit, without any intention to divest the husband's title. And her possession of funds ordinarily implies no more than that she is holding them for her husband." This is settled law, and is peculiarly applicable to this case. There is not a scintilla of proof of any intention of the appellant to make a gift of this money; nothing can be implied from the facts beyond a mere custody thereof on the part of the wife.

The cases cited by the learned Judge do not sustain his conclusions. Herr's Appeal (5 W. & S. 494) was a case in which there was strong evidence of a gift, and this Court said:—

"But such gift must be established by clear and convincing proof, not only of the act of donation and delivery, but of her separate custody of it?" The same doctrine is held in Tripner *v.* Abrahams (11 Wr. 220). In Bachman *v.* Killinger (5 P. F. S. 414), it was held that the possession by the wife of the husband's moneys, security, and property is very slight evidence of the transfer of the ownership, and his possession of her chattels ought to be considered still less evidence of title in him. In Crawford's Appeal (11 P. F. S. 52) the husband informed his wife that he had added $3000 to her money; he directed his clerk to credit her in his books with the $3000 as cash received from her, and it was done. He credited her regularly with the interest of that sum in connection with the other sums belonging to her until his death. Held that this was an executed gift followed by an express trust for his wife and payable to her from his estate, but that it could not be supported as a debt. In addition, it appeared that the husband had that amount of his wife's money in his possession. Here, there was a plain intent to make a gift followed by a positive unequivocal act. But where there is a mere permissive act, such as to allow the wife to be a custodian of his money, I know of no case in which it has been held that a gift can be implied from such act.

We need not pursue the subject further. We can see nothing in the case from which a gift of

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this money by the husband to the wife can be reasonably implied.

The money appears to have been received by the administrator from the cashier with the understanding that the question of ownership should be settled in the Orphans' Court upon distribution. There also appears to be a proceeding pending in the Orphans' Court to strike this item from the administration account. As the money has actually gone into the estate of the wife, we may treat the appellant as her creditor, and to prevent circuity of action we have concluded to dispose of the main question upon this appeal.

The decree is reversed at the costs of the appellees, and it is ordered that the deposit, less the amount due the attaching creditors, be paid to appellant.

Opinion by PAXSON, J. J. H. W.
L. L. JR.

Jan. '84, 274. February 28, 1884.

Gilroy v. Commonwealth.

Quo warranto — District Attorney—Practice—Elections—School Board—Vacancies—Act of June 13, 1836—Act of May 3, 1850.

A writ of quo warranto may issue on the information of a district attorney to test the right of certain persons to exercise the functions of a school board.

It is not necessary that there should be a previous rule to show cause why such writ should not issue, as, if it appears at any time during the proceedings that the same was improvidently issued, the Court will refuse to entertain it.

Where by mistake a school board has been organized with too many members, a whole new board cannot be chosen at the ensuing election. The vacancies occurring in the board by resignation, or by the completion of terms of office, can alone be filled.

Error to the Common Pleas of Lackawanna County.

Quo warranto at the relation of E. W. Semerell, District Attorney, against Richard Gilroy, John Morrow, John Corcoran, John Carden, Patrick Loftus, and Michael Coyne, exercising the duties of the office of school directors of the borough of Archibald.

A motion was made to quash the writ on the following grounds: (1) Because it was granted

On the trial, before HAND, A. L. J., the following facts appeared: The borough of Archibald is entitled to six school directors and no more. In 1879, under a mistaken construction of the law three extra directors were elected. The board as organized had accordingly nine members. The board as thus organized continued to transact business for some time without objection. In February, 1880, the terms of office of two of the lawful directors expired, and two successors were duly elected. Some time after this, but prior to June, 1881, the three extra and unlawful members of the board resigned and withdrew, leaving the board composed of six members, the lawful number.

At the election in February, 1881, there were two vacancies in the board, which would occur in the ensuing June, to be filled. A number of the citizens, however, believing the whole board to be irregular, voted for six school directors (the defendants) so as to constitute an entire new board. John Morrow and John Carden received the highest number of votes at the election. The former was offered a seat and declined, but the latter was refused admittance to the board. The six defendants thereupon withdrew, took possession of the school property and assumed the duties of the office of school board.

The Court charged that in the spring of 1881 there were but two vacancies. That John Morrow and John Carden were legally elected to fill these vacancies. That the former had waived his rights by refusing to act; but that Carden was entitled to a seat.

Verdict and judgment for Carden accordingly, and judgment of ouster against the other defendants.

The defendants thereupon took this writ, assigning for error, *inter alia*, the action of the Court in ordering the writ to issue without a rule to show cause, the refusal to quash the writ and the charge of the Court as above.

S. B. Price, for plaintiffs in error.

A *quo warranto* should not issue at the suit of a private relator without a rule to show cause.

Commonwealth *v.* Jones, 2 Jones, 365.
Murphy *v.* Farmers' Bank, 8 Harris, 415.

The District Attorney is not a Deputy Attorney-General, and has no authority to file suggestions for *quo warranto*. .

Commonwealth *v.* Commercial Bank, 4 Casey, 395.
Commonwealth *v.* Reed, 18 Pitts L. J. 131.

The relator had no special interest in the office.

Commonwealth *v.* Horne, 31 Leg. Int. 240.

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Murphy *v.* Farmers' Bank, 8 Harris, 415.
Commonwealth *v.* Cluly, 6 Smith, 272.

The Act of May 3, 1850, vested in the District Attorney an independent authority, although it did not take away the power of the Attorney-General.

Commonwealth *v.* Commercial Bank, 4 Casey, 392.

March 31, 1884. THE COURT. The proceeding in this case has its foundation in a writ of *quo warranto*, issued at the instance of the District Attorney, to try by what right Richard Gilroy, John Morrow, John Corcoran, John Carden, Patrick Loftus, and Michael Coyne exercise the office of school directors in the borough of Archibald. We think the facts of this case were properly disposed of in the Court below. It was certainly a mistake for the citizens of this district in February, 1881, to elect a full board of directors. The learned Judge, who directed the trial of this case in the Court below, properly instructed the jury that, at that time, there were but two such officers to elect, who would in regular order take the places of those whose terms expired in the month of June following, and that the election of the other four was a nullity, and must be disregarded. Not less correctly has the case of John Morrow been disposed of. This man was properly and regularly elected, and might have had his seat had he chosen to take it; but having refused to sit with the legal board, he occasioned a vacancy which was properly filled by appointment, and he thus forfeited his right by his own act.

It is contended, however, that the writ in this case ought to be quashed for the reason that the District Attorney has not the power to file suggestions for a *quo warranto* as had the Deputy Attorney-General under the Act of June 14, 1836, and that treating the writ as having been issued at the suit of a private person, it ought not to have been allowed but upon a previous rule to show cause. Neither of these positions can be sustained; the first because the Act of May 3, 1850, has, in express terms, vested the District Attorney with all the powers which formerly belonged to the Deputy Attorney-General. In the case of the Commonwealth *v.* The Commercial Bank (4 Casey, 391), the only question relating to the subject in hand was whether the Act of 1850 did not take away the power of the Attorney-General to institute the proceeding in *quo warranto*. It was held that it did not; but at the same time it was said that the Act was designed to clothe the District Attorney with an authority independent of that of the Attorney-General. In other words, he who occupies the position formerly filled by the deputy, now takes the place of a principal whose powers are measured by those which previously belonged to the deputy.

As to the second position assumed as above stated. Whilst in the Commonwealth *v.* Jones (2 Jo. 326), a case in which the writ was issued at the instance of a private prosecutor to try the right of an incumbent to the office of Mayor, it was held that such process would be granted only after a rule to show cause, yet the subsequent cases of Murphy *v.* The Farmers' Bank (8 Harris, 415), and the Commonwealth *v.* Cluley (6 P. F. S. 270), have so modified this decision as to hold that the rule to show cause is not indispensable. In such case, the practice is analogous to that prescribed by the British Statute of 9 Anne, under which the writ was allowed by the Court, and as the matter thus rests throughout in the sound discretion of the Court, if it appears at any time during the trial that the writ issued improvidently the Court may refuse to entertain it. This removes the necessity of a strict insistence upon the rule to show cause, since the defendant does not thereby lose his opportunity of showing that the suggestion should not have been entertained.

The material assignments of error being in this manner disposed of, the others become of no consequence, and are, therefore, passed without special consideration.

The judgment is affirmed.

Opinion by GORDON, J. E. A. B.

July, '83, 132. February 13, 1884.

Wanger's Appeal.

Decedents' estates—Exemptions—Liens—Sale.

A. died, leaving a wife and son. By his will he devised his real estate to his wife. The real estate was incumbered by a judgment against A. and by debts of A., which upon his death became liens against it. Subsequently the wife died, also indebted. The real estate being sold under order of Court for payment of her debts: *Held*, that the son was entitled to claim the $300 exemption out of the proceeds, in priority to the claims of his mother's creditors, but that his father's creditors must be satisfied in full before he could claim such exemption.

Interest could not be recovered upon the judgment against A. after the confirmation of the sale in the above case.

King's Appeal, 3 Norris, 345, and Himes's Appeal, 13 Norris, 381, distinguished.

Appeal of Abram Wanger, guardian of William Lewis, Jr., from a decree of the Orphans' Court of Chester County, dismissing exceptions to the report of the Auditor appointed to adjust, settle, and audit the account of George Little, administrator of Margaret Lewis, and distribut-

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ing the balance in the hands of the said administrator.

Before the Auditor (John H. Brinton, Esq.) the facts of the case appeared to be as follows: William Lewis died November 21, 1878, leaving a widow, Margaret Lewis, and one child, William Lewis, Jr. His will contained this clause:

"I give, devise, and bequeath all my estate, real and personal, that shall be left after payment of my just debts, to my beloved wife, Maggie Lewis, absolutely."

His real estate was subject to the lien of a judgment confessed by him to Joshua N. Pierce for $1000, and by his death some simple contract debts became liens thereon. These debts were never paid, but the widow paid the interest on the Pierce judgment, in advance, to April 1, 1882. On November 3, 1881, she died intestate. On November 17, 1881, letters of administration were granted upon her estate to George Little. On December 9, 1881, Wanger, the guardian of William Lewis, notified Little that his ward elected to retain $300 worth of the real estate belonging to his mother, and asked that the same be appraised and set aside to him. Appraisers were appointed accordingly who, on December 12, 1881, reported that the real estate could not be divided, and this report was the same day confirmed. On December 13 Little, administrator, presented a petition to the Court, praying for an order of sale of the real estate of his intestate (being the same whereof her husband had died seised) for payment of debts of Margaret Lewis. A sale was ordered accordingly, the proceeds of which constituted the fund in dispute. The administrator, upon filing his account, claimed credit for the sum of $300, claimed by William Lewis out of his mother's estate. The matter being referred to an Auditor, Pierce objected to the allowance of this credit.

The Auditor disallowed the claim, made no distinction between the two funds realized by the sale of realty and personalty respectively, and distributed the amount in the administrator's hands, so as to pay all the claims against the estates of William and Margaret Lewis, without interest, leaving a small balance for the minor on account of his claim.

Exceptions being filed to the Auditor's report, the Court (FUTHEY, P. J.), after argument, delivered an opinion, from which the following is an extract:—

"The question is presented on exception to it is held that the minor child of a widow is entitled to the benefit of the Act of April 14, 1851. The Auditor, in coming to a contrary conclusion, was governed by the case of King's Appeal (3 Norris, 345), and his attention was not called to the later decision in 13 Norris, in which King's Appeal is distinguished and limited to its peculiar facts. (See also Kelly's Estate, 1 Luz. Leg. Rep. 365.) We are of opinion, however, that the minor cannot claim such exemption as against the debts of William Lewis, which are liens upon the land, and entitled to be paid from its proceeds. His mother took the land by the devise incumbered with these liens. All she obtained, or was entitled to under his will, was what remained after the payment of the debts of her husband. (Eberhart's Appeal, 3 Wright, 509; Rishell *v.* Rishell, 12 Wright, 243.) After the payment of these liens, the minor is entitled, under his claim, to whatever remains of the proceeds of the real estate. He is entitled to this as against the debts of his mother, from whose estate he claims the exemption."

A decree was accordingly entered, separating the fund produced by the sale of the realty from the proceeds of personalty, and awarding from the former fund the full amount of their claims to the various creditors of William Lewis, together with interest on the Pierce judgment from the date of the confirmation of sale. The residue of this fund was awarded to Wanger as guardian of William Lewis, Jr.

Abram Wanger thereupon took this appeal, assigning for error, *inter alia*, the refusal to allow the minor $300 out of the realty, and allowing interest on the Pierce judgment after the confirmation of the sale.

Abram Wanger, for appellant.

The minor is entitled to $300 in preference to any creditor.

Act of 1851, Purdon's Digest, 416.
Himes's Appeal, 13 Norris, 381.

The Orphans' Court has sufficient equity power to allow this claim.

Steffy and Shimp's Appeal, 26 Smith, 94.

The creditors released William Lewis, and made Margaret Lewis their debtor by accepting interest from her.

Wm. M. Hayes, for appellee.

The case is ruled by—

Eberhart's Appeal, 3 Wright, 509.
Rishell *v.* Rishell, 12 Id. 243.

February 25, 1884. THE COURT. The

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from him property of his wife, which the statute expressly gives him. We declared the Act did not intend to apply to the property of a wife. In the latter case, the question did not relate to the distribution of the property of a wife, but to the property of a widow. The rights of a husband did not arise. It follows so far as that part of the case is presented this decree is right; and the Court was also right in holding that the land passed to the mother incumbered by the liens with which it was charged when she acquired it. There was error in allowing any interest on the judgment in favor of the appellee, Pierce. The Auditor allowed none. No exception was taken to this decision. The Court gives no reason for the allowance. It was evidently inadvertently made. To the extent of the sum allowed for interest, the decree must be modified.

And now it is adjudged that so much of the decree as orders the sum of fifty dollars to be paid as interest on the judgment of Pierce, the appellee, be reversed and set aside; and said sum be decreed to the appellant as guardian of William Lewis, and the remaining portion of the decree be affirmed. It is further ordered that the appellant and the said appellee each pay one-half of the costs of this appeal.

PER CURIAM.

CLARK, J., absent. C. K. Z.

Jan. '83, 140½. May 9, 1883.

Juniata Building and Loan Association v. Hetzel.

Evidence—Parol evidence to vary written instrument—Custom—Building Association—Mortgage.

A., a member of a building association, borrowed money from it and gave a mortgage on property belonging to his wife, in which she joined. Her acknowledgment was taken by a justice of the peace, who was also vice-president of the Association, and it was therefore held to be invalid and the land discharged. A. had also executed a bond in favor of the Association on which the defendant was surety, and in a proceeding on this bond it was

Held, that it was error to allow the defendant to testify that it was the custom of the Association to secure its loans by real estate security, which was treated as primary security and was first resorted to, and that he would not have signed the bond had it not been for the verbal agreement that the land mortgaged should be first liable for the repayment of the loan.

Held further, that since the officers of the Association were authorized by its by-laws to take either a bond or a mortgage as security for loans, they might take both, and in that case the presumption would be that both were relied on, and that the Association would not be restricted to the pursuit of one before the other.

In such a case it would have been competent for the defendant to prove a verbal agreement that the bond should not be resorted to until the mortgage security was exhausted, and that the latter had been lost through the carelessness of the plaintiff.

Error to the Common Pleas of Bedford County.

Judgment entered on a bond, by the Juniata Building and Loan Association against John K. Taylor, Mary E. Weaverling, and J. J. Hetzel.

On the trial, before BAER, P. J., the following facts appeared: John K. Taylor borrowed $600 from the Juniata Building and Loan Association, and together with his wife gave a mortgage on a house and lot belonging to her, as security therefor. A bond was also executed by Taylor with the defendants, Weaverling and Hetzel, as sureties. Mrs. Taylor's acknowledgment of the mortgage was taken before J. A. Gump, a justice of the peace, who was also vice-president of the corporation plaintiff, and for that reason, on default being made and a writ of scire facias issued, the Court held the acknowledgment invalid and the land mortgaged discharged. Plaintiff then entered up the bond. On petition of Hetzel the judgment was opened as to him, and he was let into a defence.

Defendant offered to prove by his own testimony that the said Hetzel was security on a judgment bond which was given to the plaintiff as collateral security for a loan granted by said Association to John K. Taylor, that it was the practice or custom of the said Association to secure its loans by real estate security in the first instance; that such real estate was treated as the primary security, and was first resorted to upon the collection of the loan; that the mortgage in this instance was so taken and treated, and that in addition it was the custom in all cases to require from the borrower a bond with some third person as bail; that the bond was not entered but filed among the papers of the Association, to be resorted to after the mortgage or other real estate security was exhausted, and not till then; that the bond which the defendant signed in this case, was given with this understanding; that the land mortgaged in this case was ample to pay the debt, and that the mortgage security was lost through the carelessness of the plaintiff in having the said mortgage acknowledged before its own vice-president. This to be followed by evidence that under the constitution of said Association no loan could be made except upon real estate security; and that on the day this loan was made a resolution was passed by the board of directors that Taylor should have the money when his papers were *properly* executed. That the papers were not properly executed.

Offer objected to by plaintiff on the ground that it was not competent to contradict the bond

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in this case, except on the ground of fraud or mistake. That proof of a parol agreement was not competent unless it was made with the officers of the Association. That proof of the practice or custom of the Association in regard to other loans was not competent, and that the evidence was irrelevant and inadmissible. Objection overruled. Evidence admitted. Exception. (First assignment of error.)

Defendant being on the stand, was asked: Whether he would have signed the bond in suit unless it had been understood and agreed at the meeting of the directors that the real estate of Taylor and wife should be mortgaged as security for the loan, and be first liable for its repayment. Objected to by plaintiff on the ground that the question was leading; the witness was the defendant himself, and had already been asked as to what occurred at the meeting of the directors, and had failed to say that there was any such express understanding or agreement. He should first have been asked what the agreement was and who made it on the part of the Association, before he could assign it as a basis for his action. Objection sustained and offer rejected in the order stated, but the evidence was declared admissible if the witness was asked to testify in the inverse order of the offer, and the leading questions avoided. Exception. (Second assignment of error.)

Plaintiff requested the Court to instruct the jury:—

That the evidence to set aside a solemn instrument of writing on the ground of a parol contemporaneous agreement, or of fraud, must be clear, precise, and indubitable, and that there is no such evidence in this case, and their verdict must be for the plaintiff.

Answer. The law is well stated in this point. A solemn instrument in writing can only be set aside on the ground of a parol contemporaneous agreement, or on the ground of fraud, by clear and satisfactory evidence. Whether in this case there is proven such clear and satisfactory evidence of a *contemporaneous agreement*, or of *fraud*, is a question of fact, to be decided by the jury. If the jury find there is no such clear and satisfactory proof, the verdict should be for the plaintiff. (Fourth assignment of error.)

Verdict for defendant, and judgment thereon. Plaintiff thereupon took this writ, assigning for error the admission of the evidence above set out, and the answer to the above point.

A. King (*W. M. Hall* with him), for plaintiff in error.

A party who seeks to contradict a solemn instrument of writing on the ground of fraud, or constructive fraud, by mere oral evidence, must do it by clear, precise, and indubitable evidence.

Stine *v.* Sherk, 1 W. & S. 195.
Miller *v.* Smith, 9 Casey, 386.

To warrant this verdict there should have been full, complete, and satisfactory evidence limiting the defendant's liability, or changing the terms of the instrument as signed.

Woods *v.* Farmare, 10 Watts, 195.

John Cessna (with him *J. B. Cessna* and *Russell* and *Longenecker*), for defendant in error.

It is well settled that if through any neglect on the part of the creditor, a security, to the benefit of which a surety is entitled, is lost or *not perfected*, the surety is discharged.

Strange *v.* Fooks, 4 Gifford, 408.
Wulff *v.* Jay, L. R. 7 Q. B. 756.
Burr *v.* Boyer, 2 Nebraska, 265.
Straton *v.* Rastall, 2 Durn. and East, 366.
Brandt on Suretyship, § 387.

October 1, 1883. THE COURT. No principle is better settled than that parol evidence is admissible to show a verbal contemporaneous agreement, which induced the execution of a written obligation, though it may vary or change the terms of the written contract. Therefore it was competent for the defendant to prove, if he could, that it was agreed before and at the time he signed the bond that it should not be resorted to until after the security of the mortgage was exhausted, and that the security of the mortgage was lost through the plaintiff's negligence. But evidence of the practice or custom of the Association in dealing with other persons was incompetent. There was no proof, nor offer of proof, of either a general or local custom; nor was there any usage of trade or previous like dealings between the parties to the bond. It was error to admit so much of the offer which constitutes the first assignment, as relates to and is founded upon an alleged custom.

The facts from which inferences are to be drawn are to be detailed by the witnesses, and the work of inference is for the jury. Under the rule admitting parties to testify in their own behalf, where the character of the transaction depends on the intent of the party, it is competent for him to testify what his intention was. His answer is, of course, not conclusive, but to be considered with other evidence. (Thurston *v.* Cornell, 38 N. Y. 281; Cortland Co. *v.* Hoskimer Co., 44 Id. 22; Snow *v.* Paine, 114 Mass. 520.) Where a plaintiff had conveyed property to his wife and it was sought to impeach the deed on the ground that it was fraudulently made, it was held that inquiry into his intention and motive in making the deed to her being relevant and material, it was competent for him to testify that he made the deed in good faith. (Thacher and Wife *v.* Phinney, 7 Allen, Mass. 146.) In a carefully considered case it was re-

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marked that the authorities that intent may be testified to, show no more than this: Where the doing of the act is not disputed, but is affirmed, and whether the act shall be held valid or invalid hangs upon the intent with which it was done, which intent from its nature would be formed and held without avowal, then he upon whom the intent is charged may testify whether he secretly held such intent when he did the act. This does not apply to the making of contracts, and a party to a contract shall not testify his undisclosed purpose or intention to nullify words and acts relied upon by others, which in themselves *prima facie* evidence the agreement. Minds cannot meet where one keeps to itself what it means to do. Where the oral bargain goes before the written agreement, signed and delivered without qualification, one of the parties shall not testify that he meant something else. (Dillon *v.* Anderson, 43 N. Y. 231.) In that case the defendant alleged a verbal agreement that another person was also to sign the bond, and he was not allowed to answer the question, "Did you intend to make an individual contract?"

In a suit on bonds the defendant was asked in chief: "What was the inducement that led you to sign the bonds and mortgage?" "Did you sign these bonds and the mortgage relying at the time upon the contemporaneous agreement in parol?" "In consequence of the acts and declarations of Mr. Colt, did you sign these papers?" which were overruled, but he was permitted to state all that was said and done before and at the time of the execution of the bonds. This Court held that no principle would have justified the Court below in admitting such interrogatories: that testimony of the unexpressed intent, motive, or belief of the defendant was inadmissible; and that the thoughts of one party to a contract cannot be proved to bind the other. (Spencer *v.* Colt, 89 Pa. St. 314.)

The defendant being a witness in his own behalf was allowed to testify that he would not have signed the bond unless it had been agreed that the real estate of Taylor and wife should be mortgaged as security for the loan and be first liable for its repayment. That was error, and the second assignment must be sustained.

The plaintiff's by-laws provided that the treasurer shall have charge of all deeds, bonds, mortgages, etc., on which money is loaned; that the treasurer and solicitor shall prepare all bonds, mortgages, contracts, and other writings to be given or taken; that the borrower "shall secure the repayment of said loan with legal interest, by satisfactory bond or mortgage upon real estate in the county of Bedford;" and that the president, secretary, and solicitor shall examine all papers offered as security for loans. These regulations were for the guidance of the officers and to a great extent the observance of them was a matter that alone concerned the Association and its officers. They authorized the officers to take either a bond or mortgage for a loan; both could be taken without wrong. If both were taken with sureties on the bond, the presumption would be that the officers relied upon the security of both, and that the Association was not restricted to the pursuit of one before the other.

At a meeting of the Association, Taylor, by proxy, bid for money and was a successful bidder; the proxy gave the name of J. W. Trimbath as surety; the board of directors resolved that "when papers are properly executed, Taylor is to have the money." Hetzell, the defendant, was a director of the Association, attended and took part in the meetings; he was Taylor's proxy. At a subsequent meeting of the board, the solicitor brought in the mortgage, signed by Taylor and wife, acknowledged before John A. Gump, a justice of the peace, who was vice-president of the Association. Trimbath refused to go on the bond, for which cause the papers were reported incomplete. After the meeting, Taylor arranged with Hetzel to become surety with Mrs. Weaverling, and he signed below her name, knowing at the time that the vice-president had taken the acknowledgment of the mortgage. He sets up an agreement of which he thus testifies: "Q. What was agreed and understood with reference to the security on the real estate? Ans. My name was not mentioned in connection with the security." "Q. What was understood and agreed? A. It was understood that this farm belonged to Rosanna Taylor and the mortgage was to be on it." "Q. Was or was not your subsequent action in reference to that agreement? A. It was based entirely on what took place in the board of directors that night." Q. "What did you do? A. After this time I signed this bond of John K. Taylor for $600, as I understood." "Q. Was there any agreement as to how this loan was to be secured, and if so, what was said? A. That John K. Taylor comply with the constitution and by-laws was the agreement." "Q. In what particular? A. That the mortgage should be given on real estate as security in addition thereto. That there should be a judgment bond with additional security." This is his statement of what was done and said to constitute an agreement. None was made with Trimbath. None was made with himself. The meetings were all before he signed the bond; at them, his name was not mentioned as security—it was afterwards that Taylor asked him to sign the bond. All that the directors did was to pass the resolution. Neither resolution nor by-laws declare that the mortgage

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shall be primary security, and that the bond shall only be security for the sufficiency of the mortgage. He repeatedly declared in his testimony that he would not have signed the bond had it not been for that agreement; but as already seen, it was inadmissible for him so to testify; neither was it competent for him to infer an agreement. Taking the statement of the defendant as to what was actually said and done as true, the plaintiff's point should have been affirmed.

Although we consider the competent testimony of the defendant, even if supported by many witnesses and corroborating circumstances, utterly insufficient to establish a verbal contemporaneous agreement, to avoid misapprehension we remark the question, whether an equitable claim can be established by the uncorroborated testimony of the claimant, when denied by the opposite party on oath? The defendant seeks to escape liability on the ground of a verbal agreement that induced him to sign the bond, because it shifted his position as it appears on the face of the bond to a secondary one which cannot be reached until after exhaustion of another security. He sets up an equitable defence, and contends that if the testimony of himself stands alone and is contradicted by a dozen witnesses, it remains for the jury to determine the facts involved. This is true as respects every question of fact in any claim at law; but every right founded upon a claim which is strictly equitable, whatever the form of procedure, should be supported by evidence that would satisfy a chancellor. If a fact be averred in the bill and denied in the answer, it cannot be pretended that the uncorroborated testimony of the plaintiff would be sufficient to establish such fact in a court of equity. In an ejectment for specific performance it was remarked by Chief Justice GIBSON: "It is true that the verdict in an ejectment like the present may be well found on the oath of a single witness, because there is no opposing oath of the defendant; and it is also true that, unlike a chancellor, the Court cannot give judgment *non obstante veredicto;* but rather than give judgment in conformity with it, when found on insufficient evidence, it would be proper to grant new trials forever, and to save the vexation of such useless litigation it is equally proper to indicate beforehand the measure of evidence the chancellor would require." (Brawdy *v.* Brawdy, 7 Pa. St. 157.) In that case the Court below had directed a verdict for the defendant on the ground that to the others, and certainly when written contracts or obligations are sought to be impeached by defences purely equitable, the reason is stronger than formerly for enforcing the rules of evidence applicable in cases in equity.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

CLARK, J., absent. T. R.

Jan. '83, 378. Jan. 16, 1884.

Webb v. Hitchins.

Will—"Children"—Construction.

When a parent or ancestor in designating the object of her bounty speaks of "*the children*" the more reasonable construction is that children in being, or those likely to be born of an existing marriage, were intended, rather than those who, at some remote and indefinite future time, might possibly be born of a marriage neither existing nor in contemplation.

A testatrix devised certain real estate to her daughter A. for life, and at her death to A.'s daughter B., in fee simple; and in case of B.'s death, "then to be divided amongst the children." A. was *enceinte* at the date of the will and testatrix knew it. B. was not married until long after testatrix's death, and then died before A.:

Held, upon A.'s death that the expression "the children" in the will must be taken to refer to A.'s children, and not to B.'s, and that the former were therefore entitled to the real estate.

Error to the Common Pleas No. 3, of Philadelphia County.

Ejectment, by Robert J. Hitchins, father of Emma E. Hitchins, deceased, against Albert Webb and James Penn MacCain, guardian *ad litem* of Eugene Webb and William Webb, minor children of said Albert Webb and Anne Webb, deceased, for a lot of ground on Mary Street in the city of Philadelphia. The parties submitted a case stated to the Court which set forth the facts substantially as follows: Both parties claimed under the will of Sarah Warner, who died seized, *inter alia*, of the premises in dispute. The will was proved January 28, 1867, and contained the following clause:—

"ITEM. I give, devise, and bequeath unto my daughter Anna Webb, my messuage and lot of ground situate on the north side of Mary Street above Front Street, for and during all the term of her natural life, she paying the taxes

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Testatrix left surviving her one son, William Warner, and three daughters, viz.: Elizabeth, wife of William Drinkhouse, Emma, wife of Joseph B. Martin, and Anna, wife of Albert Webb. Anna Webb had a daughter by a former marriage, viz., Sarah B. Loag, mentioned in the will. At the date of the will she had no children by Albert Webb, but was *enceinte*, which was known to testatrix, and between the date of the will and the death of testatrix a child by this marriage, Eugene Webb, was born; and after testatrix's death another child, William Webb, was born. After the death of the testatrix, Sarah B. Loag married Robert J. Hitchins, and afterwards on December 10, 1873, during the lifetime of Anna Webb, the life tenant, died, leaving her surviving her husband and one child, Emma E. Hitchins. On March 6, 1874, Anna Webb died, leaving her surviving her husband, Albert Webb, who is still living, and two children by him, viz., Eugene Webb and William Webb, already mentioned, both of whom are still living.

Albert Webb and the two children above named, Eugene Webb and William Webb, took possession of the land in dispute upon the death of Anna Webb, and have continued to occupy it ever since. On August 29, 1881, Emma E. Hitchins died in her minority, intestate, unmarried, and without issue, leaving her surviving her father, Robert J. Hitchins, who is still living. All the children of Sarah Warner, except Anna Webb, are still living.

Judgment was entered for the plaintiff on the case stated, whereupon the defendant took this writ, assigning for error the entry of judgment as above.

J. Alexander Simpson, for plaintiff in error.

Sarah Warner, the testatrix, lived with her daughter Anna at the time of making the will, and until her decease, and, as the case stated admits, at the date of the will Anna had no children by her then husband, Webb, but was *enceinte*, and this fact was known to testatrix. She also knew that Anna was very likely to have more children. She already had had one by her former husband, was about to have another by her then present husband, and in all probability would be likely to have others, as she was still of child-bearing age. Hence, when she undertook to provide for the contingency of the decease of Sarah B. Loag during the life estate of her daughter Anna, she naturally gave it to "the children," and it seems irresistible, to my mind, that she had then in her thoughts the child yet unborn, of which she knew, and those that presumably might follow after, rather than children to be born of one who was at that time but a mere child herself, and who would not be of marriageable age for years to come. Besides this, before the death of the testatrix one of these children was born, and if the testatrix had not thought that in one contingency, at least, he would have a share of her estate, she could have altered her will so to provide.

This being an ejectment suit, the Court must find that Sarah B. Loag's children were in the mind of the testatrix when she used the words "the children," for, according to the well-established rule, the *intent* of the testatrix, as gathered from the will, is to be given effect. If those children were not in her mind, it is a matter of indifference who else is intended, as a plaintiff in ejectment is to recover upon the strength of his own title, and not on the weakness of his adversary's, and in that case the judgment below must be reversed.

Frank P. Pritchard (with whom was *William W. Smith*), for defendants in error.

It is submitted that when an estate is given to one and upon her death to be divided among "the children," the most natural and reasonable presumption is that testatrix means the children of the person to whom she has given the last estate, and whom she has last mentioned. In the present case, this presumption is supported by all the surrounding circumstances and the context of the will. The testatrix gives the property to Sarah B. Loag "in fee simple." There is a clear intent to benefit Sarah B. Loag to the exclusion of any other children of Anna Webb. And in a later clause of her will she makes Sarah B. Loag the legatee of one-half of her residuary estate. It is clear she did not intend to give Sarah B. Loag a life estate, and it is, we submit, equally clear that she did not intend to exclude Sarah B. Loag's issue. In any event there is every reason to believe that by "the children" she intended to give it to the children of the person to whom she had previously given the fee simple, and whose death in her daughter's lifetime was the contingency against which she was providing. This was the view taken by the Court below, and it is submitted that this is the only view which has any reasonable foundation.

March 17, 1884. THE COURT. This contention arises under a clause in the will of Sarah Warner. It is in these words: "I give, devise, and bequeath unto my daughter Anna Webb, late Anna Warner, my messuage and lot of ground situate on the north side of Mary Street, above Front Street, for and during all the term of her natural life, she paying the taxes and water-rent, and keeping the same in good condition and repair, and from and immediately after the decease of my said daughter, I give, devise, and bequeath the same unto her daughter, Sarah B.

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Loag, in fee simple, and in case of Sarah B. Loag's death, then to be divided amongst the children." The question is, what children did the testatrix mean when she said "the children"?

The case stated *inter alia* shows that the testatrix left surviving her one son and three daughters. The son and two of the daughters are still living. The daughter Anna was the wife of Albert Webb. Sarah B. Loag was the daughter of Anna by a former marriage. At the date of the will she had no children by Mr. Webb; but was then *enceinte*, which fact was known to the testatrix. After the date of the will and before the death of the testatrix, a child of this marriage was born, and after her death another child was born. These two children are the plaintiffs in error.

After the death of the testatrix, Sarah B. Loag married Hitchins, but afterwards died during the lifetime of Anna Webb, the life-tenant, and left a husband and one child surviving. This child is the defendant in error.

The inquiry now is, what was the intent of the testatrix? That intent gathered from the whole will furnishes the cardinal rule of construction. When it is not inconsistent with established rules of law and manifested with sufficient certainty, it must govern. (Middleswarth's Adm'r. *v.* Blackmore, 24 P. F. Smith, 414; Schott's Estate, 28 Id. 40; Reck's Appeal, Id. 432.) Facts existing and known to the testatrix at the time she executed the will, furnish strong aid in arriving at her intention.

The will bears date the 23d of April, 1866, Sarah Loag did not marry until December, 1873, being more than seven and a half years after its date. Probably she was a mere child at the time of its execution; but, however this may be, there is nothing in the will indicating that the testatrix had in her mind the contingency of a subsequent marriage of Sarah and of her death leaving children surviving. While both these contingencies may have been considered possible, yet in the absence of any reference thereto in the will, we cannot assume they were provided for by the testatrix when a more reasonable intent can be fairly deduced from the language used.

The testatrix executed her will with full knowledge that Anna Webb was married and pregnant; that she was, therefore, of child-bearing age, and might give birth to other children. The unborn child was *in esse*, and others might follow. This one was capable of inheriting, and of being a devisee, when the will was executed. bounty, speaks of "the children," we think it more reasonable to assume that she intended those in being, or those likely to be born of an existing marriage, rather than those who, at some remote and indefinite time in the future, might possibly be born of a marriage neither existing nor contemplated. As then a fair and reasonable intent can be given to the language of the will by applying it to the children nearer to the testatrix, we cannot so construe it as to disinherit them and carry the property to those more remote, and who, we think, did not enter into the thought of the testatrix.

Other language in the clause cited still further indicates that the testatrix did not intend to give the property to children of Sarah thereafter to be born, in case of her death during the life of her mother. Thus it does not purport to make an immediate devise to Sarah, to vest an estate in her on the death of the testatrix, reserving a life estate to Anna Webb, but it is a devise to the latter during the term of her natural life, and it is not until "from and immediately after" her death, that the testatrix declares, "I give, devise, and bequeath the same unto her daughter Sarah." While the relative order of the two devises may not change the legal effect of the estate intended to be given to Sarah in case she survived her mother, yet we think it indicates a purpose in case of Sarah's death before she has any right of possession, not to give the estate to any of *her* children. Nor does the fact that the testatrix in a subsequent clause of her will provides that the remaining portion of her household furniture be divided equally among "my children" change the reasonable purport of the previous clause. She gave to each of her other children certain property absolutely. It was, therefore, very reasonable that she should give to the children of Anna Webb who should survive their mother, the estate of which the latter had the use during her life. This we think is the more reasonable intent of the testatrix, as manifested by the whole will. It follows that the learned Judge erred in entering judgment in favor of the defendant in error.

Judgment reversed, and now judgment in favor of the plaintiff in error on the case stated.

Opinion by MERCUR, C. J. H. P.

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Common Pleas—Law.

C. P. No. 2. April 5, 1884.

In re Assigned Estate of Samuel Croft.

Practice—Auditor's report—Filing of exceptions—Meaning of the word "until" in an Auditor's notice.

Rule to show cause why certain exceptions filed to the Auditor's report should not be stricken from the record.

On March 14, 1884, the Auditor mailed a notice to each claimant, saying that the report was ready, and could be examined at his office "*until March 25*," when it would be filed. It was filed on March 25, at ten o'clock, and later, on the same day, the exceptions were filed. The Auditor indorsed on the exceptions, that, without going into the question whether they were filed in time or not, he had considered them and decided to overrule them.

W. H. Lex, for the rule.

The exceptions were filed too late, and that being a violation of the rules of Court, they should be stricken from the record.

THE COURT. The usual understanding of the word "until" includes the day named. The exceptions were, therefore, in time.

Rule discharged. S. G. F.

C. P. No. 2. May 3, 1884.

Continental Brewing Co. v. Bonner.

Affidavit of defence—Contract—Guaranty—Surety.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit. The instrument of which a copy was filed was as follows, viz:—

"I hereby agree to become surety in the sum of five hundred dollars for James M. Barton in his dealings and relations with the Continental Brewing Company, and in the event of the said James M. Barton becoming in debt to the said Continental Brewing Company for any cause, which he shall fail to pay after due and sufficient notice, I hereby bind myself to make good to the said company any such indebtedness.

June 30, 1883. CHARLES BONNER."

The plaintiff filed also averments that the said James M. Barton owes it the sum of $882, as per judgment confessed, and that payment of the same had been demanded and refused.

The affidavit of defence filed suggested that "the copy of instrument of writing filed in this case is not such a writing as entitles the plaintiff to judgment for want of an affidavit of defence. And further that the averment filed by the plaintiff is insufficient to entitle the plaintiff to judgment."

Henry J. Scott, for the rule.

This was an original undertaking on the part of Bonner, and therefore he is primarily liable.

Seltzer *v.* Greenwald, 2 WEEKLY NOTES, 395.
Sitgreaves *v.* Griffith *et al.*, Id. 705.

Lockwood and *Sinn*, contra.

The instrument of writing filed is a contract of guaranty and not of surety. Yet even though it were the latter, it fixes no certain liability upon which judgment can be predicated; nor can the averments overcome this defect.

Love *v.* Building Ass'n, 11 WEEKLY NOTES, 303.
King *v.* Exhibition Co., 10 Id. 190.
Merchants' Bkg. Co. *v.* Stuart, 37 Leg. Int. 50.
Bray *v.* Martin, 13 WEEKLY NOTES, 385.
Scott *v.* Loughery, 6 Id. 123.
Bunting *v.* Allen, Id. 157.

THE COURT. The instrument only stipulates for payment by defendant after notice to Barton, and this cannot be proved by an averment.

Rule discharged. H. J. S.

C. P. No. 2. May 10, 1884.

Lynch v. North.

References under Act May 14, 1874—Agreements thereunder by trustees.

Rule to show cause why amicable action should not be stricken off and agreement of reference set aside.

In June, 1880, Anthony Lynch had a number of certificates of stock which were registered in his name as the owner, but which were actually in the possession and custody of his wife Mary Lynch, who claimed to be the owner of them, and refused to surrender the certificates to him. By mutual agreement these certificates were placed in the custody of G. H. North, the defendant, who gave a duplicate receipt for the same to both Anthony and Mary Lynch, in which he agreed to pay the dividends to Anthony Lynch, and to return the certificates when both parties should so direct.

On March 21, 1884, G. H. North entered into an agreement with Anthony Lynch, the husband, the plaintiff in this suit, for an amicable action, which, after reciting the foregoing facts, continued as follows:—

"Now the purpose of this amicable action is to determine the right and ownership in and to said shares of stock, to wit, whether the said shares of stock belong to and are the property of the said Anthony Lynch, or whether they are

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the property of the said Mary Lynch. And it is hereby agreed that the said George H. North, who has no other claim or title in said shares of stock except as a friendly custodian of the same, will deliver said shares of stock to whichever of the two said parties the judgment of the Court in this said amicable action shall award the same."

Subsequently an agreement was filed to submit the issue to the decision of a referee under the Act of May 14, 1874; subsequently an agreement was filed not to appeal from referee's decision. Meetings were held and some testimony presented. At the first of these meetings Mary Lynch appeared; but subsequently refused to appear again or to recognize or be bound by the reference, and thereupon defendant, North, took this rule, setting forth the above facts in his affidavit, and adding that he had made the agreement inadvertently without professional advice, and that he believed the agreement to be fatally defective in attempting to adjudicate for or against the rights of Mary Lynch, who was not a party to it, and because as a trustee he had no right to make such agreement.

Mozer, showed cause, citing—

Snodgrass *v.* Gavit, 4 Casey, 224.
Robinson *v.* Bickley, 6 Casey, 384.
McGheehan *v.* Duffield, 5 Barr, 497.

If necessary, the record may be amended by adding the name of the wife.

Latta and *Neall*, for the rule.

THE COURT. Mrs. Lynch is no party to the suit, or to the submission to reference, and it is plain that she will not be bound by the decision, though in terms it undertakes to adjudicate her rights. The trustee ought, therefore, to be relieved, but, as he has encouraged plaintiff by his consent to the proceedings up to the present time, he should pay the costs.

Rule absolute on payment of referee's costs.

T. B. S.

C. P. No. 3. May 3, 1884.

Wilson v. Byrd.

Capias—Witness attending Court at the request of the Commonwealth—When not subject to arrest.

Sur rule to quash capias.

The affidavit of the defendant set forth that he was a resident of Baltimore; that he was notified to attend the Court of Quarter Sessions of Philadelphia County as a witness for the Commonwealth; that he attended and gave testimony, and on the same day was arrested on a capias sued out at the instance of plaintiff.

Bayly, for the rule.

Although Byrd was not attending on the Court of Quarter Sessions in obedience to a subpœna, he attended at the request and invitation of the Court, and should be protected.

Jenkins, contra.

THE COURT. It would be against public policy not to afford the protection asked for.

Rule absolute. A. B. W.

C. P. No. 3. April 26, 1884.

Gardy v. Moffit.

Security for appeal from the judgment of a magistrate given by an attorney—Rule of Court No. 10.

Rule to strike off appeal.

Appeal by defendant from judgment of Magistrate Martin, obtained March 22, 1884, for $100 and costs. Bail was entered by Joseph N. Dougherty, whom defendant admitted to be a member of the bar of the Court to which the appeal had been taken.

S. E. Maires, for rule.

Rule X. § 28 (New Rules of Court, p. 16) provides, that "No attorney . . . . shall be permitted or suffered to become special bail in any action or suit, unless by leave of the Court." Under this rule of Court the bail entered for the appeal is certainly disqualified.

Joseph N. Dougherty, contra.

The rule of Court prohibiting attorneys from becoming bail does not extend to justices' courts; an attorney may become bail for an appeal.

Ober *v.* Koser, 12 L. Bar. 104.

Even though the rule does apply to such a case, the present procedure is wholly irregular.

Where a recognizance given on appeal from a magistrate is defective, the proper course is "to call on the appellant by a rule to perfect his bail within a specified period, or in default of it to have his appeal quashed," and the Court ought not to quash the appeal in the first instance.

GIBSON, C. J., in Means *v.* Trout, 16 S. & R. 349.
Redheffer *v.* Fitler, 7 Philada. 338.
Short *v.* Rudolph, 1 Crumrine, 50.
Huntingdon *v.* Jackson, 2 P. & W. 431.
Bream *v.* Spangler, 1 W. & S. 378.
Adams *v.* Null, 5 W. & S. 363.
Weidner *v.* Matthews, 1 Jones, 336.
Koenig *v.* Bauer, 7 Smith, 168.
Hummer *v.* School District, 31 Leg. Intel. 79.
Benedict *v.* R. R., 4 Luz. L. Reg. 8.
Woodruff *v.* James, 2 WEEKLY NOTES, 50.

THE COURT. The prohibition in the Rule of Court does not apply to security entered before a magistrate.

Rule discharged.

Per LUDLOW, P. J. A. M. B.

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Orphans' Court.

April 22, 1884.

Allen's Estate.

Will—Cross remainders—Although words of survivorship may be wanting, they will be implied when the intention is clear—Principal and income—Burden of proof—Credits for expenses—Collateral inheritance tax.

Sur exceptions to adjudication.

At the audit of the third account of the Pennsylvania Company for Insurances on Lives and Granting Annuities, executors *de bonis non* of William H. Allen, executor, under the will of Mary Frances Allen, the decedent, the following facts appeared:—

The testatrix died in July, 1857, and by her will, after sundry provisions, she gave two-thirds of her residuary estate to her daughter, Mary Quincy Allen, and the other one-third to her husband, William H. Allen, for life, with remainder to her step-children, Roland Curtin Allen and Ellen H. Allen, and in case of the decease of both of said step-children without leaving issue surviving them, then to her daughter Mary Q. Allen. Roland died in the lifetime of William H. Allen, unmarried, and without issue. Ellen attained full age in 1872, and intermarried with one Shelden. The executor filed his first account in 1859. His second was confirmed in 1866.

Before the Auditing Judge (ASHMAN, J.), it was contended in behalf of the Pennsylvania Company for Insurances on Lives and Granting Annuities, that the balance in their hands as accountants should not be awarded to Mrs. Shelden, because by the words of the will, "to my step-children Roland and Ellen, and in case of the decease of both without issue surviving them or me," cross-remainders between Roland and Ellen could not be implied.

The Auditing Judge found that, although words of survivorship were wanting, the intent to give the whole share to the living step-daughter might be clearly inferred.

To which finding exceptions in behalf of the accountants were duly filed.

The substance of the other exceptions filed in their behalf are sufficiently set out in the opinion of the Court (*infra*).

Frank P. Prichard and *John G. Johnson*, for the Pennsylvania Company for Insurances on Lives and Granting Annuities.

William H. O'Brien, for Mrs. Shelden.

May 3, 1884. THE COURT. It cannot be doubted that the testatrix intended that her two step-children should take the principal of that part of her estate of which the income was given to their father, her husband, for life; and that she did not intend her own children to take this share at all, unless, at the death of the father, both of the step-children should be dead without leaving issue. Nor can it be doubted that she did not intend the father, in any event, to have more than a life estate in the share thus given.

The step-son having died without issue in the lifetime of the father, the intention of the testatrix, as manifested by the will, will be defeated unless a limitation in the nature of a cross-remainder be implied in favor of the step-daughter, so as to give her at the death of the father the whole. For if the share of the step-son is to be regarded as having absolutely vested in him, it follows that it passed under the intestate laws to the father, whose interest as to one-half of the fund thus became absolute, though the will said he should have but a life estate, and the interest which would thus vest in him would in turn have to be divested if the step-daughter should also die in his lifetime without issue, since in that event the *entire* share is, by the express terms of the will, to go to the daughter of the testatrix. (See Atherton *v.* Pye, 4 Durnf. & East, 710; Reo *v.* Clayton, 6 East, 628; Burden *v.* Burville, 2 East, 47, note.) If, on the other hand, it became absolutely vested in the father, at his death, the step-daughter having survived him, it must pass, in part, to the daughter of the testatrix, though the will declared she was not to take unless both of the step-children should die without issue.

It is difficult to believe that such results were intended by the testatrix; and they are entirely prevented by holding that a cross-limitation is implied in favor of the step-daughter. Such an implication is always a matter of intention.

The general principles governing cases of this kind are thus stated by Mr. Theobald (Theobald on Wills, 573): "When the testator has disposed of his whole interest in realty or personalty, if, for instance, absolute vested interests have been given to several as tenants in common, with a gift over upon the death of all in certain events, cross-limitations cannot be implied between them, as there can be no intestacy, and cross-limitations would divest vested interests. (Skey *v.* Barnes, 3 Mer. 334; Broomhead *v.* Hunt, 2 J. & W. 459; Baxter *v.* Losh, 14 Beav. 612; Beaver *v.* Nowell, 25 Beav. 551.) If, however, the interests are not vested, but contingent, with a gift over upon the death of all before the interests vest, the argument against an intestacy applies, and no argument can be raised against cross-limitations on the ground that they would divest vested gifts, and therefore, in all probability, cross-limitations would be implied.

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(Mackell *v.* Winter, 3 Ves. 536; Scott *v.* Bargeman, 2 P. Wms. 68; Graves *v.* Waters, 10 Ir. Eq. 234.)"

The case of Scott *v.* Bargeman thus referred to is cited by the Auditing Judge as ruling this case. It certainly is not easy to draw a distinction between them; and although criticized in some of the English cases, Scott *v.* Bargeman has not been overruled, and has received the approval of so high an authority as Lord ST. LEONARDS, in Vize *v.* Stoney (1 Dr. & War. 348); Graves *v.* Waters (10 Ir. Eq. 234. See Theobald on Wills, 574.)

It is to be noted that the English cases on this subject have not been characterized either by uniformity or consistency. At one time it was supposed that cross-limitations would never be implied between more than two persons; nor where there were express limitations in certain specified cases; nor where the gift was to two or more objects "respectively;" and it has been only in comparatively recent years that these notions have been exploded.

It is clear that there was never an *absolute* vesting in the step-son in the case now before us. A bequest to any person, and in case of his death to another, is an absolute gift to the first legatee if he survive the testator; but if the bequest be in remainder after a life interest, the gift over is not restricted to death in the testator's lifetime, but operates during the continuance of the life interest. (Hervey *v.* McLaughlin, 1 Price, 264.) And here the gift in effect is to the step-son, or, should he be dead leaving issue, then to such issue taking substitutionally. It cannot be known then until the death of the father, whether the person to take will be the son or his issue, and consequently until then there can be no absolute vesting.

In Baxter *v.* Losh, *supra*, cited and relied upon in support of the exceptions, the legatee, in respect of whose share survivorship was claimed by the other legatee, died in the lifetime of the testatrix; and the gift, being of a residue, the share passed under the intestate laws to *her* (the testatrix's) next of kin, just as in Yard's Appeal (5 Norris, 125); and in Skey *v.* Barnes (3 Mer. 334), which was also cited, the death of the legatee whose interest was held to be vested did not occur until after the time appointed for of vesting. (Hawkins on Wills, 226.) Neither of these cases is at all in conflict with the ruling of the Auditing Judge.

Nor has it been shown that it was error to treat the sum received by the executor from the guardian of the daughter as principal. The burden of showing affirmatively that any portion was income and therefore the property of the executor in his individual right was certainly upon him; and in the absence of proof on his part, the view most unfavorable to his rights and most favorable to those for whom he was trustee must be taken.

Nor do we think the form of the award in the report of the Auditor upon the guardian's account is at all material. Such an award was a mere excrescence in that proceeding, and its only value is, in connection with the facts mentioned in the report, as evidence to charge the executor with moneys not previously accounted for.

The credits for expenses, which could only have arisen in consequence of the failure of the executor to file his account at the proper time and in the proper manner, are necessarily disallowed.

The adjudication must be modified, however, to the extent of making the award to the step-daughter subject to the payment of collateral inheritance tax upon the principal to be received by her. This, under the circumstances, as no separate moneys of the estate have been found since the executor's death, is purely formal, as the amount can only be recovered as a debt of the executor.

It is conceded by counsel for Mrs. Shelden, the step-daughter, that the principal coming to her from the estate of the testatrix is but $2618.56, and not $2850, the sum mentioned in the adjudication. According to the restated account submitted at the argument on behalf of the exceptant, it should be but $2462.52. We have not been furnished with the evidence which would enable us to determine the correctness of the restated account, and can therefore make the reduction only to the extent of the admission on the part of the legatee. To this extent the adjudication will be amended by the substitution of $2618.56 in place of $2850 as the amount of principal, and awarding that sum, less collateral inheritance tax, to the legatee, with interest from

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JUNE 19, 1884.* [NO. 28.

Supreme Court.

RULE OF COURT.

And now, June 11, 1884, it is ordered that the Hour List be suspended in each of the several districts.

The argument of each case shall be limited to one hour, unless when it is taken up for argument the Chief Justice, on an examination of the paper-books, shall determine that more time is necessary. The Short List, and the rule in regard to capital cases, shall remain as heretofore.

This order is not to apply to the counties of Philadelphia and Allegheny, so as to change or affect the special rules there in force.

The Prothonotary of the Middle District is directed to certify this order to the Prothonotaries of the Eastern and Western Districts respectively.

PER CURIAM.

ULYSSES MERCUR,
Chief Justice.

July, '82, 152. April 18, 1883.

Johnson's Appeal.

Assignments for benefit of creditors—What instruments constitute—Debtor and creditor—Mortgage—Trustee—Account—Jurisdiction.

While no particular form of words is necessary to constitute an assignment for the benefit of creditors under the Act of 1836, yet the transaction must be in substance a transfer of *property* of the assignor in trust for the benefit of his creditors. A *mortgage* executed by the assignor to a trustee for creditors, in consideration of an extension of time for the payment of the assignor's debts, being a mere security, cannot be treated as an assignment for the benefit of creditors under said Act.

A. and B., residing in Montgomery County, being financially embarrassed, obtained an extension of time from their creditors, and in consideration thereof gave a mortgage on their real estate to C., who resided in Philadel-

Appeal of John C. Johnson, trustee for the creditors of George and Caleb H. Malin, from a decree of the Common Pleas of Montgomery County, upon his account as trustee, filed in said Court, setting aside the report of the Auditor thereon, for want of jurisdiction.

The facts of the case, as they appeared before the Auditor, were as follows:—

On March 6, 1875, George and Caleb H. Malin, residents of Montgomery County, being financially embarrassed, in consideration of an extension granted them by their creditors, executed a mortgage on their lands situate in said county, as security for the payment of their indebtedness, to John C. Johnson, a resident of Philadelphia, as trustee for creditors. This mortgage recited that, being unable to pay their present indebtedness, the mortgagors had asked an extension of time for payment, etc., and their creditors had agreed to comply with their request on condition of being secured in part by a mortgage on the private real estate of the said partners. The mortgage was in the usual form to J. C. Johnson, in trust for the use and benefit of all the present creditors of the firm in *pro rata* proportions in accordance with their claims—with the mortgagor's equity of redemption added.

The trustee realized a fund from a sale under execution of the mortgaged premises and filed an account in the Common Pleas of Montgomery County, regarding the mortgage as an assignment for benefit of creditors under the Act of June 13, 1836, section 14 of which gives jurisdiction to the courts of the county where the assignor resides. An auditor was appointed who reported distribution of the fund. Exceptions to the report were filed on the ground that the Court had no jurisdiction. The Court sustained the objections, in an opinion by STINSON, J., and set aside the report. The trustee thereupon took this appeal, assigning for error the action of the Court in sustaining the exceptions.

G. R. Fox, for appellant.

The mortgage in Ridgway *v.* Stewart, 4 W. & S. 383, cited by the Court, was not a mortgage for the benefit of existing creditors, but an ordinary mortgage to trustees to secure bonds payable in future. The present mortgage was to secure existing debts.

G. Heide Norris (*Geo. Junkin* with him), for creditors.

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but that the distribution must be made in Philadelphia, where the trustee resides.

If we concede the first proposition to be correct, the second follows logically. We have, therefore, presented the single question whether the mortgage was in effect an assignment under the Act of 1836.

The recent case of Wallace & Krebs *v.* Wainright & Co. (6 WEEKLY NOTES, 550), contains much of the learning upon this branch of the law, and it would be useless to repeat what was there said, or to again review the authorities there referred to. In Wallace & Krebs the debtor assigned a number of judgments to his attorneys in payment of the creditors of the assignor, naming them. There was no express trust, but this Court held there was an implied trust, and that the assignment came within the Act of 1836.

The principle to be deduced from the authorities is that the form of the transaction is not material; the law cannot be evaded "by any sham departure from the general form of assignments" (Fallon's Appeal, 6 Wr. 235); hence an absolute transfer of a man's property in trust for the payment of his debts must be regarded as an assignment within the Act of 1836, without regard to the particular form of the conveyance. But it must be an assignment or transfer of property. Judgments confessed to secure creditors are not such preferences as are avoided by the Act of 1843, although an assignment for creditors was intended, and was shortly afterwards executed. (Blakey's Appeal, 7 Barr, 449.)

We are of opinion that the mortgage in this case was not an assignment for creditors under the Act of 1836. That it was not intended as such by either the mortgagors or the mortgagee is too plain for argument. Nor has any of the creditors intended to be benefited thereby ever treated it as such. The facts connected with it, briefly stated, are that Malin Brothers, residents of Montgomery County, becoming embarrassed in 1875, obtained an extension of twenty-four months from their creditors, and in order to secure their liabilities thus extended, executed the mortgage in question upon their real estate to the appellant as trustee. The consideration of the mortgage was the extension, and had the extended paper been paid at maturity the condition of the mortgage would have been performed and the mortgagors entitled to have satisfaction entered of record.

There is no room here for an allegation that the mortgage was intended as an evasion of the Act of 1836. It was a security for the creditors precisely as if the mortgagors had given indorsed paper or other personal security to procure an extension. Moreover, the mortgage was not an absolute transfer of anything; it was a mere pledge or security. In this it lacks one of the essential features of assignments under the Act of 1836. In all the instruments which have been held to be assignments for creditors, there has been in some form an absolute transfer of the property. The assignor parted with all his title and control thereof, save alone the right to have any surplus reconveyed to him that might remain after the payment of his debts.

We are of opinion that the learned Judge below ruled this case upon correct principles.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

Opinion by PAXSON, J. T. R.

Jan. '84, 203. February 6, 1884.

Stewart's Appeal.

Statute of Limitations—Partnership account—Its relation to the individual account of a surviving partner—When the statute commences to run.

A running account with a surviving partner of a dissolved firm who has the collection of the partnership assets is not an account with the firm, and consequently cannot toll the running of the Statute of Limitations against a partnership claim.

A fortiori are the above observations true where the items in the account relied upon to toll the statute are not charged against the firm but against the individual surviving partner.

Appeal of Elizabeth Stewart, from a decree of the Orphans' Court of Fayette County, confirming the Auditor's report distributing the balance of the estate of Andrew Stewart, deceased.

The Auditor to whom the executor's account was referred found the following facts:—

The Hon. Andrew Stewart, died, testate, July 16, 1872. His will was duly admitted to probate, and letters testamentary granted to his widow, Elizabeth Stewart, and son, D. S. Stewart, on the 17th day of August, 1872. Mrs. Stewart, his widow, being old and unable to attend to her duties as executrix, D. S. Stewart took upon himself the entire management of the estate, and as acting executor filed an account in the Orphans' Court of Fayette County. The decedent in his lifetime had been engaged extensively in buying and selling mountain lands, and through disputes concerning the titles to these tracts of land, had been almost constantly involved in lawsuits.

It further appeared that the firm of J. B. & A. Howell, composed of Gen. Joshua B. Howell and Alfred Howell, Esq., attorneys-at-law, existed in Uniontown, in regular and active prac-

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tice, and of the highest professional standing, from the year 1851 to the latter part of the year 1861, when Gen. J. B. Howell entered the army and was killed in Virginia, in September, 1864. This firm were the regular and only attorneys of Mr. Stewart from the year 1851 until its dissolution on the first of January, 1862, after which Alfred Howell continued to act as his regular attorney, assisted at times by Edward Campbell, Esq., until the death of Mr. Stewart. Mr. Stewart had made payments to these attorneys at various times on account of their services, but no regular settlement had ever been made between them. After D. S. Stewart had entered upon his duties as executor he wrote to Mr. Alfred Howell, by letter dated April 8, 1873, requesting him to render his account against the estate "by the 15th inst." In pursuance of this request Mr. Howell prepared an account of his individual claims against said estate, and also a separate account showing a balance due the firm of J. B. & A. Howell, amounting, with interest, to $2155.35. This account was objected to by the executor, and not having allowed it in his account filed, Mr. Howell appeared before the Auditor and claimed that amount from the distribution of the balance in the hands of the accountant.

The account of J. B. & A Howell referred to, which was offered in evidence, is composed on the debit side principally of fees for professional services. These services were rendered from the year 1851 to 1861 inclusive. The credit side of the account is made up of items of charges for hay, wood, coal, etc., including orders and cash at various times from 1854 to January 16, 1867.

The claim was allowed by the Auditor on the ground that a mutual account existed between Andrew Stewart and Alfred Howell, surviving member of the firm of J. B. & A. Howell up to and until January 16, 1867, and consequently, although the firm was dissolved in 1862, the Statute of Limitations was prevented from running against the claim of the firm; whereupon he awarded to the plaintiff the full amount of the firm's claim with interest, $1265.14.

To this award exceptions were filed on behalf of the defendant, but disallowed, and the report of the Auditor confirmed absolutely by the Court. Elizabeth Stewart thereupon took this appeal, assigning for error the decree of the Court.

Edward Campbell (with whom was *A. D. Boyd*), for appellant.

If the law of mutual accounts applied, how would it affect this case, seeing that the last item of Stewart's account against the firm is dated January 1, 1864? It was barred at Stewart's death in 1872, and would not support the firm claim against Stewart by virtue of there being mutual subsisting demands. In that case the firm claim would have to stand on its own merits as an independent claim, and all items not within six years would have to be rejected.

Boyle & Mestrezat, for appellee.

The Auditor finds upon the evidence that said firm, by its surviving partner, tried the cases of Andrew Stewart with J. Beeson & Co., in September and December, 1866, and that said partner continued in and took part in the disposition of other cases in which the firm were employed until as late a date.

It was, therefore, apparent to the Auditor that there were mutual and reciprocal claims and demands commencing with the existence of the firm, and continuing regularly until within six years previous to the death of Andrew Stewart, and that, therefore, the Statute of Limitations was no bar to a recovery of the claim.

February 18, 1884. THE COURT. The mutual accounts and dealings, which will save a balance on either side from the bar of the Statute of Limitations, must be those between the accounting parties, and the whole transaction must be of such a character as to raise a legal presumption that the accounts are intended to apply to the payment or extinguishment of each other, and thus, like payments on a note, operate as an acknowledgment of the precedent indebtedness. (Van Swearingen *v.* Harris, 1 W. & S. 356.) But running accounts with a partner, though he be a surviving partner, and as such has the collection of the partnership assets, certainly cannot be called an account with the firm, and can, therefore, be of no avail to stop the running of the statute against a partnership claim.

In the case in hand, there is no doubt that much more than the time necessary to bar the account of J. B. & A. Howell had passed before the death of Andrew Stewart. That firm had been dissolved in 1862, and J. B. Howell died in 1864. But from the time of the dissolution there could be no mutual dealings between that firm and Stewart or any one else, for, as in the case of the death of a natural person, there was nothing left with which to deal.

It is, therefore, somewhat remarkable that the Auditor and Court below should have come to the conclusion that there were mutual accounts between Stewart and the dead firm down to January 16, 1867.

Stewart, of course, might have continued to pay on the partnership account, but as the firm itself was dead and gone, I cannot see how there could have been any such new accounts against him as to give to any subsequent dealings the character of mutuality. That was not among the possibilities.

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But even this charge of the 16th of January, 1867, which is here lugged in to toll the statute, was not made by Stewart against the firm of J. B. & A. Howell, but against Alfred Howell individually. How then can this be said to be the continuation of a mutual account with the partnership?

That Alfred Howell was the surviving member of the firm, and that upon him devolved the settlement of its accounts, can make no difference. As well might an individual charge against an administrator be regarded as a charge against the decedent whose estate he represents.

Alfred Howell, with the assent of Stewart, might have applied this charge as a payment to the firm account, and in that case had Stewart been fully informed of the condition and extent of that account, it might have amounted to such an acknowledgment of his indebtedness as would have tolled the statute; but of this there was no evidence; hence the position assumed by the appellee cannot be sustained.

The decree of the Court below is now reversed so far as it awards the sum of $1265.14 to Alfred Howell, Esq., surviving member of the firm of J. B. & A. Howell, and it is now ordered that that sum be paid over to the appellant, Mrs. Elizabeth Stewart; ordered also that the appellee pay the costs of this appeal.

Opinion by GORDON, J. H. P.

Jan. '84, 79. March 6, 1884.

North and West Branch Railway Co. v. Swank.

Right of way—Contract, construction of, alteration of, by parol testimony.

An agreement by a landowner to sell a right of way over his premises for a fixed sum to a railroad company covers all damages of whatsoever nature suffered by the landowner.

Where, by the terms of a contract, another writing is made a part of it, the two writings will be received together as affording a common basis of construction.

Where a writing is signed by the parties to a contract, it is presumed to embody their final determination, absorbing all preliminary negotiations, and parol testimony of one of the parties to change a written contract, if denied by the other, must be corroborated by another witness, or the equivalent of another, before a court of equity will attempt to reform, or set it aside.

Error to the Common Pleas of Columbia County.

Appeal, by the North and West Branch Railway Company, from the viewers' assessment of damages for lands of Jacob Swank, taken by the said railway company for a right of way.

The facts, as they appeared on the trial before ELWELL, P. J., were as follows: The North and West Branch Railroad Company was incorporated by Act of May 13, 1871 (P. L. 814), for the construction of a railroad from Wilkesbarre, by way of Bloomsburg, to Williamsport, with branching powers, and subject to the general railroad Act of 1849, and its supplements.

On August 14, 1880, the president of the railroad company entered into a written agreement with the plaintiff, Jacob Swank, for the right of way over his farm in Catawissa Township, Columbia County; said agreement was in the following terms:—

"I agree that the N. & W. Branch R. R. Co. shall have the right of way through my land; and, if the parties cannot agree as to the amount of damage, it shall be referred to E. M. Tewksbury, and his decision shall be binding upon both parties. I furthermore agree to the terms offered to the N. & W. B. R. R. Co., by Solomon Shuman in the presence of Caspar Rhawn this 14 August, 1880.

JACOB SWANK.

"Witness, C. RHAWN."

The agreement with Shuman read as follows:—

"I agree with the N. & W. B. R. R. Co. to sell them the right of way along the river-bank for two hundred ($200 00) dollars per acre for tillable land, and release the river-bank; or, for two hundred and fifty ($250.00) dollars per acre, if they go back from the river.

"Catawissa, Pa., 14 August, 1880.

SOLOMON SHUMAN.

"Witness, C. RHAWN."

In December, 1880, the plaintiff demanded security for his damages, whereupon the railroad company, on December 15, 1880, filed a bond in the Court of Common Pleas.

In July, 1881, the franchises, corporate rights, and property of the North and West Branch Railroad Company were sold by the sheriff upon process issuing out of the Court of Common Pleas of Columbia County, and by due process of law became vested in the North and West Branch Railway Company, which was duly organized and established as the successor of the former company, and proceeded with the construction of the road.

In May, 1882, the plaintiff instituted legal proceedings for assessment of damages, whereupon the railway company insisted upon the enforcement of the agreement of August 14, 1880, as fixing the rule and mode of assessing damages. The award of viewers, finding for the plaintiff in the sum of $2650, having been made up without regard to said agreement, the railway company appealed to the Court of Common Pleas.

There was some conflicting testimony as to a conversation between Swank and the president of the road on the day before the above written contract was entered into; Swank alleging that

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the president then promised him that his fruit-trees would not be touched, that the road would pass by the cider-press, and that he should have a way to the river. But Waller, the president, testified that they then arranged to meet and consummate their agreement (or endeavor to do so), and that on the next day they did meet at the shop of Caspar Rhawn, in Catawissa, when the above contract in writing was signed by Mr. Swank. Swank's testimony, as above, was not corroborated.

Plaintiff requested the Court to charge, *inter alia*, as follows: "That, if the jury believe that Swank was induced by D. J. Waller, president of the railroad company, to sign the agreement to locate the track on other land than that on which it is located, or to build an arch under said track at the old passage way of Swank to the river, which arch was not so built by the company in laying said track, then the agreement as to amount for land taken is not binding on Swank."

Answer. "This is correct, provided the jury find that the conversation and negotiations in respect to the right of way and leading to the agreement, were to the effect that an archway would be made by the company, giving the plaintiff access to the river, and that his fruit-trees would not be disturbed by the location of the road; and that these representations, and the arrangement in respect thereto continued up to the time of executing the writing. While parol evidence is inadmissible to alter a contract, it is competent for the purpose of showing that it would be a fraud upon the maker to take his land without the performance of the conditions on which he agreed to part with it. Where there is a written contract, the evidence should be clear in order to set it aside by reason of representations or misrepresentations." (Ninth assignment of error.)

Defendant requested the Court to charge, *inter alia*, as follows: "That the construction of the contract of August 14, 1880, is for the Court and not for the jury; and the damages therein stipulated for will include the general damages to Mr. Swank's property from the location of the railroad, as well as mere compensation for the land taken."

Answer. "As stated in this point, the construction of the contract of August 14, 1880, is for the Court. The general rule is, as I have already said, that an agreement with the company for the location of its road on the land of an owner, is presumed to include a license to do what is lawful in the construction and management of its road, to the same extent and to the same effect as if the land had been compulsorily taken, and it is, therefore, considered to release a claim for injury to other lands of the grantor (or for other damage) to which he would have been entitled if the land had been taken by legal proceedings under the statute. But in this case the parties contemplated compensation for other damages than the mere taking of the land for the right of way, and therefore the general rule, above stated, is not applicable here, and damages above the value of the land taken may be assessed if any such have been sustained." (Second assignment of error.)

Verdict for the plaintiff, Jacob Swank, in the sum of $1887, and interest, and judgment thereon. Whereupon the railway company took this writ, assigning for error, *inter alia*, the answers to the above points.

Charles R. Buckalew (with whom was *H. W. Palmer* and *L. E. Waller*), for the plaintiff in error.

The terms of the Shuman contract, in which the compensation for the right of way was in fixed terms, was made a part of the Swank contract, and this should have been the only guide in assessing the damages. The contract was for the right of way, and that included everything.

Pierce on Railroads, 133, and cases cited.
Western Railway *v.* Babcock, 6 Metc. 346.
Conwell *v.* Springfield and N. W. R. R. Co., 81 Ill. 232.

W. H. Rhawn (with whom was *E. R. Ikeler* and *J. B. Robins*), for defendant in error.

The provision in the contract to refer any question in dispute, as to the damages, to a referee, would be meaningless, if the construction contended for by the plaintiff in error should prevail.

But in the construction of an instrument in writing, the rule is to give effect to all its language.

Oswald *v.* Kopp, 2 Cas. 516.
Williamson *v.* McClure, 1 Wr. 402.
Miller *v.* Fitchorn, 7 Cas. 252.

There was sufficient evidence of a parol understanding between the parties that certain property should not be taken, to go to the jury.

March 31, 1884. THE COURT. By the contract Swank agreed that the Railway Company should have the right of way through his land, and if the parties could not agree as to the amount of damage, it should be referred to E. M. Tewksbury; and furthermore agreed to sell the right of way along the river bank, for two hundred dollars per acre for tillable land, and release the river bank; or, for two hundred and fifty dollars per acre if they go back from the river.

No part of this contract is rendered immaterial or insensible by giving the other parts their legal and ordinary interpretation. The sale of the right of way is absolute, with the privilege on the part of the purchaser to choose one of two locations. If the way along the river bank be taken,

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the price shall be less per acre, exclusive of untillable land, and the bank be released; if the one back from the river, a higher price per acre for all the land. In case of dispute respecting the land, whether tillable or untillable on the river bank, or whether the land occupied is on the bank or back from the river, or about any other matter causing a disagreement as to the amount of damage, the decision of Tewksbury shall be binding upon both parties. It is manifest that a real difference could arise involving more than a measurement of land. The road might be so located that one party would claim it was on the bank, and the other that it was back, each in good faith. So, difference might arise whether land taken is untillable. On its face the agreement is full and complete, and the several parts related to each other. Its form is of no consequence; the meaning is precisely the same as if the terms of the Solomon Shuman grant had been written at length in the paper signed by Swank.

An agreement between a landowner and a railroad company to sell the latter a right of way across the premises of the former, covers all damages of whatever sort suffered by the landowner—all for which he is legally entitled to compensation. This principle, recognized in the charge of the learned Judge of the Common Pleas, is so well settled and so reasonable that it has not been controverted. But the Court held that the parties to the agreement in question contemplated compensation for other damages than the mere taking of land for the right of way, and that the general rule is not applicable; to this we are impelled to dissent. The parties contracted for "the right of way" for compensation, to be ascertained, at a certain rate per acre for the quantity of land occupied. No word or clause indicates a reservation by the landowner of the right to recover damages to other land, or to recover for the vines, trees, and shrubs on the land taken for the way. Nothing is excepted out of the grant. The way defined in the contract is entire and within the general rule. So far as advised, the popular understanding of a grant of right of way for a railroad is that it includes all the company may lawfully and adversely take from the grantor for use as a way. We are of opinion that the second assignment of error must be sustained.

Parol testimony is admissible to reform a written contract by varying or adding to its he agreed to part with it. But the conditions ought to appear in the writing. If by mistake, or by design of the agent of the company, this contract does not fully express the agreement, it can be reformed in equity, and the reformation, according to the rules of evidence in equity proceedings, can be made at the trial of this action. Swank was the only witness who testified in support of the alleged "representations or misrepresentations," which, if established, change the terms of the written contract, or as submitted actually set it aside. His testimony is uncorroborated; the allegation is denied by the other party, and some testimony adduced of its untruth. Were the defendant in error in a court of equity, asking that the contract be reformed, or set aside by reason of the alleged fraud, and the allegation denied, upon such testimony as adduced here, his bill would be at once dismissed. His testimony could not be considered by the Chancellor, unless corroborated by another witness, or the equivalent of another; unless there be such testimony as a Chancellor could consider upon a question of this nature, it ought not to be submitted to a jury in a proceeding at law. In this State equity can be administered in actions tried in the law courts, but the rules of evidence in an equity case and in a case at law should not be confounded. (Juniata B. and L. Association *v.* Hetzel, 14 W. N. C. 431.)

The ninth assignment of error raises the question of the sufficiency of the testimony to establish the fact that the agent of the company induced Swank to sign the agreement, by agreeing to locate the track on other land than that on which it is located, or to build an arch under said track at the old passage-way of Swank to the river. As already shown, it is insufficient, and the sixth point of the plaintiff below should have been refused. The same error also pervades the matter complained of in the third and eighth assignments.

We think the Court rightly ruled on all the points raised which have not been remarked.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by TRUNKEY, J.

PAXSON, J., absent. W. M. S., Jr.

Jan. '83, 389. April 11, 1883.

Munroe v. Luzerne County.

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Held, that in order to ascertain whether the prothonotary of a particular county was entitled to the benefit of the provisions of the Act, the population of the county at the time he entered upon the performance of his duties must be deemed the criterion.

By the United States census of 1870, it appeared that Luzerne County had a population of 160,915, of which number 80,000 resided in that portion of the county which subsequently in 1878 was set off as Lackawanna County. In a suit brought in 1883, by a prothonotary of Luzerne County who entered upon the performance of his duties in 1880, to recovery his salary from the county:

Held, that the Court would not presume from the foregoing facts without further evidence, that the population of Luzerne County in 1880 exceeded 150,000, and that, therefore, plaintiff was not entitled to the salary fixed for prothonotaries of counties having such a number of inhabitants by the provisions of the Act of March 31, 1876, § 14 (P. L. 13).

Error to the Common Pleas of Luzerne County.

Amicable action in debt, wherein Thomas Munroe was plaintiff, and the County of Luzerne was defendant.

The facts agreed upon were as follows:—

Thomas Munroe was elected Prothonotary of Luzerne County in 1879, was duly qualified, and in 1880 entered upon and discharged the duties of his office for three years. When the new Constitution was adopted, and at the time of the passage of the Act of March 31, 1876, the said county of Luzerne, according to the United States census of 1870, had a population of 160,-915. That the county of Lackawanna was erected and created out of, and ceased to be a part of the county of Luzerne, on August 21, 1878. That the county of Lackawanna at the time of its creation had a population of 80,000. That the county of Luzerne, minus that portion embraced in the county of Lackawanna, had, as indicated by the census of 1870, less than 150,000 inhabitants. That the salary of the said Thomas Munroe as Prothonotary for the year 1880, under the Act of March 31, 1876, was $6000; and that he paid into the treasury of the county of Luzerne, of the moneys received by him for fees in that year $6000, after deducting the amounts due his clerks. And further, that the county of Luzerne paid the said Thomas Munroe $5373.27 on account of salary as Prothonotary for 1880, leaving a balance due of $626.73, and withheld because the county of Luzerne, after the erection of the said county of Lackawanna out of it, did not contain 150,000 inhabitants. The present suit was instituted February 24, 1883, to recover said sum of $626.73.

On these facts Rice, P. J., decided that the Act of March 31, 1876, ceased to apply to the county of Luzerne after its division in 1878; and thereupon entered judgment for the defendant.

The plaintiff then took this writ, assigning for error the entry of judgment as above.

Garrick M. Harding (*John McGahren* with him), for plaintiff in error.

William S. McLean (*E. V. Jackson* with him), for defendant in error.

October 1, 1883. The Court. The plaintiff entered upon the duties of his office on the first Monday of January, 1880. To recover in this action, he must establish the fact that the county of Luzerne then contained a population of over one hundred and fifty thousand. The burden rests on him to prove his case.

The evidence on which he relies is contained in this case stated. We find, *inter alia*, the following facts admitted:—

1. When the United States decennial census for the year 1870 was taken, and according thereto, the county of Luzerne as then organized and constituted contained a population of one hundred and sixty thousand and nine hundred and fifteen.

2. In pursuance of the Act of April 17, 1878, the county of Lackawanna was erected and created out of the county of Luzerne on the 21st of August, 1878, and thenceforth ceased to be any part of the latter county.

3. At the time of its erection, the county of Lackawanna had a population of eighty thousand inhabitants.

4. When the decennial census of 1870 was taken, as indicated thereby, the portion of Luzerne County not embraced within the territorial limits of Lackawanna County had less than one hundred and fifty thousand inhabitants.

5. Under the 14th section of the Act of 31st March, 1876 (Purd. Dig. 1997, pl. 14), the plaintiff would have been entitled to the salary he claims, if the county of Luzerne contained a population sufficient to admit of the application of that Act.

This Act is general in its terms. It is designed to apply to counties then containing the requisite population, and also to those which might thereafter acquire it. Whenever an effort is made to apply this Act to an officer of any particular county, the fact to be ascertained is whether the county contained sufficient population at the time the officer entered on the duties of his office. Whatever the population may previously have been, or what it may thereafter become, does not control the case.

By what mode that population shall be ascertained does not arise in this case. The agreement of the parties settles several questions relating to the population. We, therefore, take that agreement as the starting point.

It is agreed that the whole county of Luzerne contained a population in 1870 of less than

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11,000 in excess of 150,000, and that the portion of territory set off therefrom in 1878 contained eighty thousand. Without any increase of population in the mean time, that would have reduced it in the portion of territory remaining in the county of Luzerne to less than 81,000. In the case-stated, the plaintiff does not aver, and the defendant does not admit any increase of population. In the absence of any such agreement the plaintiff asks us to assume that the original county had increased its population 69,000, an increase of more than 42 per cent. in eight years; or if the increase was not so much at that time, yet that the superadded increase in the reduced county of Luzerne prior to the first of January, 1880, brought it up to the 69,000. In the absence of evidence we cannot assume any such fact. The case-stated does not aver any such increase, nor any other fact from which it may reasonably be inferred. The paying over to the county of a portion of his fees by the plaintiff cannot change or control the question of population, on which his right to recover rests.

The learned Judge was clearly correct in entering judgment for the defendant on the case stated.

Judgment affirmed.

Opinion by MERCUR, C. J. H. J. S.

Jan. '84, 88. March 28, 1884.

King v. Mount Vernon Building Association.

Taxes and taxation — Assessment — Liability —Mortgage—Fraudulent conveyance.

A mortgagee of certain premises purchased the same at a sale under the mortgage for an amount less than the mortgage debt, and was subsequently obliged to pay taxes which were in arrear for several years prior to the sale. B. took a conveyance of the premises in June of one of said years, the taxes for the year having been assessed in the name of his grantor:

Held, that B. was not responsible to the mortgagee for the amount of the taxes of that year.

Three days after the conveyance to B., he in turn conveyed the property to a son of his grantor, but the deed was not recorded, and did not leave the hands of the conveyancer. It was alleged that the conveyance was in-

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, by The Mount Vernon Building Association against Miles King, to recover money paid by the plaintiffs for taxes due and payable by the defendant.

On the trial before LUDLOW, P. J., the following facts appeared:—

Joseph B. Hancock, on May 11, 1877, executed a mortgage on premises No. 1728 Girard Avenue, Philadelphia, to the Mount Vernon Building Association. At the time King and Hancock were both in business. Some time afterwards Hancock failed, very much indebted to King, to whom, on June 14, 1879, he conveyed the above premises together with other real estate, the deed being properly executed and put on record. Three days later on June 17th of the same year, King and wife executed a conveyance of the same premises to Joel C. Hancock, which was left with the conveyancer, but was never recorded. Joel C. Hancock, who was a son of Joseph B. Hancock, was not present at the execution of the deed, and never went into possession. King testified that he had received no consideration for the conveyance of the properties, that he had never gone into possession thereof, and had never received any rents therefrom. He also testified that at the time of the failure of Hancock, the latter was indebted to him in the sum of $16,000. The evidence showed that the rents on the above properties were paid to Hancock up to May, 1880, and after that, until the plaintiffs took title, to Fisher, who signed himself as the agent of King, and who was in the employment of Hancock. King testified, however, that he had not authorized Fisher to use his name in signing receipts. Joseph B. Hancock remained in possession until the day of the sheriff's sale under the above mortgage in June, 1882, at which the plaintiffs became the purchasers. After obtaining a deed from the sheriff, the plaintiffs were compelled to pay the taxes for the years 1879, 1881, 1882, and brought this action to recover the same from King whom they alleged to be the owner. The Court charged as follows:—

"There is a principle of law settled in this State, which virtually holds that when the owner of property gives it subject to certain

on who was the real owner after June, 1879. There is some evidence that a deed was executed to Joel C. Hancock three days after the deed to him of 14th June, 1879. In other words, after June 17, 1879, a deed was executed and never recorded, which remained with Haines till this morning. In determining the question of ownership, I say to you, that if that deed was executed with an intent to cover up this property so that the creditors of Joseph B. Hancock could not reach it, and that the deed so executed was left unrecorded in possession of Haines, the title never changed. The jury, in finding such a state of facts as that, would have a right to find the whole object of that conveyance was, in point of fact, fraudulent; and, if so, the title was never divested and remained in King. If so, he becomes responsible for the tax liens existing at the time of the sale by the sheriff, which were paid by the plaintiff. . . . .

"If King was the real owner from June 14 to June 17, 1879, then, for whatever taxes were liens upon the property at the time, he is responsible, and your verdict should be for that amount at least. If he was not the owner after the 17th June, then he was not responsible for any taxes assessed after he parted with the title, but he is responsible for taxes which were liens at the time of his so parting with his title."

Verdict for the plaintiff and judgment thereon.

The defendant thereupon took this writ, assigning for error the charge of the Court, as above.

John G. Johnson, for plaintiff in error.

Admitting the soundness of the doctrine of Hogg *v.* Longstreth (1 Out. 256), the defendant was not liable for taxes assessed in 1878, because there was no personal liability on his part to pay them. For the taxes of 1879 were assessed not against him, but against Hancock, his grantor, who was at that time the owner. The taxes for that year became Hancock's personal debts by Acts of Assembly, and had the taxes for that year been paid by King, under the authority of the above case, he would have been entitled to have had them refunded. The defendant, therefore, not being the owner at the time of the assessment, was not responsible.

Shaw *v.* Quinn, 12 S. & R. 299.

As to taxes for subsequent years, it was for the jury to say in whom was the ownership of the property. If King was the owner, he was liable for taxes assessed during his ownership. But King was not liable, for he was not the owner, for in 1879, after holding the property three days, he reconveyed to Hancock, and title passed out of him. Again, if there was a fraudulent attempt on the part of Hancock to cover up his property from his creditors, as alleged on the other side, but which is denied, then no title passed to King in the first instance, and of course he was not liable; so that in either case the defendant is not responsible for the taxes.

[TRUNKEY, J.—Was the deed from King to Hancock actually delivered?]

It was left with the conveyancer. But that is not the question here. If the Court had charged the jury on the question of delivery, that would have been quite another thing.

George Junkin, for defendant in error.

The defendant is liable for the taxes of 1879 under the ruling in—

Hogg *v.* Longstreth, 1 Out. 256.

When the mortgagor is in possession, and neglects to pay taxes which are a lien on the land, the mortgagee may pay them, not in reliance on the personal liability of the owner, but in reliance that the land is liable, and the lien will be deemed as transferred by the State to him in favor of the mortgage debt.

Kortright *v.* Cady, 23 Barb. 490.

King's liability to reimburse to the mortgagee, the taxes paid, grew out of the fact that he had the title subject to the mortgage; that he had constructive possession; that he had actual possession by receiving the rent; that he was bound to pay taxes out of the income; and that the real estate was liable for their payment. Whatever may have been the agreement as to the proportion of the taxes for the year 1879, the land at all events was liable to be taken and sold for the taxes. The mortgagee in this case being compelled to pay, an implied promise to reimburse him arises.

Hogg *v.* Longstreth, 1 Out. 256.

The evidence clearly shows an attempt to defraud creditors by secret conveyance.

April 14, 1884. THE COURT. The taxes for 1879 were assessed against Joseph B. Hancock, who was at that time the owner of the premises No. 1728 Girard Avenue. Hancock conveyed to Miles King on the 14th of June, 1879, and on the 17th of the same month King executed a deed for the same premises in favor of Joel C. Hancock. The latter deed was not recorded, and does not appear to have been delivered. It remained in the hands of Henry Haines, the conveyancer, and was by him produced upon the trial below.

The Court below held that King was personally responsible for the taxes of 1879, though he held the title but for three days. This, we think, was error. It is undoubtedly true that an owner of real estate, against whom taxes have been assessed, is personally responsible for such taxes. But it was held in Shaw *v.* Quinn (12 S. & R. 298) that "taxes on real estate cannot be apportioned among the different persons who may become owners of it during the year; the per-

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son charged at the beginning of the year is liable for the taxes of the whole year, though he alien before the day of appeal."

It was urged, however, that Hogg *v.* Longstreth (1 Outerbridge, 255) lays down a different rule. We do not so understand that case. No question was there raised that Longstreth was not personally liable for a portion of the taxes because the same was assessed against a previous owner. On the contrary, it distinctly appeared, as we learn from the report of the case, that taxes had been assessed against the property in the name of John Longstreth, registered owner, for the years 1874 to 1878 inclusive. Not only so, but claims had been filed by the city and judgments recorded against Longstreth for the taxes of 1874, 1875, and 1876; writs of alias levari facias were issued upon these judgments, and were in the hands of the sheriff when Hogg paid the amount thereof in order to prevent a sale of the properties. Such were the facts upon which the opinion in Hogg *v.* Longstreth was predicated, and it is needless to say that the question of Longstreth's personal liability was not an open question. Hence it must be understood that when our brother TRUNKEY says in his opinion that "by force of law the taxes were a personal charge against the defendant, as well as a lien on the real estate," he was speaking of taxes which had been assessed against Longstreth, who was at the time the owner of the property. Neither his opinion nor the judgment rendered in that case conflicts in any degree with Shaw *v.* Quinn.

This view sustains the first assignment of error. The second and third assignments relate to the taxes for the years 1881 and 1882. These taxes were likewise assessed against Hancock. If, however, King was the owner during those years, he would be personally liable for the taxes by virtue of such ownership. We do not think a mistake of the assessor would relieve him of such liability. The whole policy of our tax laws is to make the owner of land at the time taxes are assessed liable for the payment thereof. No better illustration of this could be given than the Act of 1804, which made the tenant liable with the right to defalk the taxes paid by him against the landlord's claim for rent. And Caldwell *v.* Moore (1 Jones, 58) is authority for the principle that where taxes are assessed against the lessee of land, the lessor, who is the owner, is liable to his vendee for such taxes, in the absence of any contract between the lessor and the lessee by which the latter was bound to pay them.

In the case in hand the jury have found that King was the owner during the years 1881 and 1882. In submitting this question to the jury, however, the Court instructs them that "if the deed was executed with an intent to cover up this property so that the creditors of Joseph B. Hancock could not reach it, and that the deed so executed was left unrecorded in possession of Haines, the title never changed."

The element of fraud thus introduced was irrelevant, and may have misled the jury. The conveyances from Joseph B. Hancock to King, and from the latter to Joel C. Hancock were good against all the world, except the creditors intended to be defrauded; and as this is not a contest with such creditors, we must assume the deeds to be good *inter partes*. The recorded title being in King by the conveyance to him of the 14th of June, it will be for the jury to say whether he remained the owner after the 17th of June, when he executed the deed to Joel C. Hancock. I find nothing in the evidence to charge the latter as owner; nothing to show that the deed was ever delivered to him; that he took possession under it, or that he ever knew of it.

If King was the owner during these years, we have no hesitation in saying under the authority of Hogg *v.* Longstreth (*supra*) that he would be liable to the plaintiff below.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J. F. J. A.

July, '83, 217. March 27, 1884.

Linton's Appeal.
Shelmerdine's Appeal.

Executors—Disposition of assets of testator—Payment of individual debt by executor.

When an executor disposes of his testator's assets in payment of an individual debt, the purchaser has notice of the misapplication, becomes a participant in the breach of trust, and is liable accordingly for loss thereby occasioned to creditors or legatees.

Such liability may be enforced in a suit in equity brought by a co-executor who had not participated in the fraud, and had not been guilty of laches.

But where a valid judgment is transferred to one executor in part payment for a mortgage of the testator, the fact that said executor converted the judgment to his own use, is not to be charged to the purchaser unless he knew that such was the executor's purpose.

It is proper for the Court in such case upon entering a decree charging the purchaser of the mortgage with that portion of the purchase-money consisting of the executor's own debt, to subrogate such purchaser to the claim of such executor to a distributive part of his testator's estate. Such purchaser should not, however, be subrogated to a similar claim upon the part of a co-executor who has been without fault and has not been guilty of laches.

Appeals of James Linton and W. H. Shelmerdine from a decree of the Common Pleas No. 4, of Philadelphia County.

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Bill in equity, between William H. Shelmerdine, executor of R. C. Shelmerdine, deceased, complainant, and James Linton and George C. Shelmerdine, defendants, to compel payment for or restoration of a certain mortgage of $4000 to the complainant as executor of the estate of R. C. Shelmerdine, which mortgage, it was alleged, had been illegally transferred to James Linton by George C. Shelmerdine, one of the executors of the decedent, in payment of his individual debt to Linton.

The facts as they appeared before the Master and adopted by the Court were as follows:—

Robert C. Shelmerdine died September 23, 1876, testate. His will was admitted to probate October 2d, 1876, and letters testamentary were issued to W. H. Shelmerdine, the complainant in the bill, and to George C. Shelmerdine, one of the defendants in the bill, as executors.

The estate of the testator was devised and bequeathed to his nine children, among whom were William and George, in equal shares. The said executors sold a piece of real estate, and took a purchase-money mortgage for $4000 as part of the consideration for the property. On December 12, 1877, the plaintiff joined with George C. Shelmerdine in executing an assignment of the mortgage to the defendant, Linton, and permitted George to retain the papers and make the settlement. George took in payment from Linton (1) an order to satisfy a judgment held by him against George, amounting, with interest, to $2595; (2) an assignment of a judgment held by Linton against one Ruff, amounting, with interest, to $1110; and (3) $325 in money; making a total of $4030, the amount of the mortgage, with interest, at the date of the settlement, December 15, 1877. After the settlement had been made, the plaintiff called on George for the money. The latter put him off with excuses, and finally told him of the settlement, and how it had been made, to which William made objections. This was about a week after the settlement, and before George had caused satisfaction to be entered on the judgment against him, and before the Ruff judgment was marked to the use of George. On October 26, 1878, William wrote to Linton for information concerning the settlement. Linton called on William, and was told by him that he could not hold the mortgage under the conditions upon which he received it. He also went to see George, who told him that, while William was disposed to make trouble, his sisters, who were then living with George, were satisfied with the settlement. On November 19, 1878, William wrote to Linton, requesting an interview concerning the mortgage, to which Linton replied, stating that the mortgage had been placed in the hands of Mr. Pancoast, his counsel, and referring the matter to him. Mr. Linton again called on George, who repeated the statement that his sisters were, and that his brother William was not satisfied with the settlement. William called on Mr. Pancoast twice, and left the impression on the mind of that gentleman that the subject would be dropped, and he so informed Mr. Linton and returned the papers to him. In November, 1879, George decamped to Brazil. His brothers and sisters knew of his intended flight. He was deeply in debt, and feared that he might be arrested. On April 7, 1880, Linton was served with a copy of the bill filed in this suit. After the testimony had been taken, the bill, answer, and proofs were referred to a Master, who made a report thereon, decreeing that the defendant should not be allowed credit for any item of the consideration paid by him to George C. Shelmerdine, except the $325 in cash, but that owing to the laches and misconduct of George C. and William H. Shelmerdine, Linton should be subrogated to their rights in the decree, namely, two-ninths thereof: and after exceptions had been filed and argument heard thereon, the solicitor for the defendant filed a petition for leave to file an additional answer, setting forth that since the cause had been argued in this Court, he had presented his petition to the Orphans' Court for this county, for a citation to William H. Shelmerdine, the plaintiff in this suit, to file his account; that the said William is amply able to pay the legatees under the will of their father their full shares of the said mortgage of $4000, and that said legatees are in collusion with William H. Shelmerdine in endeavoring to throw upon the defendant Linton the loss of said mortgage, and to shield their brother from the same; that by reason of their conduct there is no danger of any loss to said legatees; and that the Orphans' Court had delayed action on said petition until this Court has rendered its decision, and praying for leave to file said answer and to take proof of the matters therein stated.

The Court (ARNOLD, J.) was of opinion that the facts set forth on this petition did not constitute a legal defence to the plaintiff's claim, and modified the decree reported by the Master so that Linton should be allowed credit for the value of the Ruff judgment at the date of the settlement namely $1110; and holding that Wm. H. Shelmerdine was not guilty of such laches as to forfeit his share of the proceeds of the mortgage; and accordingly entered a decree that Linton pay to Wm. H. Shelmerdine $2595, with interest from December 12, 1877, and that he be subrogated to the rights of Geo. C. Shelmerdine only in the decree, namely one-ninth thereof.

Thereupon Linton took this appeal, assigning for error, the ruling (1) that William H. Shelmerdine could, by styling himself "executor of

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R. C. Shelmerdine, deceased," bring this bill, and (2) that Linton was liable for any part of the mortgage.

Wm. H. Shelmerdine also appealed from the decree, assigning for error, *inter alia*, that part of the decree which allowed Linton credit for the value of the Ruff judgment.

George Junkin, for James Linton.

Wm. H. Shelmerdine cannot maintain this bill. It should be dismissed with costs; but without prejudice to the maintenance of a bill against James Linton by the legatees of Robert C. Shelmerdine, in the event of their failure to recover their legacies from Wm. H. Shelmerdine and his sureties.

These legacies have never been demanded of him, and the testimony shows that he is well able to pay them. His conduct made possible the fraud of his brother and renders him liable for the loss to the legatees.

Williams on Executors, pp. 1544, 1548, and 1553.
Leading Cases in Equity, vol. ii. part ii. (ed. 1877), pp. 1972 and 1973.

If W. H. Shelmerdine had filed his account and charged himself with the $4000 mortgage, and then paid the legatees, he could not have maintained this bill. As between himself and Linton he was the negligent party, and should not be allowed to recover from Linton, at least until it was shown that he would not be able to pay the heirs.

Franklin Swayne, for Wm. H. Shelmerdine.

The fact that the executor received payment of his own debt to the extent of $2500 on the transfer of the estate mortgage vitiated the whole transaction.

Crane *v.* Drake, 2 Vernon, 616.
Andrew *v.* Wrigley, 4 Br. Ch. Cases, 137.
Bonney *v.* Ridgard, 1 Coxe's Ch. Reports, 146.
McLeod *v.* Drummond, 17 Ves. 166.

The marking of the Ruff judgment by Linton to the use of George C. Shelmerdine as an individual was aiding him to make a further *devastavit*, and hence he should not be allowed for that.

Wright's Appeal, 39 Leg. Int. 170.
1 Perry on Trusts, § 225.
1 Leading Cases in Equity, 109.

The faithful executor was the proper person to bring the suit; even had he been a wrong-doer he would have had the right.

McLeod *v.* Drummond, *supra*.
Swink's Admr. *v.* Snodgrass, 17 Ala. 653.
Ellis's Appeal, 8 WEEKLY NOTES, 538.

April 7, 1884. THE COURT. These appeals are from the same decree, and were argued together.

It is a well-recognized rule that when an executor disposes of or pledges his testator's assets in payment of or as security for a debt of his own, the person thus acquiring them takes them subject to the claims of the creditors and of general and specific legatees of the testator. To the extent that the respondent acquired the mortgage from the executor of the decedent in payment of the executor's own debt, the Court correctly held the respondent liable. Not to have done so would have given him the benefit of a transaction, which the law declares to be a fraud on the creditors of the testator. It was also just to subrogate him to the rights of this unfaithful executor in the mortgage. We, however, see no error in refusing to divest his co-executor, guilty of no fraud, of his interest as legatee in the mortgage. While the respondent justly was allowed for the judgment which he transferred in part payment on his purchase of the mortgage, yet there his equities against the co-executor and against the legatees stopped. Their rights were properly enforced in the name of the faithful executor. We see no error in the decree.

Decree affirmed in each case; and each appeal is dismissed at the costs of the respective appellant therein.

PER CURIAM.

STERRETT, J., absent. W. M. S., Jr.

Jan. '84, 433. April 24, 1884.

Watson et al. v. Supplee.

Errors and appeals—Affidavit of defence—Act of April 18, 1874—Practice.

The provision of the Act of April 18, 1874 (P. L. 64), that in all actions wherein by Act of Assembly or rule of Court the plaintiff is entitled to ask for judgment for want of a sufficient affidavit of defence, and the Court shall decide against his right to such judgment, plaintiff *may* except to such decision, and take a writ of error to the Supreme Court, must be construed to mean that unless plaintiff so excepts, no writ of error will lie.

Error to the Common Pleas of Montgomery County.

Assumpsit, by Calvin A. Watson and Walter Dormitzer, copartners, trading as Watson & Dormitzer, against Eliza D. Supplee, upon a promissory note for $317.33, drawn by defendant to the order of A. H. Supplee & Co., and indorsed by them to the order of the plaintiffs.

Defendant filed an affidavit of defence, and plaintiffs thereupon took a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence. After argument the Court entered an order, discharging the rule for judgment. Thereupon, and without filing an exception to this order, plaintiffs took this writ, assigning for error, *inter alia*, the discharge of the rule.

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Edward F. Pugh (*W. W. Craig* with him), for plaintiffs in error.

Isaac Chism (*Chas. T. Miller* with him), for defendant in error, were not called upon.

[GORDON, J. Is it the fact that no exception was taken in the Court below to the order discharging the rule for judgment?

Pugh. Yes; but we do not deem it necessary under the provision of the Act of April 18, 1874 (P. D. 1873, pl. 3), the words of which are: "may except to such decision." Those words are directory merely and not imperative.

[GORDON, J. We do not think so.]

Writ of error quashed.

PER CURIAM.

MERCUR, C. J., and CLARK, J., absent.

J. H. M.

Common Pleas—Law.

C. P. N. 2. April 5, 1884.

City of Philadelphia v. McCuen et al.

Practice—Pleading—Judgment on bond—Judgment opened—Narr.—Feigned issue.

When judgment entered by warrant of attorney on a bond is opened, it is usual to go to trial on the merits without narr. or plea. If it is important to have the issue defined, a feigned issue may be framed, or a formal narr. and plea filed.

Eisely *v.* Ditsche (2 WEEKLY NOTES, 200) distinguished.

Sur rule to strike off rule to plead.

The record showed a judgment on a warrant of attorney accompanying a bond, and judgment opened. There was no paper of record except the power of attorney filed. Plaintiff ruled defendant to plead in eight days, or judgment *sec. reg.* Defendant then took the present rule.

John Roberts, for the rule.

Abraham M. Beitler and *Wm. Nelson West*, contra.

THE COURT. The practice in this class of cases is very informal. Usually the parties go to trial on the general merits of the case, without either narr. or plea, but where it is material to have the issue defined with precision the proper way to do it is by feigned issue or by formal narr. and plea. This is the practice indicated by the Court in Bush *v.* Monteith (2 WEEKLY NOTES, 112), and none of the cases cited are in conflict with it. Eiseley *v.* Ditsche (2 WEEKLY NOTES, 200) decides only that a formal narr. is not necessary in ordinary cases, and plaintiff cannot be non prossed for want of a narr., unless he has been previously ruled to declare.

Rule absolute.

Opinion by MITCHELL, J. S. G. F.

C. P. No. 3. February 2, 1884.

Commonwealth ex rel. Senior v. Douglass, Lawson, and Krumbhaar, County Commissioners.

Sealed proposals to furnish stationery, etc., for the Recorder of Deeds and other officers—Duty of City Commissioners as to such proposals—Exercise of their discretion—Refusal to schedule, examine and consider—Mandamus.

Sur demurrer to relator's petition and to, writ of alternative mandamus.

The petition of John L. Senior set forth, that in consequence of a public notice of the Commissioners of the county of Philadelphia for supplies, he prepared in due form, and on Wednesday, the 23d day of January, 1884, before 10 o'clock A. M., delivered to the said Commissioners, at their office, his sealed proposals, indorsed "Sealed Proposals," and addressed to the said Commissioners, to furnish stationery, books, and blanks for the departments of the Recorder of Deeds, Prothonotary of the Courts of Common Pleas, Board of Revision of Taxes, and County Commissioners, for the year 1884, and having entered into and filed with the City Solicitor his bond, with surety therein in the sum of five hundred dollars, as required by the ordinance in such case provided, the said proposals of petitioner were accompanied by the certificate of said solicitor that petitioner had filed in his office the bond required by ordinance preparatory to bidding for a contract to furnish the books, stationery, etc., advertised for as aforesaid. And petitioner did in all other respects fulfil all the requirements of the several Acts of Assembly and ordinances of the said city in such case made and provided.

Petitioner further showed, that on the 23d day of January, 1884, the said Commissioners opened the "sealed proposals" of the several bidders to furnish the supplies aforesaid, at the office of the Commissioners, in the presence of the Finance Committee of Councils, including the said proposals of petitioner, and thereupon the said Commissioners, in violation of their duty and the rights of petitioner in the premises, rejected the said proposals of petitioner, and refused to

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schedule, examine, or consider the same with the other proposals for furnishing supplies received by them from other bidders, the said Commissioners then and there falsely and unlawfully pretending, as an excuse for such rejection, that petitioner is not known to be engaged in the stationery or printing business, and that petitioner is not a responsible person.

Petitioner further averred, that the said Commissioners were engaged in scheduling the said proposals, excepting therefrom the aforesaid proposal of petitioner, and that upon completing said schedule, they would proceed to award contracts for said supplies, and that petitioner could not have an adequate remedy in this behalf in an action at law. Petitioner prayed therefore for a writ of alternative mandamus against the said Commissioners, to show cause why they should not receive and schedule relator's proposals, and consider the same, and if, upon examination and consideration thereof, petitioner should be found to be the lowest bidder for said supplies, or any of them, that they, the said Commissioner, should award a contract to petitioner for the same, according to law and their duty in that behalf.

The respondents demurred to the petition and alternative mandamus, on the ground, *inter alia*, that in rejecting the relator's bid, and deciding him not to be a responsible person, they exercised a discretion vested in them by law, and which this Court cannot coerce.

Abraham M. Beitler, for the demurrer, cited—
Comm'th *ex rel.* Park Com. *v.* City of Philadelphia, 2 WEEKLY NOTES, 124.
Comm'th *v.* Mitchell, 1 Norris, 343, 351.

W. S. Price, contra, was not heard by the Court.

Eo die. THE COURT. The decision of the Commissioners was premature. They should receive and schedule all the bids; after this they can excercise their discretion as to a bidder whom they do not deem responsible. We therefore enter judgment for the plaintiff on the demurrer; and it is ordered by the Court that the defendants forthwith proceed to discharge the duties incumbent upon them, by virtue of the laws and ordinances of the city of Philadelphia relating to the subject-matter in dispute. A. B. W.

[See next case.]

C. P. No. 3. February 9, 1884.

Senior v. Douglass et al. City Commissioners.

Practice—Refusal of the City Commissioners to obey a peremptory mandamus commanding them to proceed to perform the duties incumbent on them by the law and the ordinances of the city, in relation to bids for supplies—Attachment for contempt—Injunction—Method of enforcing the mandamus.

Sur supplementary petition of John R. Senior.

A petition had been presented January 26, 1883, setting forth the refusal of respondents to schedule petitioner's bids for certain supplies, and praying for a writ of peremptory mandamus, which was awarded February 2, 1884, addressed to defendants, commanding them and each of them to proceed to perform the duties incumbent on them by the law and by the ordinance of the city of Philadelphia relating to the subject matter in dispute.

The supplementary petition set forth (1) the issuance and service of the writ of mandamus; (2) the scheduling of petitioner's proposals by the Commissioners; (3) the examination and comparison of said proposals with those of the other bidders by said Commissioners in the presence of three out of the twenty-four members of the Finance Committee of Councils at the Commissioners' office on February 6, 1884; (4) that it then and there appeared that petitioner was the lowest bidder for certain articles specified; (5) that it thereupon became the duty of the said Commissioners to award a contract for said articles at the prices named to petitioner, and that the petitioner's right was to have such contract awarded him; (6) that the Commissioners refused to award such contract to petitioner. The petition prayed that the Court so further proceed in the premises that the command of the writ of peremptory mandamus might be forthwith carried into effect, and a contract for said supplies awarded to petitioner.

W. S. Price, for petitioner.

I take it, the right of the petitioner, being the lowest bidder, is to have the contract awarded him.

[LUDLOW, P. J. The effect of the order was only to compel the Commissioners to schedule petitioner's bid. After that, to proceed to do their duty under the law.]

The Commissioners are merely ministerial, not judicial officers, with a limited discretionary power. And it has been decided that they cannot exercise an arbitrary discretion.

[LUDLOW, P. J. Either take a rule to show cause why an attachment for contempt should not issue, or file a bill praying that the Commissioners be enjoined from awarding the contract to any other bidder than petitioner. A. M. B.

[See next case.]

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C. P. No. 3. February 16, 1884.

Senior v. Douglass et al. City Commissioners.

Mandamus—Attachment for contempt—Respondents acting under advice of the City Solicitor—Power of the City Commissioners in awarding bids for supplies—Who is a responsible bidder—Rejection of a bid by the Commissioners because of information and belief that the bidder had previously defrauded the city—Injunction.

(1) Sur rule on the City Commissioners, respondents, to show cause why a writ of attachment should not issue against them as for contempt in not obeying the command of a writ of peremptory mandamus.

(2) Sur motion for preliminary injunction.

The writ of peremptory mandamus was issued February 2, 1884, and commanded them that they "proceed to perform the duties incumbent on them by law, and by the ordinances of the city of Philadelphia, relating to the subject matter in dispute (see preceding reports of this case), and specified in the petition for a mandamus presented by said John R. Senior to said Court."

The answer of the respondents to the rule set forth that acting strictly within the law as the City Solicitor advised them, they proceeded to schedule the bid of John R. Senior; that upon such scheduling it was ascertained that he was the lowest bidder for sundry articles, but not for all; that the defendants knew Senior simply as a member of the firm of Thomas W. Price & Co., and had prior to the reception of any bids decided that any bid received from him should be rejected; that they thus decided because he had, as they were informed and believed, in prior contracts with the city defrauded the city by furnishing inferior materials in place of those bid for; that they decided that Senior was not a responsible bidder; that his bid was scheduled on the 6th of February, 1884, and on the 7th of February they, with the approval of the Finance Committee of Councils, awarded the contracts for supplies for the year 1884 to the lowest responsible bidders, refusing to award any contract to the said Senior, whom they had decided not to be a responsible bidder; that on each schedule they noted, "the bid of John R. Senior was scheduled under protest by the County Commissioners, and by the advice of city, approved April 4, 1882, and December 26, 1882.

In the same suit, upon the 11th of February, 1884, the plaintiff filed a bill in equity setting forth the facts as above, and asking for an injunction restraining the defendants and each of them from awarding a contract to any person or persons other than the plaintiff for the supplies therein enumerated. A preliminary injunction was granted the same day. The motion to continue the injunction and the rule for the attachment were argued together.

Wm. S. Price, for the rule.

If the Commissioners have a discretion in awarding bids, they must exercise the discretion reasonably, or the Court will compel them by mandamus.

Commonwealth *v.* Mount Moriah Cemetery, 2 WEEKLY NOTES, 244.

The Court has jurisdiction to redress the wrong complained of. All official bodies, except the Legislature, are amenable to the Courts.

Kerr *v.* Trego, 11 Wright, 292.

It was not competent for the Commissioners to treat the plaintiff as an irresponsible person upon *ex parte* information only, that he had not fully complied with the terms of a former contract. The plaintiff is entitled to defend himself against such a charge if made. The case of Commonwealth *v.* Mitchell, cited by defendants, contains nothing to the contrary of this doctrine. That no man shall be condemned without a hearing, is a maxim of fundamental law.

Field *v.* Commonwealth, 8 Casey, 478.

Wm. Nelson West, City Solicitor, and *A. M. Beitler*, Assistant City Solicitor, contra.

The defendants were acting under the advice of the City Solicitor in rejecting the plaintiff's bid. The Act of 23d May, 1874, imposes not only a ministerial duty upon city authorities, but also duties and powers which are deliberative and discretionary. Mandamus will not lie to compel them to modify their decision even though the action was erroneous, in the absence of clear proof of fraud and bad faith.

Commonwealth *v.* Mitchell, 1 Norris, 343.
Commonwealth *v.* Guardians of the Poor, 40 Leg. Int. 46.
Same *v.* City of Phila., 2 WEEKLY NOTES, 124.

February 16, 1884. THE COURT. The defendants acted under the advice of the City Solicitor in refusing the proposals of the plaintiff.

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C. P. No. 3. May 3, 1884.

Dobson v. Fell.

Appeals from judgment of magistrate—Filing an appeal from a magistrate nunc pro tunc—Conduct of the magistrate misleading the defendant as to the time for filing—Rule taken after execution issued.

Sur rule to show cause why the appeal from the judgment of Magistrate Lennon heretofore filed should not be regarded and decreed to have all the force and effect which the same would have had if filed on or before the first Monday of April, 1884.

The affidavit on which the rule was granted set forth, *inter alia:*—

"That judgment was rendered against defendant for the sum of $77.18, on the —— day of March, 1884, in his absence.

"That defendant had a good defence to the suit, on the merits; that he called at the office of the magistrate on the 29th day of March, during business hours, with his bail or surety, for the purpose of then taking an appeal. That he signed the affidavit and bond, but the magistrate was not present to administer the necessary oath. That he called at said magistrate's court again, on the first day of April, instant, and then saw the magistrate, and made before him the proper affidavit, and asked for the appeal, intending to file it at once in the office of the prothonotary, but said magistrate told him to call for it in a few days. That on the fifth day of April he called again. That again, on the 10th day of April, he called at said magistrate's court, and feceived the appeal, which he filed, the same day, in the office of the prothonotary. That the petitioner was without knowledge of the law requiring the appeal to be filed in the office of the prothonotary on or before the next return day, and was misled by the conduct of the magistrate in postponing the matter, and by his language, into thinking that he had more time within which to file his appeal than was actually the case."

Execution was issued on the judgment, and notice of levy served.

Barry, for the rule.

Defendant used all reasonable diligence. He called at the magistrate's office *three* times for the transcript, and failed to get it. If he had been successful on any one of these three occasions, be would have been in time. The conduct of the magistrate in putting him off

A defendant who has been led into inaction by mistake, and swears to a good defence, will be permitted to file his appeal *nunc pro tunc*.

McNulty *v.* McCarty, 4 WEEKLY NOTES, 478.
Schoneman *v.* Sternberger, 7 Id. 111.

Cookman, contra.

Eo die. THE COURT. The appeal was taken too late. The execution has gone forth, and we cannot stop it.

Rule discharged. A. B. W.

C. P. No. 4. March 15, 1884.

Harrington v. Cambridge.

Patents—Execution—Fi. fa.—Right, title, and interest in a patent right cannot be taken in execution under a fi. fa.

Sur rule to show cause why the levy made by the sheriff upon all the defendant's "right, title, and interest" in certain patents for an improvement in machinery for making cigar moulds, by virtue of a writ of fieri facias should not be set aside.

J. D. Bennett, for the rule.

A patent right is not subject to levy by fi. fa. at common law.

Ager *v.* Murray, 21 Am. Law Reg. 469.

Nor can it be reached in equity.

Bakewell *v.* Keller, 11 WEEKLY NOTES, 300.

No statute has provided for it.

D. C. Harrington, showed cause.

The defendant has assigned the patent, and has no standing.

[THAYER, P. J. Nobody doubts that it is assignable; but it does not follow that it can be levied upon by fi. fa.]

It is so decided in Flagg *v.* Farnsworth (12 WEEKLY NOTES, 500).

[ELCOCK, J. What would you sell?]

All the interest in the patent.

[ELCOCK, J. Where? All over the United States?]

Yes, for the patent right follows the owner. A debtor might put all his property into the patented machinery, and prevent its use by a creditor on the ground that he owns the patent under which it is worked.

[THAYER, P. J. I have never heard of selling a man's right, title, and interest in a patent under a *fi. fa.* It required an Act of Assembly to effect the sale of stocks in that manner. The decision of the Supreme Court of the United States is against the plaintiff. In such a case

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JUNE 26, 1884.* [NO. 29.

Supreme Court.

July, '83, 207. January 25, 1884.

Bowlby v. Thunder.

Will—Contemporaneous paper and memorandum on same sheet—Construction of—Fee—Trust—Words of desire, recommendation, and confidence, when insufficient to create—Probate—Effect of.

A. by his will devised all his estate, real, personal, and mixed, to his wife for her own use and benefit, with a discretionary power to sell the whole or any part thereof. The will was duly executed with all requisite formalities. In another writing of the same date, upon the same sheet, the testator expressed the fullest confidence in his wife that she would carry out his intentions as to his children and grandchildren so far as they might in her opinion prove worthy of her attention, of which and of their necessities she was to be the sole judge. In a third writing, styled "Memorandum," of the same date and upon the same sheet, he named specific property for his son, grandson, and children of a daughter. Neither of the subsequent writings were under seal and witnessed, but they were admitted to probate. Testator's widow subsequently conveyed part of the property devised under the above will for a valuable consideration to B. in fee. In a contest between the children and grandchildren of A. and the devisees of B.:

Held, that the first paper was a full and complete will, under which testator's widow took a fee, which was neither enlarged nor restricted by the power of sale, and that neither of the two subsequent papers were parts of the will, nor codicils thereto.

Held further, that assuming all the papers constituted but one will, the mere precatory words used by the testator could not defeat the estate in fee vested in his widow, nor convert the devise to her into a trust.

Error to the Common Pleas No. 2, of Philadelphia County.

Ejectment, by Elena M. Thunder *et al.* against Anne E. Bowlby *et al.*, to recover two houses and lots at the northeast corner of Tenth and Lombard streets in the city of Philadelphia.

On the trial, before ELCOCK, J., the following facts appeared: Charles Johnson died in the year 1838, leaving to survive him his widow, two children, and grandchildren, having first made his last will and testament as follows:—

Item.—I give and bequeath unto my beloved wife Catharine, all my estate, real, personal and mixed, of whatsoever description, for her own sole use and benefit, with full authority to sell and dispose of the whole, or any portion of the same, should she at any time deem it necessary so to do.

And, lastly, I do hereby nominate and appoint my said wife Catharine, to be my sole executrix, with full authority to call in and appoint one other person to assist her in the execution of this my last will and testament.

And in witness whereof I, the said Charles Johnson, have to this my last Will and Testament, set my hand and seal on this third day of March, in the year of our Lord one thousand eight hundred and thirty-eight (1838).

CHARLES JOHNSON. [SEAL.]

Signed, sealed, delivered and published by the said Charles Johnson, as and for his last Will and Testament in the presence of us who have at his request, subscribed our names thereto, in the presence of the testator and each of us. NATHANIEL B. COOPER, JOHN P. ROBERTS.

Be it known to whom it may concern, that in willing all my estate, real and personal, in favor of my wife Catharine, I do it with the fullest confidence (that should she survive me) she will carry my intentions as to the ultimate distribution of it into effect, so far as in her opinion my children and grandchildren respectively may prove worthy of her attention. I have therefore deemed it prudent (should it be the will of God that she should survive me) to leave her who has toiled and labored with me through life, the management and disposition of our joint savings, knowing that she will not only judge of the necessities of my respective heirs, but also of those most worthy of her regard. Under these impressions (should it please God to call me first), I have the fullest confidence of my intentions being carried into due execution.

CHARLES JOHNSON.

Philadelphia, March the third, eighteen hundred and thirty-eight (1838).

Memorandum (for her) My mansion house corner Lombard and Tenth Streets, northwest, to my grandson, Charles Johnson.

The factory to my son Charles S.

The house I reside in, and the two frame houses northeast corner of Lombard and Tenth Streets, to the children of my daughter Anne, being for her own use during her life, in trust so as not to be subject to the debts, control, or engagements of her husband.

All the remaining part of my estate divided among my heirs as my wife may deem advisable, and I recommend her to call on my worthy friend, Benjamin Jones, Jr., as her assistant, who (if it suits him to serve) will faithfully execute the duties. CHARLES JOHNSON.

Philadelphia, March 3, 1838.

These papers were all admitted to probate October 29, 1838. The widow of testator, Catharine Johnson, on January 3, 1842, executed a deed for the premises in question to one Silvano A. Martinez in fee, the consideration recited being $3000. Three days later she married said Martinez, and died in 1863. Martinez died

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The Court ordered a verdict for plaintiffs, subject to the point, which was reserved, whether the testamentary papers of Charles Johnson did or did not vest a fee in the premises in question in his widow Catharine Johnson.

Verdict accordingly. Subsequently the Court entered judgment for the plaintiffs on the point reserved. Defendant thereupon took this writ, assigning for error the action of the Court in entering judgment for the plaintiffs on the point reserved.

F. F. Brightly and *Amos Briggs*, for plaintiffs in error.

The question is whether under the three testamentary papers there is a devise of a fee to testator's widow, or a trust reposed in her to convey to her children and grandchildren. The contention on the other side that there is a fee would be plausible, if only a part of the papers was read. But if the testator intended a fee, why confer a power of sale? If the first paper creates a devise in fee, a power of sale is unnecessary. But the words in the second paper, "be it known to whom it may concern that in willing all my estate, real and personal, in favor of my wife Catharine, I do it with the fullest confidence that (should she survive me) she will carry my intentions as to the ultimate distribution of it into effect," etc., were evidently meant to create a trust. This construction is strengthened by the fact that there is to be an ultimate distribution of the estate, and such ultimate distribution is inconsistent with a fee in the widow. The words, too, "my children and grandchildren" indicate classes to take in remainder. The sense of the language clearly is that his wife was to be his trustee to carry into effect his intentions as to ultimate distribution. And this creates a trust within the principle of—

Warner *v.* Bates, 98 Mass. 275.

Any obscurity as to the subjects of testator's bounty in the second paper, is cleared up in the last, which clearly designates both species of property and beneficiaries. The force of the words "all the remaining part of my estate to be divided among my heirs," etc., is antagonistic to the construction of a devise in fee to his widow, for the testator restricts the devise to those of his own blood.

It is submitted that she did not convey a fee to Martinez. The fact that the deed was made within forty-eight hours before her marriage with the grantee, and that there was great disparity in the age of the parties, are circumstances touch-

interest in the estate, and sells without reference to the power, the donee sells but the interest vested in him. In this case the widow sold simply her life interest.

[PAXSON, J. Does the deed purport to be an execution of the power?]

No, and it is well settled that he who wishes to convey under a power, must refer to the power. A sale without reference to the power only passes the grantor's interest, and is not an execution of the power.

Wetherill *v.* Wetherill, 6 Harris, 265.
Jones *v.* Wood, 4 Id. 42.
Hay *v.* Mayer, 8 Watts, 203.

Walter George Smith, *Francis Rawle*, *E. D. McLoughlin*, and *Samuel Robb*, for defendant in error.

The two papers are not parts of the testator's will, but the first paper was his will, for it is clothed in all the legal formalities in its execution requisite to a valid will. By the first paper a fee or an absolute gift is vested in testator's widow.

Fox's Appeal, 3 Out. 386.

In the conveyance to Martinez there was an undoubted consideration duly acknowledged, and allegations of no consideration of blood and disparity of age are mere padding, and amount to nothing. Their proper course was to have demanded an account in 1863, but for nineteen years they allowed her grantee to remain in possession and enjoy the property. Mere loose declarations by Martinez that he had only a life interest cannot of themselves avail to reduce his interest from a fee to a life estate. But while all the requirements of law are complied with in the first paper to render its execution valid, the formalities essential to valid execution are not observed in the second and third papers. The testator, illiterate as he was, does not even call them codicils. Is it reasonable to suppose that the testator would have turned around and given by another will all the property to another, having first given it outright to his wife? And could he have so done it on the same day? But even assuming all the papers constitute together a will, no trust was created in contemplation or by construction of law. For mere precatory words and words of confidence do not create a trust.

Second Reformed Presbyterian Church *v.* Disbrow, 2 Sm. 219.
Jauretche *v.* Proctor, 12 Wright, 466.
Pennock's Estate, 8 Harris, 268.

The last case clearly governs this.

"It is undoubtedly true that where a testator

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The receipt of $3000 was undoubtedly an adequate consideration, and even had no consideration passed there is no suggestion of fraud after a period of forty years. Nor is there any evidence that there was no consideration, and if the consideration had been considered insufficient, they could have called for an account.

February 18, 1884. THE COURT. The writing executed first is a full and complete will. It was signed, sealed, and declared by the testator as and for his last will and testament, in the presence of two persons who subscribed their names as witnesses thereto. He therein gave and bequeathed unto his wife all his estate, real, personal, and mixed, for her sole use and benefit, with full authority to sell and dispose of the whole or any portion thereof should she at any time deem it necessary to do so. This authority to sell was mere surplusage. It did not enlarge the power which the previous devise in fee simple gave her, nor did it indicate any intention to restrict her in the exercise of that power. Neither of the subsequent writings professes to be either a part of his will, or a codicil thereto. The first of them is addressed "to whom it may concern." Its purpose appears to have been to inform all persons who might feel interested in the disposition he had made of his property, why he had devised his whole estate to his wife. It was by reason of his great confidence in her, who had toiled and labored with him through life, that he deemed it prudent to give her the management and disposition of their joint savings. While he does therein express his confidence that she will carry out his intentions in the ultimate distribution of the estate so far as in her opinion his children and grandchildren respectively may prove worthy of her attention, yet he makes no disposition of any part of his estate, nor does he intimate any intention to restrain her free will. It is "her opinion," not his, which is to guide and control her disposal of the property. He does not even indicate which children or grandchildren he thinks worthy of his consideration. That thought is not suggested. On the contrary, the suggestion relates to those only that in her opinion "may prove worthy of her attention." After thus stating some of his reasons for having devised his property to his wife, [illegible] take from her the right to use, enjoy, and dispose of, the property as her own. The fact that the will does not contain words of inheritance did not prevent the whole estate of the testator in the property devised from passing to his wife, under section 9 of the Act of 8th April, 1833, as it does not appear by devise over or by words of limitation or otherwise, in the will, that the testator intended to devise a less estate.

It is contended, however, that these two writings should be considered a part of the will, and that the language therein is sufficient to create a trust. Conceding that at one time such language in a will would have been held sufficient in England to create a trust, yet the rule in Pennsylvania is now clearly settled otherwise. Words in a will merely expressive of desire, recommendation and confidence are not sufficient to convert a devise or bequest into a trust. (Pennock's Estate, 8 Harris, 268; Jauretche *v.* Proctor, 12 Wright, 466; Second Reformed Presbyterian Church *v.* Disbrow, 2 P. F. S. 219.)

Standing by themselves alone, expressions of a desire or wish of the testator as to a direct disposition of his property may constitute a valid devise or bequest thereof; yet the rule is different when such expressions are used after an absolute disposition has been made. Having made an unqualified devise of his property, no precatory words to his devisee can defeat the estate previously devised. (Burt *v.* Herron, 16 P. F. Smith, 400.)

While the language contained in these two writings must control the effect to be given to them, yet there is another fact significant of the intent of the testator. Hence, notwithstanding all the writings bear the same date, and are on one sheet of paper, yet a blank page intervenes between the first or will, and the two subsequent writings. In thus separating them the testator manifestly further intended to indicate that they constituted no portion of his will. Still further, the first he executed with the usual formalities of a will, under seal, and in the presence of subscribing witnesses, while neither of the subsequent writings has any seal nor any witness. The fact that all the writings were probated at the same time, cannot change the character previously stamped upon them. Probating does not create a will. It cannot make a will out of a [illegible]

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Jan. '83, 244. Feburary 13, 1883.

Lawrence et al. v. Lawrence.

Wills—Construction of—"Issue"—Estates tail—Deed to bar—Act of Jan. 16, 1799.

A devise, made in 1844, to A. and B. "and their heirs, as tenants in common and not as joint tenants: But if the said A. should die without leaving lawful issue, then, and in that case," his moiety to go "to B. his heirs and assigns forever," passes to A. a fee tail which may be barred by a deed executed and acknowledged for that purpose.

The context held insufficient in the present case to show that testator contemplated a definite and not an indefinite failure of A.'s issue.

Eichelberger *v.* Barnitz, 9 Watts, 447, followed.
Ingersoll's Appeal, 5 Norris, 240, and Daley *v.* Koons, 9 Norris, 246, distinguished.

A deed for the expressed purpose of barring an estate tail, although in trust that the grantee should immediately convey to the grantor, is good for its special purpose.

Error to the Common Pleas of Delaware County.

Ejectment, by Lavinia J. Lawrence against Thomas D. Lawrence and Patrick Raidy, for an undivided moiety of a tract of land in Haverford Township, Delaware County. Plea, not guilty.

On the trial before CLAYTON, P. J., the following facts appeared: Clement Lawrence died in 1844, unmarried and without issue, leaving as his next of kin, a brother and nephews and nieces, children of deceased brothers. His will, dated October 16, 1844, and duly proved November 11, 1844, contained, *inter alia*, the following:—

"Item:—I give and devise unto Thomas D. Lawrence and Mordecai Lawrence, sons of my brother Henry Lawrence, deceased, all that messuage and tract of land situate in the Township of Haverford aforesaid, bounded by Darby Creek and lands of Mary Bond and others. To have and to hold the said messuage and tract of land to them, the said Thomas D. Lawrence and Mordecai Lawrence, and their heirs, as tenants in common and not as joint tenants: But if the said Mordecai Lawrence should die without leaving lawful issue, then, and in that case, I give and devise the moiety or undivided half-part of said messuage and tract of land, with the appurtenances thereunto belonging, devised to him, to the said Thomas D. Lawrence, his heirs and assigns forever."

There were also further devises and bequests as follows:—

1. Real estate to Wm. P. Lawrence and his heirs, but if he should die without leaving lawful issue, then, and in that case, to Thomas D. Lawrence, his heirs and assigns forever.

3. Real estate to Clement Lawrence, his heirs and assigns forever, but if he should not live to attain the age of twenty-one years, then, and in that case, to the eldest son then living of Thomas D. Lawrence, subject to the same conditions.

4. Real estate to Wm. P. Lawrence, his heirs and assigns forever.

5. Real estate to Mordecai Lawrence, his heirs and assigns forever.

6. Eleven bequests of personalty, in each of which the words "heirs and assigns" are added to the name of the legatee.

Under the above will, Thomas D. and Mordecai Lawrence held the property in suit as tenants in common, sharing the rents and profits. On May 28, 1878, Mordecai and his wife executed a deed to Lavinia J. Lawrence, for the undivided half-part of said premises, the consideration being the sum of one dollar, and expressed to be for the purpose of barring all estates tail in said Mordecai, and containing the following clause:—

"In trust by a good and sufficient deed of conveyance, immediately after the delivery of these presents, to grant and convey the same premises to the said Mordecai Lawrence, his heirs and assigns, etc., and for his and their only proper use and behoof forever."

Lavinia J. Lawrence reconveyed the same day. Mordecai Lawrence died about February, 1880, leaving a widow, but no children, he never having had a child born to him. By his will, dated January 1, 1864, he devised all his real estate to his wife for life, and at her death to his adopted daughter, said Lavinia J. Lawrence, the plaintiff below. After his decease, Thomas D. Lawrence, one of the said defendants, retained possession of the aforesaid premises, and leased them to his tenants.

The defendants below submitted, *inter alia*, the following points:—

2. By the will of Clement Lawrence, the estate devised to Mordecai Lawrence in the premises in question, terminated upon his decease without issue. *Refused.*

3. The deed executed by Mordecai Lawrence, dated May 28, 1878, was ineffectual to bar an estate tail, if any existed in the grantor. *Refused.*

4. The verdict must be for the defendants. *Refused.*

The Court charged the jury as follows:—

"Under the evidence the plaintiff is entitled to recover, and I direct you to render a verdict for the plaintiff." Verdict accordingly for the plaintiff and judgment thereon. Defendants thereupon took this writ, assigning for error the refusal of the above points and the charge of the Court.

A. Lewis Smith (*George E. Darlington* with him), for the plaintiffs in error.

In the construction of wills, the intent of the testator prevails over merely technical rules.

Stover's Appeal, 27 Smith, 282.

This testator desired to retain in his family the property which had long been associated with his name. He therefore intentionally distinguished between the words "heirs" and "heirs

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and assigns." The omission of the word "assigns" to his mind added the qualification which he wanted to annex to an estate, otherwise absolute, that is, made it a base fee.

In a will, the word "issue" may be construed to be a word of purchase.

Taylor *v.* Taylor, 13 Smith, 481.

The words "without leaving lawful issue" may from the context be construed to mean a definite failure of issue.

Ingersoll's Appeal, 5 Norris, 240.
Daley *v.* Koons, 9 Norris, 246.
Eby *v.* Eby, 5 Barr, 461.
Leightner *v.* Leightner, 6 Norris, 144.
Hill *v.* Hill, 24 Smith, 173.
Nicholson *v.* Bettle, 7 Smith, 384.
Hoge *v.* Hoge, 1 S. & R. 144.

In this case such construction is required by the words "then, and in that case," which follow the words "without leaving lawful issue."

The deed to bar the entail is defective, because the law would immediately execute the trust to reconvey, and there would therefore be no period of time during which the title to the property would be in the grantee, which is evidently necessary under the Act of Jan. 16, 1799 (Purd. 619, pl. 4).

John M. Broomall, for defendant in error.

Evidently the testator's design was to keep Mordecai's devise in the line of his blood as long as that lasted, and it is that which gives it the elements of an estate tail. The word "assigns" in a will has no meaning or function whatever. That testator did not intend a base fee appears from the fact that he uses "heirs" alone as to Thomas's devise, and that is conceded to be absolute.

The rule is that a devise over on failure of issue means an indefinite failure of issue.

Smith on Exec. Int. 270, pl. 538.
2 Washb. on Real Property, 4 ed., 690, *349.
Wharton Dig. *Wills*, 902, pl. 356.

The cases cited by plaintiff's in error to prove the contrary are not in point; but the following cases prove this rule to be well settled in Pennsylvania.

Sharp *v.* Thompson, 1 Wharton, 139.
Lapsley *v.* Lapsley, 9 Barr, 130.
Amelia Smith's Appeal, 11 Harris, 9.
Haldeman *v.* Haldeman, 4 Wright, 29.
Matlack *v.* Roberts, 4 Smith, 148.
Ogden's Appeal, 20 Smith, 501.
Hope *v.* Rusha *et al.*, 7 Norris, 127.
Stone *et al.* *v.* McMullen, 10 WEEKLY NOTES, 541.
Boyd *v.* Wingate, 13 WEEKLY NOTES, 56.

The phrase "then, and in that case" is simply an example of tautology; it might be stricken out without changing the meaning of the sentence.

purposes of the deed. The only essential element is the expressed intent to bar the entail.

Barnet *v.* Deturk, 7 Wright, 92.

March 3, 1884. THE COURT. In ordinary language, when a testator gives an estate to a person and his heirs, with a limitation over in case of his dying without issue, he means that the devisee shall retain the estate if he leaves issue surviving him, and not otherwise. But at common law the established interpretation of words of limitation on failure of issue, whether the terms be "if he die without issue," "if he die without having issue," "if he have no issue," or, "if he die before he has any issue," in absence of all words making a different intent apparent, is, that they import a general indefinite failure of issue, and not a failure at the first taker's death. (2 Jarman on Wills, 497.) That this is the rule in Pennsylvania has not been doubted since the decision in Eichelberger *v.* Barnitz (9 Watts, 447). There the testator directed that if his son Henry "should die without leaving any lawful issue," that then his full share "should go to the testator's other children;" and it was held that Henry took a fee tail.

Not controverting the rule, the plaintiffs in error contend that in the light of the fact that at the date of the will of Clement Lawrence, Thomas D. Lawrence had children, and both William P. and Mordecai Lawrence had been married a number of years and were childless, the testator intended a failure of issue at a particular period, namely, the death of Mordecai Lawrence. The testator devised 1. Real estate to William and his heirs; but if William should die, without leaving lawful issue, he devised the same to Thomas, his heirs and assigns forever; 2. A tract of land to Thomas and Mordecai, and their heirs as tenants in common; but if Mordecai should die without leaving lawful issue, the moiety devised to him to go to Thomas, his heirs and assigns forever. 3. A tract of land to Clement Lawrence, his heirs and assigns forever, but if he should not live to the age of twenty-one years, the said tract to go to the oldest son then living of Thomas, subject to the same conditions. Then follow two devises of real estate; one to William, his heirs and assigns forever, one to Mordecai, his heirs and assigns forever; and eleven bequests of personal estate, and in each the words "heirs and assigns" are added to the name of the legatee. He intended in the bequests of personal property to give an absolute estate, and that intent would have been as clearly expressed had he omitted the words "heirs and assigns." Had

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of conjecture. In the devises of real estate the words "heirs and assigns forever" are used in five instances, and the word "heirs" in three. That in each case, unless limited or conditioned by other words, an estate in fee simple was devised, is admitted. Conceding that the word "heirs" was appropriate, if not necessary, for devising a fee, how could the fee be qualified by the word "assigns" or words "assigns forever"? Neither of these words has a popular or technical meaning that could qualify a devise to a man and his heirs. The intendment in every devise is very plain. To Thomas the land is given in fee; to William and Mordecai lands are given in fee, with limitation over; to Clement the land is given in fee, subject to the contingency that if he should die before the age of majority then over to another person. What the word "assigns" means in any of these devises is impossible to conceive. If any meaning was attached to it by the testator it was probably the same as where it is used in the bequests of personalty. He could not have intended less than a fee in the devise of one-half the tract to Thomas and his heirs; he intended no more when if Mordecai should die without issue, he devised the other half to Thomas, his heirs and assigns forever. In a deed with covenant by the grantor, the word "assigns" may have significance, but in a devise, as in this will, none. It is urged that the phrase "then, and in that case," appearing in each of the first three devises, shows that the testator used the word "then" in the devises to William and Mordecai respectively, as referring to the time of their death, as in the case of Clement, to the time of his full age. But in each case if the phrase were striken out, the meaning would remain precisely the same, and, therefore, there is no particular sense in which it is used in one place that serves to define it in another. None of the devises are modified by the superabundance of words. If a word be used in a definite and ascertainable sense in one place in a will, that will aid in arriving at its meaning in another. Whether the will is artistic or not, if its meaning be plain it shall not be set aside for mere redundancy of words. The indiscriminate use of words and phrases in this will fails to show that the word "heirs" in any devise was used in other than its technical sense; nor does it show that the word "issue" was used in the sense of children, or as denoting a class of persons, nor nite failure of issue, and the inference was irresistible that in the third the words were used in the same sense as before. Had the third not been defined by the two preceding, "the law would have construed it to be an indefinite failure of issue." In the present case the limitation is in the same words in the devises to William and Mordecai, and said words are found nowhere else in the will.

In Daley *v.* Koons (90 Pa. St. 246) the devise was to M. for life, and after her death to her children in fee, and in the event of M. dying without issue, then to her brothers and sisters. The devise to M.'s children, preceding the words importing a failure of issue, was within the rule "that words importing a failure of issue, following a devise to children in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large." The devise was to M. for life, and then to her children in fee. This case and others cited by the counsel for plaintiffs in error in their ingenious and able argument, illustrate various exceptions to the legal interpretation of the words, "dying without issue," when the meaning is shown by other words in the will. But we are not convinced that they apply to the case in hand, because of the dissimilarity of the facts.

The deed by Mordecai Lawrence to Lavinia J. Lawrence was for the express purpose of barring the estate tail, and although it was in trust that the grantee should immediately convey to the grantor, it was good for its special purpose. Such conveyances and reconveyances, for nominal consideration, for the purpose of barring estates tail, have been upheld, indeed, their validity has been unquestioned. The conveyance was upon the expectancy, founded on oral agreement, of reconveyance, and putting the trust in writing ought not to vitiate the transaction. The object of the statute is accomplished by the deed, acknowledged, entered upon the records of the court and recorded, which acts meet the requisites for barring the estate tail; for that purpose the legal title passes, whether the trust is oral or written. When written, the grantee is beyond temptation to claim the land.

Judgment affirmed.

Opinion by TRUNKEY, J.

CLARK, J., absent. C. K. Z.

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Oct. & Nov. '83, 51. October 5, 1883.

Hughes v. The Westmoreland Coal Company.

Contract—Construction of—Latent ambiguity—Evidence—Cross-examination.

A party cannot, under the guise of cross-examination, lead out matter constituting his own case, where such matters are not introduced in the examination in chief, or do not go to the bias or interest of the witness.

Where the defendant is improperly allowed to cross-examine the plaintiff's witness and educe matter of defence, the testimony so drawn out should be considered as if the witness had been called and examined in chief on the part of the defendant. Under such circumstances it is error for the Court to order a nonsuit on the ground that the plaintiff's own witness had testified to matter constituting a good defence.

A. entered into articles of agreement with B. to sell him a certain tract of coal upon snbstantially the following terms: For the coal on the west side of the ravine on the east side of the Sowash property, $140 per acre, and for the balance $70 per acre. B. assigned his right under the articles to C., against whom suit was brought to recover a balance of purchase-money. The evidence showed that there were two well-marked ravines on the east side of the Sowash property, but one nearer to it than the other, so that the second could not be reached without crossing the first:

Held, that no latent ambiguity had been developed, that the construction was, therefore, for the Court and not for the jury, and the proximate ravine must be taken as the one contemplated by the contract.

Error to the Common Pleas of Westmoreland County.

Assumpsit, by Martha M. Hughes against The Westmoreland Coal Company, to recover a balance of unpaid purchase-money for a certain tract of coal.

On the trial, before HUNTER, J., the following facts appeared: The plaintiff, who had a life estate in the coal in question, joined with her husband (who is now deceased) in 1853, in an article of agreement to sell and convey said coal to her brother, Wm. Larimer, the following being the terms of payment:—

"For each acre of good, merchantable coal contained in that portion of the land, which lies along the west side of the ravine on the east side of the Sowash property, the sum of $140 per acre, and for the merchantable coal upon the remainder the sum of $70 per acre, payable semi-annually, as fast as the coal is mined."

In 1854 Wm. Larimer assigned to the defendants all his right and title under said articles, and under this assignment the defendant entered into possession of the mines then open on the land, and continued to mine coal therefrom until the commencement of this suit.

The plaintiff proved that east of the Sowash property there was a ravine which extended almost due south to a point called Pat's Cabin, at which point it assumed a Y-shaped form; one fork (ravine No. 2), continued in the same general direction as the stem, and was deeper and discharged more water than the other fork (ravine No. 1), which branched off in a southwesterly direction, and the position of which, as regards the Sowash property, was rather southeast than east. Both ravines, however, were well marked and defined. Ravine No. 1 was nearer to the Sowash property than ravine No. 2, and a direct line from any point on said property to any point on ravine No. 2 would cross ravine No. 1. There was some evidence to show that the coal between ravines Nos. 1 and 2 was of quite as good quality as the coal west of ravine No. 1; but it appeared on cross-examination that at the date of the articles it could not be mined without considerable difficulty.

The plaintiff claimed, *inter alia*, that she had developed a latent ambiguity, and that it was for the jury to say which of the two ravines was contemplated by the articles as being the boundary line of the $140 coal.

Mr. Schellenburg, superintendent of the defendant's mining operations, was called as a witness by the plaintiff, and interrogated as to how many acres of coal the tract contained, how much had been mined, when mined, and from what portions of the tract. The defendant's counsel, in cross-examining him, asked the following questions: Q. "Where is this ravine No. 2 (No. 1 in this report) that you claim is the division line between these two values of coal; state where it is located and whether it is a well-marked ravine upon the ground?" Objected to as disorderly and not proper cross-examination. Objection overruled. Exception. (First assignment of error.) Q. "You have stated the amount of coal you took out; state whether or not it has been paid for up to May 17, 1881?" Objected to as not proper cross-examination. Objection overruled. Exception. The witness answered the last question in the affirmative. Mrs. Logan, daughter of the plaintiff, and who attended to her business, testified as to the amount paid, which showed a balance due even on the basis of ravine No. 1 being the correct boundary line of the $140 coal.

The Court, on motion of defendant, granted a nonsuit, which it subsequently refused to take off, giving *inter alia*, as a reason the fact that plaintiff's own witness had testified that the coal had been paid for in full. Plaintiff, thereupon, took this writ, assigning for error the above rulings of the Court as to evidence, and the granting of the nonsuit and refusal to take off the same.

Lucien W. Doty and *Winfield S. Wilson* (*James C. Doty* with them), for plaintiff in error.

The rule is well settled that the cross-examination should be confined to matters in regard to

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which the witness has been examined in chief, and to such questions as may tend to show the bias and interest of the witness.

Hopkinson *v.* Leeds, 28 Smith, 396.
Fulton *et al. v.* Central Bank of Pittsburgh, 11 Norris, 112.

Where the testimony of a witness is required to establish a fact which is part of the plaintiff's case, and also another fact which is part of the defence, justice requires that no advantage be given to either party in the manner of eliciting it. This advantage was given the defendant in cross-examination.

Floyd *v.* Bovard, 6 W. & S. 75.

An ambiguity on the face of a written instrument is for the Judge to explain; but if it arise from extrinsic evidence it must be solved by the jury.

Brownfield *v.* Brownfield, 2 Jones, 136.
Beatty *v.* Lycoming Co. Ins. Co. 2 Smith, 456.
Lycoming Mutual Insurance Co. *v.* Sailer, 17 Smith, 108.

The location of a disputed line or boundary is always a question of fact for the jury.

Brown & Rockwell *v.* Willey *et al.*, 6 Wright, 205.
Barclay *et al. v.* Howell's Lessee, 6 Peters, 498.

In this case the articles are unambiguous on their face, but extrinsic evidence shows two well-defined ravines to either of which the description in the deed might apply, and the question should have been left to the jury.

Richardson *v.* Stewart, 2 S. & R. 84.

Admitting it was a question for the Court, yet the Court should have decided that ravine No. 2 was the true boundary line; it was better defined, deeper, and discharged more water; it bounded coal of equally as good quality as ravine No. 1; ravine No. 2 continued in the same course as the main ravine, while ravine No. 1 did not, and was more like a tributary.

Admitting that the question was for the Court and was rightly decided, still it was for the jury to decide on the question of payment if there was any discrepancy in the testimony of the witnesses.

Berg *v.* Abbott, 2 Norris, 177.
Prutzman *v.* Bushong, Ib. 526.

Moorhead and *H. P. Laird* (*Head* and *J. A. Marchand* with them), for defendant in error.

The questions asked on cross-examination were distinctly as to *res gestæ* of the direct examination, and, therefore, permissible.

Markley *v.* Swartzlander, 8 W. & S. 172.
Coranhoran *v.* Hart, 9 Harris, 495.

They were not a new matter, and, therefore, the cases cited by plaintiff in error are inapplicable.

This Court will be slow to reverse on the ground of improper cross-examination.

Jackson *v.* Litch, 12 Smith, 455.
Bank *v.* Fordyce, 9 Barr, 277.

The extrinsic evidence showed no latent ambiguity. Ravine No. 1 is a well-marked ravine, and existed when the articles were signed; it completely cuts off a part of this coal, east and eastwardly from the Sowash property, and it would be impossible to reach ravine No. 2 directly without crossing ravine No. 1. It answers the contract description, and it is absurd to say that because there are one or more deeper or larger ravines beyond, a latent ambiguity has been developed.

Harvey *v.* Vandegrift, 8 Norris, 346.

The evidence showed that the coal between the two ravines was, in 1853, difficult to mine, and that accounts for its not being placed on an equality with the coal west of ravine No. 1.

If the contract has been properly construed then the coal taken has been fully paid for.

Nov. 12, 1883. THE COURT. Although the objection to the question set forth in the first specification of error might well have been sustained, its allowance was harmless. The location of the ravine therein referred to was not in dispute, and it was proved and uncontroverted that there was a ravine on a part of the Fullerton tract, formed by the confluence of two smaller ones, each well marked upon the ground. Which of these two ravines was intended by the parties to the contract is the most important inquiry in this action. It arises under the following clause: "For each acre of good merchantable coal contained in that portion of the land which lies along the west side of the ravine on the east side of the Sowash property, the sum of one hundred and forty dollars per acre, and for the merchantable coal upon the remainder, the sum of seventy dollars per acre."

There is no patent ambiguity. If there were but one ravine the meaning would be unmistakable. Because there are two, in absence of any evidence of the intention except as appears in the writing, the plaintiff contends there is a latent ambiguity, and that the jury must determine which is the line. It is settled that where there is a latent ambiguity in an instrument which requires the aid of extrinsic evidence to ascertain the subject of the contract, or where a contract is partly in writing and partly in parol, or where a contract cannot be understood without reference to facts dehors the writing, the question is for the jury. If a written contract relates to a house or a tract of land, and it be proved by parol evidence that there are two houses or two tracts, alike within the description, the fact must be determined by the jury. But when the location of the land described in the deed is certain, it needs not a jury to distinguish it from another tract. If it be admitted that the boundaries of a tract of land actually exist on the ground, as named in the deed, a jury shall not interpret the deed, or determine that the land is in another place.

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The plaintiff shows that there are two ravines. If there were but one, it is not pretended that there would be a fact to determine by jury trial. It is none the less certain that the body of coal in controversy was bounded on the west by the Sowash property, and on the east by a ravine, because there are two ravines, than it would be were there but one. And the construction of the deed is exclusively for the Court. Were the fact of two ravines in dispute, it would be submitted to the jury to determine, with instructions by the Court as to the meaning of the deed.

Above the confluence the first ravine from the Sowash line is southeast from the Sowash property; but a direct line from any part of the Sowash tract to any point on the second ravine will cross the first. We are of opinion that a stipulation respecting the coal between the Sowash tract and the ravine means the ravine nearest the tract; not that one or more shall be crossed to reach a ravine no better defined than the first. When a grantor contracts for a larger consideration per acre for a portion of the grant between specified marks, if there be doubt as to which of two similar marks he intended, the doubt must be solved in favor of the grantee. But it seems unnecessary to apply rules for resolving doubts to the language of this instrument, for it is reasonable to infer that the parties intended the proximate ravine to the Sowash line instead of the remote. The learned Judge of the Common Pleas rightly assumed the construing of the deed and gave the proper construction.

We think the Court erred in not submitting the testimony relating to payment to the jury. It has been reiterated in this State that cross-examination must be confined to matters which have been stated in the examination in chief, and to such questions as may tend to show bias and interest in the witness; that to permit a party to lead out new matter, constituting his own case, under the guise of a cross-examination is disorderly, and often unfair to the opposite party; and that these rules are established for the purpose of eliciting truth and preserving equality of the rights of parties in trials of causes. The purpose might often be defeated by a rigid enforcement of the rules in all cases. In the order of examination of witnesses and the introduction of testimony much must be left in chief on the part of the defendant. Under such circumstances it is error for the Court to order a nonsuit on the ground that the plaintiff's own witness had testified to matter constituting a good defence. (Jackson *v.* Litch, 62 Pa. St. 451; Hopkinson *v.* Leeds, 78 Id. 396; Fulton *v.* Central Bank of Pittsburgh, 92 Id. 112.)

The plaintiff called Mr. Schellenburg, superintendent of the defendant's mining operations, for the purpose of proving how many acres of coal had been mined, when mined, and from what portions of the tract. Upon cross-examination, the plaintiff objecting, the witness was allowed to say that within his own knowledge all the coal taken out had been paid for. The contract showed the price per acre, the witness proved the number of acres and on what parts of the tract; this was the plaintiff's case, the jury could find the amount; but whatever the sum, the defendant had been allowed to inject an insertion that the whole had been paid, without calling a witness. The injected matter was pertinent defence impertinently introduced. True, in answer to a direct question in chief, the witness asked the privilege of explaining, whereupon he stated the quantity to a certain date, adding, "I paid for more than that." But the addenda was a reason for more strictly enforcing the rule in his cross-examination. He had not been examined in chief as to payment. The plaintiff's case was not like a sale of goods for cash, a single transaction, where a witness who proves sale and delivery may be cross-examined as to the payment at the time, that being of the *res gestæ*. So, a subscribing witness who testifies to the execution of a written contract, may be cross-examined as to what passed between the parties at the time of its execution; but not respecting matters which occurred between them at a subsequent date.

Had an orderly examination of the witness been enforced no question of nonsuit would have arisen. Then the jury would have considered the testimony of Mrs. Logan upon the question of payment, as well as that of Mr. Schellenburg. But even if allowance of the objectionable cross-examination is not taken as ground for reversal, the testimony ought to have been submitted.

Judgment reversed and procedendo awarded.

Opinion by TRUNKEY, J.

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Common Pleas—Law.

C. P. No. 3. March 24, 1884.

Sweeney v. The Rev. Hugh McLaughlin Beneficial Society.

Beneficial Societies—Suit by member for benefits when by-law provides for arbitration—Expulsion of a member having vested property interests—Constitutional law—Mandamus.

Sur demurrer to answer.

Alternative mandamus, issued on relation of Hugh Sweeney against the Reverend Hugh McLaughlin Beneficial Society, commanding it to restore the relator to membership.

The petition of Hugh Sweeney set forth, that being a member of the above society, he claimed that by reason of sickness he was entitled to certain payments from the said society, and commenced suit against the society for the same; that upon bringing the said suit, and by reason thereof, the said society did unlawfully and illegally expel him from membership thereof.

The answer set forth that the petitioner was regularly and duly expelled by the society defendant from membership in said society, for wilfully and knowingly violating the constitution and by-laws of said society, and after full notice, appearance, and trial of the charges made against him.

That by a by-law of the society defendant it is provided as follows: "There shall be a committee of arbitration, selected for the purpose of hearing and deciding all disputes and disagreements which may arise in the transaction of the business of the society between the members and the officers thereof. . . . . Said committee, should they be unable to agree when hearing and determining a case of dispute, shall have power to select an umpire, whose decision shall be final.

"Each and every person, on being elected a member, and also those who may be members at the time of the passage of this amendment, shall pledge himself to submit all causes of dispute, with all the facts relating thereto, to the committee appointed under this law, and abide by the decision of this committee."

That on the seventh day of September, 1880, the relator instituted legal proceedings against the society defendant, for the recovery of sick benefits which he alleged to be due him, thereby violating and refusing to comply with the above by-law.

That on the fifth day of April, 1881, the charge was made, in writing, against the relator, of violating and refusing to comply with the above by-law. At a subsequent meeting, where the relator was given an opportunity to defend himself, he was duly expelled.

The relator demurred to the answer on the ground, *inter alia*, that it did not appear that the society was authorized to make the by-law stated in the return.

George H. Earle, Jr., for the demurrer.

A by-law ousting the jurisdiction of the Courts, and making a violation of the provisions of the by-law punishable by expulsion, is not a lawful one. The Court has jurisdiction to inquire whether a member has been expelled for sufficient cause, and if not, to restore him.

Evans *v.* Philadelphia Club, 14 Wright, 115.
Commonwealth *ex rel. v.* German Society, 3 Harris, 251.
State *v.* Union Merchant's Exchange, 2 Mo. App. 96.
Commonwealth *v.* St. Patrick Ben. Soc., 2 Binney, 441.

J. I. Farley, for the respondent.

Sweeney had no right to bring suit before he had submitted to arbitration, in accordance with the provisions of the by-law.

THE COURT. We consider that any by-law which provides for the expulsion of a man from a society in which he has vested property interests, is a violation of the Constitution of the Commonwealth.

Judgment for relator. A. B. W.

C. P. No. 4. December 17, 1883.

In re Mrs. Kilgore.

Attorneys-at-law—Admission of women—Relation of attorney and client—Power of Legislature to determine qualifications of attorneys—Discretionary power conferred by the Legislature upon the Courts—Act of April 14, 1834.

Sur motion for the admission of Mrs. Carrie B. Kilgore to the bar.

The applicant presented a diploma showing that she had been graduated from the department of law of the University of Pennsylvania, and a certificate of admission to practice in the Orphans' Court of this county.

Horatio Gates Jones and *Damon Y. Kilgore*, for the motion.

Courtesy to the Orphans' Court should induce the granting of this motion. Women are admitted to practice in the Supreme Court of the United States. This should settle the question of women's right to practice in all the State Courts, especially as admission to a State Court is a prerequisite to admission to the United States Courts. Hence if you deny her, she cannot be admitted to the United States Courts while she is a citizen of Pennsylvania. Article IV. of the Constitution of the United States declares that

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the citizens of each State shall be entitled to all the privileges of the citizens of the several States. In many States women have been admitted, and they would be entitled to the privilege of admission here. The practice of law is a civil right. Hence a Court may only regulate, not prohibit it. The Senate committee of the Legislature at first regarded a bill authorizing the admission of women as unnecessary, and subsequently reported such a bill favorably; but it was not acted upon at that session.

The admission of women is now sanctioned by custom. The fact of coverture is no objection. In this case the applicant made an ante-nuptial contract with her husband, which relieves her from the disabilities of married women. Women can employ counsel; it must follow that they can act as counsel. Moreover the Court always has the power of summary punishment for professional misconduct.

C. A. V.

May 3, 1884. THE COURT. In the decision of this motion two questions immediately present themselves, and the answers to be given to these two questions determine the whole case. The first is a question of power, the second a question of discretion. Have we the power to admit a woman to practice as an attorney of this Court? If we have, ought we to exercise that power by a favorable consideration of the present motion, or ought we to refuse it? Notwithstanding the doubt expressed by some eminent jurists whether, under a government of distributed powers, such as those contained in our written constitutions, it is competent for the Legislature to determine the terms and conditions upon which attorneys shall be admitted to practice, considering such admission as an exercise of judicial power, and that all judicial powers are by those constitutions vested in the Courts, I incline to the opinion that the subject is within the control of the legislative department of the government, and that it has the same power to prescribe the qualifications of attorneys which it has to determine those of all other public officers in cases where the Constitution is silent. In England, Parliament has not hesitated to regulate the matter by statute when it thought proper to do so. Sir Edward Coke informs us that "in divers parliaments it was thought good to decrease the number of attorneys, finding them to be the causes of the multiplication of suits, but though divers good laws have been made therein yet the number of them daily increaseth, to great inconvenience in the Commonwealth, and to the no small blemish and discredit of that ancient and necessary vocation." And he instances, as examples of this legislation, the statutes 20 Ed. I, rot. 4; 4 Hen. IV. c. 14; 33 Hen. VI. c. 7, 2 Inst. p. 250; 4 Inst. p. 76; Id. p. 257. In the United States it has been the uniform practice of the several States to legislate upon the subject of the admission of attorneys.

I accept therefore the proposition that in Pennsylvania it is competent for the Legislature to determine the qualifications of attorneys-at-law. Let us look therefore at the statute in force upon this subject, the Act of 14th April, 1834, and see what qualifications the Legislature has required the Courts to demand for the admission of attorneys. "The Judges of the several Courts of record of this Commonwealth shall respectively have power to admit a competent number of persons of an honest disposition, and learned in the law, to practice as attorneys in their respective Courts" (sec. 68). It is too plain to admit of argument that the only qualifications which the Courts are required by law to demand of persons applying for admission to practice are that they shall be "of an honest disposition and learned in the law." There are in the Act no restrictions as to age, color, citizenship, sex, or condition. They must be honest and learned in the law. These are the sole legislative requisites. All else is left to the discretion of the Courts, for it is to be observed that the Courts are not required to admit all persons having these qualifications, but they are empowered to "admit a competent number of persons," and those admitted must have the specified qualifications of honesty and learning. Now while it can be said with certainty that no Court would take it upon itself to make invidious distinctions between individual applicants, or to limit the number of admissions where the applicants possess the required qualifications, the language used is important as showing the discretionary character of the power. Let us next see in what manner the Courts have exercised this discretion. Their rules require: 1. That the applicant shall be a citizen of the United States. 2. That the applicant shall be of full age. 3. That the applicant shall have served a regular clerkship for two years in the office and under the direction of a practising attorney of this Commonwealth. 4. That the name, age, and place of residence and the name of the practising attorney under whose direction the clerk is studying shall be registered in the prothonotary's office. 5. That before registry there shall be a preliminary examination by the Board of Examiners on all the branches of a good English education. 6. That before admission the applicant shall have successfully passed an examination by the Board of Examiners. 7. That if the applicant has been graduated a Bachelor of Laws by the University of Pennsylvania, the clerkship in the office of a practising attorney shall be dispensed with. Here are therefore seven qualifications which are not mentioned in the Act of Assembly, all of

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which have been imposed by the Courts. Now if everything in the form of qualification beyond the two requisites mentioned in the Act of 1834 is not left by law to the discretion of the Courts, by what authority have they imposed these additional qualifications? It is clear that the Courts have always construed the Act of 1834 as giving them a discretionary authority over the whole subject of the admission of attorneys, except in so far as concerns the two imperative conditions as to honesty and learning which that Act demands. If therefore all requisites and conditions not enumerated in the Act of Assembly rest in the judicial discretion of the Courts it is plain that the question of the admission of a woman to practice as an attorney must rest in that judicial discretion, for neither the Act of 1834, nor any other Act of Assembly, excludes females either by express words or necessary implication. I will not stop to consider the effect of the use of the pronoun "he" in some of the subsequent sections of the Act, for it has so long been a settled rule of construction that the masculine pronoun when used in statutes, comprehends females, just as the use of a plural applies as well to a single individual, that it is altogether useless to enlarge upon the point. It is a rule which was settled at a very early day (2 Inst. 45), is recognized in the definition clauses of all statutes which contain such clauses (see for example Revised Statutes of U. S., tit. 1, c. 1), and which applies even to penal laws. Sec. 103 of the penal code, for instance enacts "if any person shall be guilty of larceny *he* shall be deemed guilty of felony," etc. If a woman may come under the designation of "he" in a statute defining a felony and fixing its punishment, it is hard to conceive that she cannot under the same designation be brought within the terms of a statute defining civil rights.

But it is said that notwithstanding the words of the Act, it was not the intention of the Legislature that they should include females, that women have never been admitted to practice as attorneys, and therefore the Legislature intended they never should be. But this assumption appears to me to be altogether gratuitous. If they had intended to exclude them it is reasonable to suppose they would have used proper words to do so. A writer who is an authority upon this subported by the words." (Dwarris on Statutes, 204.) "The best rule of interpretation to be adopted by the Courts is to ascertain the meaning of the Legislature from the words used in the statute." (Id.) "It would be dangerous in the extreme," says Judge STORY, "to infer from extrinsic circumstances that a case for which the words of the Act expressly provide shall be exempted from their operation." (Conflict of Laws, Int. 10.) "When the sense of a statute is manifest there can be no reason to refuse the sense which it naturally presents. To go elsewhere in search of conjectures in order to restrain it is to elude it." (Jackson *v.* Lewis, 17 Johns. 475; People *v.* The N. Y. Central R. R., 13 N. Y. Rep. 78.) "It is safer," said the Judges in 1 Term R. 52, "to adopt what the Legislature has actually said than to suppose what they meant to say." It is very possible that the Legislature, when they passed this Act did not contemplate the admission of women to the bar. Neither, in all probability, did they contemplate the admission of colored persons. The truth is, they intended nothing upon the subject, except to require honesty and legal learning as qualifications; what classes of the community should be admitted was a subject which did not enter into their consideration. They purposely framed the Act in the most general language, and left the matter to the discretion of the Courts, wisely considering that they would be the best judges of the circumstances and conditions of every case. The legislation was not intended for a day, but as a permanent and settled rule for all future years. The Act in which these provisions occur is entitled "An Act relative to the organization of the Courts of justice," and so far as concerns the provisions in question it is clear that they were intentionally cast in the most general terms in order that the Courts might not be restrained in the free exercise of the discretion committed to them. There is no ground whatever therefore for saying that the Legislature intended that, under no circumstances whatever, should a woman be permitted to practice as an attorney-at-law. The statute was not enacted in the interests of men as distinguished from the interests of women. It is a general statute, and whatever falls within the words falls within the meaning, unless it is plainly unreasonable, or op-

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able to appreciate the logic of this argument. I cannot understand how a custom can arise out of a mere negation, or how, when a new point arises for the decision of the Court, it can be pronounced bad, simply because it has never arisen or been decided before. Can there be a custom that a thing shall never be because it never has been? What a complete answer this would have been for BACON to have given to COKE when he argued, in Slade's Case, before all the Justices of England, that an action on the case, as well as an action of debt, would lie for a breach of a simple contract. But then, if it had prevailed, we might never have had the action of assumpsit. And if true, how successfully it might have been urged against every valuable reform in the law which has been the product of judicial judgments. PEMBERTON, an English Chief Justice, once boasted that he had, for his own share, made more law in his lifetime than King, Lords, and Commons. Nor is this remarkable when it is considered that under a system of jurisprudence, such as that which prevails in England, and which we have inherited, it is the every-day experience of the Judges to be confronted with new points of law which never have arisen before, where no statutes and no precedents exist for guides, and which can only be resolved by the application of general rules of justice and right to new combinations of facts. Not only so, but it constantly happens that the Courts, refusing to be bound by some antiquated and musty precedent or obsolete rule, lay down new rules more conformable to the altered opinions and habits of society, and the new exigencies of a changing civilization. And herein consists the superiority of this system of administering justice over all other systems. As Judge WILSON has well said, "It is characteristic of a system of common law that it may be accommodated to the circumstances, the exigencies, and the conveniences of the people by whom it is appointed. Now, as these circumstances, exigencies, and conveniences silently change, a proportionate change in time and in degree must take place in the accommodated system." (Works, p. 38.) It is not many years since the law seemed to be settled that no suit could be sustained against a corporation unless upon an express contract under the seal of the corporation. It is now everywhere held that it may be sued upon implied contracts, in actions upon the case, and in trespass. Referring to these changes in the law in Bushel *v.* The Insurance Co. (15 S. & R. 177), Judge ROGERS only announced a self-evident truth when he said, "these changes in the law have arisen from a change of circumstances, from that silent legislation by the people themselves, which is continually going on in a country such as ours, the more wholesome because it is gradual, and wisely adapted to the peculiar situation, wants, and habits of our citizens."

But the present motion involves no change of the law, and no change of any custom, using that word in its legal sense. It is simply the presentation of a new question growing out of the opinions and practices of modern society, a question which has never until recently arisen or been decided in this State. When Courts cannot solve such questions by reference to books or cases, they must decide them by that common sense of justice which is natural to man, by that "right reason conformable to nature" of which Cicero speaks. He who fears the progress of the law through such channels, misconceives the true relations of jurisprudence to society. A jurisprudence such as ours is evolved from society itself. It is the authoritative expression of its opinions and practices. It cannot stand still while society advances. It must follow it in its march, adapt itself to its wants and habits, minister to its necessities, and reflect its convictions. In 1769 Mary Conway was publicly ducked at the end of Market Street wharf as a common scold, in pursuance of the judgment of a Court of competent jurisdiction. In 1779 Ann Maize suffered a like barbarous punishment in the same place for a similar offence by the judgment of the law, but in James *v.* The Commonwealth, this disgraceful relic of a barbarous age disappeared forever from our laws without the aid of any statute. It is not saying too much to declare that the judgments of the Courts, keeping pace with the advance of civilization and the progress of enlightened public sentiment, have worked greater changes and produced greater ameliorations in the conditions of society than all the statutes which have been passed since the landing of Penn. To decide new questions as they arise out of the changing conditions of society, and to define legal rights heretofore undetermined by any statute or any legal decision, cannot be said in any just sense to be a usurpation of legislative powers, or an unwarranted exercise of judicial authority. That is one of the purposes for which Courts exist. When in 1876 we admitted to the bar a man of African descent we did that which in 1834 probably no Court in Pennsylvania would have ventured to do. Is there now any Court in the State which would undertake to refuse admission to such a man on account of his color? Yet who will say that the framers of the Act of 1834 intended that colored men should be admitted? Or who would now argue that the Courts in doing so unwarrantably altered any custom or usurped any power which they did not lawfully possess? The case in principle is precisely parallel to the present case. In neither case did the Legislature intend or enact anything upon the subject of color or sex.

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They were content to leave all such questions, as they might arise from time to time in the future, to the judicial discretion of the Courts. There is therefore no ground whatever for any doubt that the granting of the present motion is within the power of this Court. It is a matter left wholly to our discretion by the Act of 1834. And so completely is it within our discretion that our decision upon it is not subject to the review of any other tribunal. (Commonwealth *ex rel.* Brackenridge *v.* The Judges, 1 S. & R. 187.)

I pass now to the consideration of the second question. Having the power in our discretion to grant or refuse this motion, ought it to be allowed or refused? When I speak of discretion I do not of course mean that arbitrary discretion which substitutes for rules of reason, right, and law the prejudices, caprices, or preferences of the Judge. The discretion of a Judge in that sense is indeed the law of tyrants. But I use the word in the sense in which it is defined by Lord COKE, *discretio est discernere per legem quid sit justum.* I speak of that judicial discretion which seeks to ascertain what is just by a resort to rules of law and principles of right, which measures surrounding conditions and weighs results, that judicial discretion for which a Judge is as officially responsible as he is for any judgment which he pronounces.

I do not intend here to undertake any discussion of what are popularly called women's rights. I have no disposition to enter as a combatant into those lists. Yet it is necessary to observe, what is known to all men, that there is scarcely any subject upon which the opinions and practices of civilized societies have undergone greater changes during the present century than that which relates to the social and legal *status* of woman. Positive legislation has everywhere broken down the barriers within which she was formerly confined. Public sentiment has at the same time emancipated her from the restraints which formerly circumscribed her life and fettered the freedom of her action. If there is any longer any such thing as what old-fashoned philosophers and essayists used to call the sphere of woman, it is, it must be admitted, a sphere with an infinite and indeterminable radius. She is no longer relegated to the position of a plaything or with men for the highest rewards of ambition. Not to speak of other professions which have no particular bearing upon the present question, she may be found at the present moment practising law in Maine, Massachusetts, Connecticut, Ohio, Illinois, Indiana, Michigan, Missouri, Iowa, Wisconsin, California, Texas, Oregon, the District of Columbia, and the Territories of Wyoming and Washington, and perhaps in some other States whose laws I have had no leisure to examine. She is heard before the Supreme Court of the United States, and admitted to the law schools. The present applicant has produced before us a diploma of the University of Pennsylvania, written in very fair Latin, and duly signed by all the professors of the law school of that institution, certifying that she is skilled in the knowledge of the law; that they have conferred upon her the degree of Bachelor of Laws, and strictly enjoining upon all men that they respect her title to all the rights, privileges, and honors thereunto belonging. It is to me surprising that any one should speak with apprehension of an impending social change by which women are to seek fortune and fame in fields which were formerly denied to them. Such persons should awake from their slumbers. The revolution is over. It was so gradual that perhaps you did not observe it, or note the several steps of its progress. But it is over. It is an accomplished fact. Its results exist to-day everywhere and all around us, and have existed long enough for a moral philosopher to write its history. Now, I will ask, are we to take notice of these changes, and recognize the weighty facts which they have brought with them, and the rights which have grown out of them, or are we to set ourselves to the vain task of attempting to turn backward the wheel of time, to convince history that it is all wrong, and to say at this time of day that a woman shall not be permitted to pursue the vocation to which her tastes lead her, and for which her studies have qualified her, to earn her bread in any respectable calling she may elect to pursue, or that the profession of the law is, of all the professions and vocations in the world, the only one from which she shall be excluded—the only tree of knowledge of which she shall not eat? It does not seem to us that such a decision would be in the line of a wise judicial discretion, but

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her path in the pursuit of an honorable occupation which she is qualified to undertake.

A single additional point remains to be disposed of. It seems to be thought that while a single woman might possibly by a great strain be admitted to practice as an attorney-at-law, the obstacles to the admission of a married woman are so serious as to be absolutely incapable of being surmounted, and the reason assigned for this is that as a *feme covert* she is not bound by contracts. The duty of a lawyer is to render professional service when required, for which service he receives an honorary compensation from the client. He may, it is true, by the law of Pennsylvania (unlike in this respect the law of England) maintain an action for his services. But the essential basis of the relation, unless all that has been written upon this subject and in praise of the profession of the law is unfounded, is not in contract. To bring it down to this is to degrade it somewhat from the lofty position which has always heretofore been assigned to it by the greatest writers and most influential members of the profession. But what difference does it make if she cannot be sued as upon a contract. There are other adequate remedies for neglect of duty, infidelity, or misbehavior in office, which are provided by law and to which she would undoubtedly be amenable. They are contained in the 73d and 74th sections of the Act of 1834, and the 28th section of the Act of 16th of June, 1836. These laws are an ample security for the client in dealing with an attorney even if she be a married woman. If those who employ her are satisfied with this security I fail to see that the objection which has been urged in this respect has any weight whatever. If one may lawfully appoint a married woman an attorney-in-fact, a trustee, or an executor, without any security whatever other than that which is furnished by those provisions of law which are applicable to all fiduciary relations, I cannot see why one should not be at liberty to employ a married woman as an attorney-at-law upon the same contions.

For these reasons we are of the opinion that this Court has abundant authority of law to grant this motion, and that in the exercise of that judicial discretion which the law has committed to us it is our duty to allow it. It is accordingly allowed, and upon taking the required oath of office Mrs. Kilgore will be admitted as an attorney of this Court.

Opinion by THAYER, P. J.

ARNOLD, J., dissenting.

Unwilling to assume any credit or responsibility for the order just made, by silent participation in it, and believing that an expression of dissent without giving my reasons, might cause my action to be misunderstood, I will, as briefly as possible, state what I consider the legal objections to the present application.

1. An attorney does not follow a vocation or employment merely, but he holds an office, so styled by the Constitution, Article II., section 6, and the laws made in pursuance thereof, Act of May 15, 1874, §§ 8 and 15. He is required to take an oath of good behavior "in the office of attorney;" Act of April 14, 1834, § 69. Women have never been permitted to hold an office in this Commonwealth, except by constitutional grant or legislative enactment. The Constitution, Article X., § 3, makes them eligible to office under the school laws. Married women were authorized to become corporators of institutions, composed of women for the care and education of children or the support of women, by the Act of February 24, 1859; and of associations for purposes of learning, benevolence, charity or religion, Act of April 9, 1879; and the rights and privileges of members of saving funds and building associations, were conferred upon them by the Act of April 10, 1879. What was the necessity of all this legislation, if the right to hold office is inherent in them?

2. The Legislature of this Commonwealth having enacted an uniform law for the admission of attorneys, all other powers are, or ought to be, in abeyance, under the well-established rule that when a statute exists on any subject, the common law is abrogated. The Legislature has conferred power upon the Courts to admit a competent number of persons as attorneys. If nothing more was enacted, we would be free of difficulty, and might admit women to practice; but the Legislature has gone further and designated the sex of those persons. It is enacted that *he* shall take an oath; shall have power to prosecute and defend suits in which *he* may be retained; shall file *his* warrant of attorney, when required, in suits in which *he* appears; shall be liable to suspension if *he* misbehaves *himself;* and for retaining money of *his* client, the Court shall prevent *him* from prosecuting longer, etc.: Act of April 14, 1834. If it was intended to include both sexes, the pronouns *they*, *their*, and *them* would have been used. That the contingency of a woman applying for admission as an attorney, was not contemplated nor provided for by the Legislature, is in my opinion, one of the strongest proofs that further legislation is necessary before *she* can be admitted and subject *herself* to the obligations of the office; for under the law of this State, while a man is subject to arrest for neglecting to pay over money collected by him as an attorney (Act of July 12, 1842, Wills *v.* Kane, 2 Grant, 60), another law provides that no female shall be arrested for a debt (Act of June 13, 1836, § 6; *Ex parte* Nagley,

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1 Ash. 373). Suitors are entitled to full protection against all classes of persons who practice as attorneys.

3. Three of the four Courts of Common Pleas of this county having decided that a woman cannot be admitted as an attorney under existing legislation in this State, for the sake of uniformity and to preserve that comity which ought to exist between the Courts, I would follow their judgment, unless it is clearly shown to be wrong.

Whether it is wise and expedient to admit women to practice at the Bar, is a question which in my judgment is not properly before us, and, therefore, not within our province to consider. All argument upon that subject ought to be addressed to the Legislature. Senator Hoar, of Massachusetts, who voted in the United States Senate in favor of admitting women to practice in the Supreme Court, expressed the true rule on the subject when he said, "Now, with the greatest respect for that tribunal, I conceive that the law-making and not the law-expounding power in this government ought to determine the question what class of citizens shall be clothed with the office of the advocate." (Cong. Record, February 8, 1879, pp. 14 and 15.) Any one curious to know what has been written on the subject, may find the arguments against admitting women in Miss Goodell's Case (39 Wisconsin, 232); Miss Robinson's Case (131 Mass. 376); Mrs. Bradwell's Case (55 Illinois, 535, and 16 Wallace, 130); and Mrs. Lockwood's Case (9 Court of Claims Rep. 346); and the argument in favor of it, *In re* Mary Hall (21 Am. Law. Reg. (N. S.) 728).

It is true that the Legislatures of several of the States and Congress have been prompt to enact remedial legislation, when the necessity for it has been made apparent. I am not disposed to act in advance of the necessary legislation on the subject in this State.

Entertaining these views, I deem it my duty to express them, and withhold my assent from the admission of women as attorneys, until the Legislature confers the power upon us. W. H. W.

C. P. No. 4. May 3, 1884.

Comerford v. McKeever.

Practice—Judgment for want of a plea entered on same day as plea filed, although before it, will be stricken off.

Sur rule to strike off plea.

The narr. and rule to plead were filed February 6, 1884. On February 18, proof of service of the narr. was filed, judgment for want of a plea was entered, and afterwards, on the same day, defendant filed a plea.

George Bull (*George W. Arundel* with him), for the motion.

The plea was filed after judgment entered, and should therefore be stricken off.

THE COURT. We have heretofore decided that a plea filed on the same day that judgment is entered for want of a plea must stand, upon the ground that there are no fractions of days in such matters.

Rule discharged, and judgment stricken off.

Per THAYER, P. J. W. H. W.

Orphans' Court.

February 21, 1884.

Fitzpatrick's Estate.

Decedent's estate—Audit of account—Application to withhold a portion of the fund from distribution, to cover a claim upon which suit has been brought, must be made at the adjudication.

Sur exceptions to adjudication.

Before the Auditing Judge (ASHMAN, J.) a claim was presented on behalf of Mary Magoohan, for services rendered to decedent, in the sum of $145.20. This claim was withdrawn in the course of the audit, without prejudice to the claimant's right to bring suit in the Common Pleas. Distribution of the entire fund was awarded.

Exception was taken by the claimant to the distribution of the entire fund by the Auditing Judge.

McCaffrey, for exceptant.

W. Gorman, contra.

February 23, 1884. THE COURT. It does not appear that any request was made at the audit that sufficient money should be set apart to await the result of the suit in the Common Pleas, consequently the distribution awarded by the Auditing Judge is proper, and in accordance with the will of testatrix. The claimant, however, is not prejudiced. As the accountant will not distribute without refunding bonds, he will not only protect himself, but obtain a security for the benefit of the claimant, in case she should recover her claim.

As it is discretionary with the Court (Hammett's Appeal, 2 Norris, 392), counsel should promptly request the setting apart sufficient of the estate to meet claims pending in the common law courts. If no such request be made, there is no ground for exception, and such application could only properly be presented upon petition to reopen the adjudication. It is too late after final confirmation.

The exception is accordingly dismissed, and adjudication confirmed.

Opinion by HANNA, P. J. E. F. H.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JULY 3, 1884.* [No. 30.

Supreme Court.

Oct. & Nov. '83, 126. October 9, 1883.

Linton's Appeal.

Wills—Married women—Testamentary capacity—Execution of will by married woman under § 7 of Act of April 11, 1848—Issue devisavit vel non—Confidential adviser—Rule in Boyd v. *Boyd, when inapplicable—Subsequent declarations by testatrix.*

The fact that a testatrix, a married woman, at and immediately before the signing of her will (which had been previously written), was in a state of intense nervous excitement and apprehension of death, caused by her being about to submit to a dangerous surgical operation, and aggravated by a quarrel with a member of her family, is not sufficient to warrant the Court in awarding an issue devisavit vel non, on the allegations of testamentary incapacity, and that the testatrix was unduly influenced by prejudice and passion; especially where, as in this case, the testatrix recovered from the surgical operation and afterwards made no change in her will.

The fact that by said will the testatrix's confidential legal adviser, who wrote it, was made one of the executors thereof (but not a devisee or legatee thereunder), is not sufficient, under the above stated circumstances, and upon his propounding the will for probate after retaining it for four years after the testatrix's death, to cast upon him the burden of proving testamentary capacity and the absence of undue influence.

Boyd *v.* Boyd, 16 P. F. Smith, 283; Cuthbertson's Appeal, 1 Out. 163; Wilson's Appeal, 3 Out. 545, distinguished.

The seventh section of the Act of April 11, 1848, requiring that a will by a married woman shall "be executed in the presence of two witnesses, neither of whom shall be her husband," must be read in connection with the general Act of 1833. The word "executed," in the Act of 1848, refers to the formality of making a will required by the Act of 1833, with the additional requisite that it shall be done in the presence of the two witnesses.

Hence, all that is necessary to the execution of a valid married woman's will, is that two witnesses, neither of whom shall be her husband, shall be present when the testamentary paper is signed by her, and either see her sign it, or receive the acknowledgment of the genuiness of her signature thereto.

It is not necessary that the subscribing witnesses should be able to testify affirmatively that the testatrix knew that the instrument which she signed was her will, or that she formally published or declared it to be her will in any other way than by signing it, and requesting them to attest her signature.

Appeal by A. F. Linton and P. R. E. Elwina Linton, his wife, from a decree of the Orphans' Court of Armstrong County, dismissing their appeal from the decree of the Register, admitting to probate the will of Jane D. Finlay, deceased, and refusing their petition for an issue devisavit vel non.

From the testimony taken by the Register, and submitted to the Court, the following facts appeared: Mrs. Jane D. Finlay died December 30, 1876, leaving an estate worth over $50,000, and leaving to survive her, her husband, John B. Finlay, an only child, P. R. E. Elwina, then about fourteen years of age (now the wife of A. F. Linton), and her father, James D. Brown. Letters of administration were granted upon her estate, and subsequently in January, 1881, in pursuance of a citation issued by the Register, the following testamentary paper in question was produced by John Gilpin, and offered for probate:—

I, Jane B. Finlay, of Kittanning Borough, in Armstrong County, State of Pennsylvania, do make and publish this my last will and testament (hereby revoking any and all prior wills by me at any time heretofore made) in manner following, to wit: As to all and singular the property, whether real, mixed, or personal, or choses in action of whatsoever kind and wherever situated, that I may own or be entitled at the time of my death, I do give, devise, and bequeath the same unto Grier C. Orr, and his heirs, to have and to hold the same for the uses and trusts following, to wit: In trust to receive and collect the rents, issues, profits and proceeds of said property, and from time to time, until my daughter, Phebe R. E. Elwina Finlay, shall attain the age of twenty-one years, to add such rents, issues, profits, and proceeds to the principal sum or property; and after my said daughter shall have attained the age of twenty-one years, then in trust to receive and collect the rents, issues, profits, and proceeds of said property and its accumulations, and to pay over to my said daughter the said rents, issues, profits, and proceeds, in semi-annual instalments, for her sole and separate use during her natural life, and after her death, then to hold the said property in trust for her children, who may survive her, or their issue; and in case my said daughter shall die without leaving lawful issue living at the time of her death, then in trust to invest said property and accumulations in such memorial as said trustee or his successor shall determine will best perpetuate the name and memory of my said daughter.

Item. I do hereby nominate, constitute, and appoint my friends, Grier C. Orr, Esq., and John Gilpin, of the borough aforesaid, the executors of this my last will and testament. Lastly, that I do recommend that the trustee hereinbefore named shall, when he sees proper, and deems it for the interest of my said daughter, sell or dispose of any portions of the property herein devised or bequeathed to him, and shall hold the proceeds of such sales in lieu of the portions so sold; and I do hereby authorize and empower the said Grier C. Orr, Esq., to sell and dispose of any and all property that I may own or be entitled to at the time of my death, to such person or persons, in such manner, and for such prices as he shall deem meet; and I do order and direct that the purchaser or purchasers from said Grier C. Orr, Esq., shall be in no wise liable or bound to see to the proper application of the purchase-money which they may pass to said Grier C. Orr, Esq.; and further, upon receipt of the purchase-money said

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Grier C. Orr shall have full power and authority to make, execute, and deliver to the purchasers, deeds and conveyances, in fee simple or otherwise, for any of said property which he may see fit to sell.

In witness whereof, I, Jane B. Finlay, have to this my last will and testament, written upon two pages of paper, hereto set my hand and seal, this eleventh day of December, A.D. eighteen hundred and seventy five.

JANE B. FINLAY.

Signed, sealed, published, and declared by Jane B. Finlay, the testratrix, as and for her last will and testament, in the presence of us, who have at her request signed our names as witnesses thereto, in the presence of said testatrix and of each other.

JAS. KING.
T. H. ALLISON.
T. M. ALLISON.

It was shown that the alleged execution of the will took place on December 13, 1875, just previous to the performance of a dangerous surgical operation upon the testatrix, viz., the removal of a cancer in the breast.

Dr. James King, one of the subscribing witnesses to the will, being dead, his signature was proved.

Dr. T. H. Allison, another of the subscribing witnesses, testified, *inter alia*, as follows:—

Q. Did you see Jane B. Finlay sign it (the will)?

A. Now, listen closely. On the 13th day of December, 1875, in a room of the house in which Mrs. Finlay was living, she pulled out a paper from some place about her person, and said: "Gentlemen, I want you, or I wish you, to see me sign this, or witness this," or some words equivalent to that. I don't remember the words exactly. She went to a chair over at the side of the room, and sat down, and took this paper that she had brought forth, and she took a pen and ink in her hand, and I saw her making motions as though she were writing. Dr. King went forward first; you saw his writing here. . . .

I had been at the house before. When I came in, just before the operation, Mrs. Finlay and her father were quarrelling. It appeared to me that they were jangling something about a deed connected with a house. I had gone from there into the front room. She followed in, and I suppose others. I don't know who all. About this time she jerked this paper from out of her bosom, and I think said, "I will do it;" said that to her father.

Q. Just at that point what was her appearance as to excitement or calmness?

A. She was very much excited—intensely excited.

Q. Was that before you signed this paper that she made use of that language?

A. Yes, sir.

Q. Now, as near as you can, if you can estimate it, how long before you signed that paper?

A. A very short time—a very few minutes.

Q. Between the time that she made that reply to her father, and the time that you signed the paper, had there been any change in her condition as to excitability?

A. I think not.

Q. No change in her condition?

A. I think not.

Q. How long, Doctor, after you signed that paper did you perform the operation?

A. Just as soon as we got everything ready.

Q. Within an hour?

A. I think so. . . .

Q. What was her physical and mental condition as to excitement?

A. Her physical condition was bad. Her mental condition was very much excited, both before and at the time of the operation.

Q. At the time you were asked to and did sign the paper, Doctor, did any person read any portion of that paper in your presence or hearing?

A. They did not.

Q. Was it named in your presence or hearing as a will?

A. It was not.

Q. Did Mrs. Jane B. Finlay at any time ask you to sign it as her will?

A. She asked us as I have told you; her language was, "Gentlemen, I want you to witness this," or words equivalent to that any way.

Q. The point in my question is, did she ask you to witness it as a will?

A. That was the full amount of her language.

Q. A word of the will was not read?

A. No, sir; nothing said about a will. . . .

Q. At the time you signed that paper was Mrs. Jane B. Finlay of sound mind, memory, and understanding?

A. What do you mean by the words sound mind?

Q. Well, the legal construction is: that is, that she was of sufficient soundness of mind, memory, and understanding to make a valid will. You understand the meaning of sound mind, memory, and understanding just as well as I do, and a little better. You take your own view on that?

A. To answer that, yes or no, I don't like that. What is it you want of me?

Q. Sound applies to the words mind, memory, and understanding.

A. I don't like that kind of a question, the way that you put it in. I don't like it. I don't pretend to intimate at all that Mrs. Finlay was clear insane. She was very much excited, and her mind had been wrought up by her diseased condition to a very great extent, and the trouble with her father had got her into a still greater state of excitement that day. She had very great fears in regard to the disease; she had very great fears in regard to being placed under an anæsthetic; and she had great fears in regard to the

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operation, from the fact of her mother having died under the same circumstances; these were her fears. . . .

A. As I said before, I saw Mrs. Finlay sit down and take a pen, and went through the motions, I presume, of writing. Dr. King went forward, and, I presume, I suppose signed this; then, I presume, I went forward and signed, as it is my name here.

Q. Did she specifically acknowledge in your presence, Doctor, either of those signatures?

A. She said nothing about them.

Q. When she had the pen and ink and made this writing, was it on a chair or table?

A. She was writing on her knee. . . .

Q. From the 6th of December, 1875, to the 13th of December, 1875, Mrs. Finlay discussed with you in a reasonable, sensible manner, the proposed operation and the probabilities of it, did she?

A. Well, some of it was sensible, and some of it was not extremely sensible.

Q. Did she seem to appreciate the nature of the disease?

A. Yes, she was appreciating it wonderfully well.

Dr. T. M. Allison, the other subscribing witness, testified, *inter alia*, as follows:—

Q. After the communication of the result of your consultation there, what was her condition as to excitement, and mental condition?

A. She was very much excited.

Q. State now whether she asked you to sign any paper and just as near as you can what she said about it.

A. She produced a paper of some kind, I don't know what, from about her person somewhere, from the bosom of her dress, and asked us all to come. She said, "Gentlemen, I want you to witness my signing this paper," or witness her signature, I believe was the words.

Q. Did she sign in your presence?

A. Well, I suppose she did. She took a pen in her hand. She had the instrument on her knee, on a writing stand or portfolio, or something of that kind; took a pen in her hand and run over it. I suppose she was writing her name; I was not very close.

Q. You could not see the actual signature?

A. No, sir, I did not see her make the letters to form the name.

Q. You saw her make motions as though she was writing.

A. Yes, sir. . . .

Q. In medical parlance, what would you call her condition at the time? Was it in the nature of hysteria, or was it something else?

A. It would be pretty hard to give it a name. I have spoken of her being in a great state of nervous excitement; wonderfully wrought up; acted somewhat strangely; talked a great deal, and at random sometimes. It would bear as closely on hysteria as anything I could name, part of it.

R. J. Karns testified, under a commission to Socorro, New Mexico, as follows:—

Fourth. What do you know about Mrs. Finlay, having a form of will written about the time of, and before said surgical operation was performed? Do you know whom they employed to write said form of will and if so state who it was?

A. A few days prior to the said surgical operation having been performed, while she was in a very poor state of health, she directed me to go and ask Mr. John Gilpin, a practising attorney of Kittanning, to call upon her. I gave him the message, that is, I gave Mr. John Gilpin the message, and he called upon her, and I understood it was for that purpose, of drawing up a form of will for her.

Fifth. What did she say of the form of will that was prepared for her when she received it? What objections, if any, did she make, and what reply did the attorney who wrote the will make to such objections?

A. One or two days after Mr. Gilpin had called upon her as aforesaid, and before the surgical operation had been performed, I took up a paper from Mrs. Finlay's table purporting to be a will, written in the handwriting of said Mr. Gilpin, but without any signature whatever. Mrs. Finlay told me that was the paper Mr. Gilpin had prepared for her to sign, and added, "I am so far gone I really don't know what is in it. I have left it all to Mr. Gilpin, believing he will act honestly in the matter," or words to that effect, which words she repeated several times in my hearing, and even after said surgical operation was performed, after she began to get better, said that she really did not know what was in said will.

Mrs. Mary Henry testified in answer to interrogatories under a commission to Port Huron, Michigan, as follows:—

4. As to a paper purporting to be a will written by John Gilpin, Esq., for the said Mrs. Jane B. Finlay, I did know of said paper. Mrs. Finlay said to me when I first saw her after said operation, "Why did you not come sooner and I would have given you something in my will?" I said, "Is it too late now?" She said, "Yes; I have given everything away." Knew of no changes she wanted made.

5. Was with Mrs. Finlay some six or seven months after the operation. All she said about her will was that she had made it at the time or just before the operation was performed. This she told me when I first saw her after the operation, and she never spoke of it again.

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R. J. Karns, Mrs. Henry, and Sallie R. Brown testified as to angry disputes and quarrels between Mrs. Finlay and her father prior to and about the date of the alleged execution of the will.

The Register revoked the letters of administration, and admitted the will to probate, from which decision A. F. Linton and wife appealed to the Orphans' Court, and also presented a petition for a precept for an issue to the Common Pleas, alleging want of testamentary capacity, undue influence, and that the proofs before the Register were not sufficient for probate.

The Court, in an opinion by BREDIN, J., refused the petition for an issue and dismissed the appeal; whereupon said A. F. Linton and P. R. E. Elwina, his wife, took this appeal, assigning for error the said action of the Court.

George W. Guthrie and *J. P. Colter* (*H. Burgwin* with them), for appellants.

The will was drawn by the testatrix's confidential adviser, who, being an executor, takes a benefit thereunder. The evidence shows great mental disturbance on the part of Mrs. Finlay at the time of its alleged execution, and such mental weakness, though far short of testamentary incapacity, is sufficient to cast the burden of proof on the proponent, within the principle of—

Boyd *v.* Boyd, 16 Smith, 283.
Frew *v.* Clarke, 30 Smith, 170.
Cuthbertson's Appeal, 1 Out. 163.

Moreover the will is *inofficious*, harsh, and unnatural; a large estate is left, not to the only child of the alleged testatrix, but to accumulate, and be expended in a memorial by the trustee. There was uncontradicted evidence that the instrument was not read to, or by Mrs. Finlay, at the time it is alleged to have been signed; and that before and after that time she declared that she did not know its contents; and no will can be valid the contents of which the testator does not know and approve. The proponent did not explain his possession of the instrument. His retaining the will for over four years without presenting it for probate, and his permitting the estate in the mean time to be administered by administrators, are suspicious circumstances not explained.

Theobald on Wills, p. 20.
In re Thomas Dunn, 8 Ind. M. S. 752.
Cleare *v.* Cleare, 1 P. & D. 655.
Harter *v.* Harter, 3 P. & D. 11.
In re Oswald, 3 Id. 162.
Day *v.* Day, 2 H. W. Green (N. J.), 549.
Harris *v.* Vanderveer, 6 C. E. Green, 561.

The alleged will in this case was not executed according to the requirements of the Act of April 11, 1848, section 7, providing, that the wills of married women "shall be *executed* in the presence of two or more witnesses, neither of whom shall be her husband." The substitution in the Act of 1848 of the word "*executed*" instead of the word "*signed*," used in the Wills Act of 1833, indicates that something more than mere signing is required, namely, that the will shall be executed *as a will* in the presence of "two witnesses," etc. The evidence clearly shows that Mrs. Finlay did not refer to it as a will.

Fransen's Will, 2 Casey, 202.
Camp *v.* Stark, 2 WEEKLY NOTES, 577; S. C., 32 Sm. 235.
Rich *v.* Keyser, 4 Smith, 86.
Anderson's Est. 4 Norris, 207.

Under statute 1 Vict. ch. 26, which provides, that the signature to a will shall be "made or acknowledged" in the presence of witnesses, such an execution as here alleged would not be sufficient.

Ilcott *v.* Genge, 4 Moo. P. C. 265.
In re Ashton, 5 Notes of Cases, 548.
In re Swinford, 1 P. & D. 630.
In re Ann Rawlins, 2 Curt. 326.
In re Harrison, Id. 863.
Hudson *v.* Parker, 1 Rob. Eccl. 14.
Blake *v.* Blake, 7 L. R. Prob. Div. 102.

Jos. Buffington and *J. H. McCain* (*O. Buffington* with them), for appellees.

The evidence entirely fails to show want of testamentary capacity in Mrs. Finlay, or to rebut the legal presumption that Mrs. Finlay had knowledge of the contents of her will.

Stevens *v.* Vancleve, 4 W. C. C. Rep. 265.
Provis *v.* Rowe, 5 Bing. 435.
Comstock *v.* Hadlyme, 8 Com. 263.
Hoshauer *v.* Hoshauer, 2 Casey, 406.
Irvin *v.* Deschamp. 11 WEEKLY NOTES, 565.
Loy *v.* Kennedy, 1 W. & S. 396.
Lewis *v.* Lewis, 6 S. & R. 495.

The word *executed* in the Act of 1848 merely refers to the qualifications and formalities required by the Act of 1833, with the restriction that neither of the witnesses shall be the husband of the testatrix, the purpose being protection against the influence of the husband.

Carson's Appeal, 9 Smith, 493.
Camp *v.* Stark, 32 Smith, 243.
Dickinson *v.* Dickinson, 11 Smith, 407.

If the appellant's interpretation be correct, the will of every *covert* testatrix would be at the mercy of the witnesses' memory. Having proved the signature of Dr. King, and his death, it amounts to the same thing as though he had actually testified to all facts necessary to admit the will to probate.

Harden *v.* Hays, 9 Barr, 151.
Egbert *v.* Egbert, 28 Smith, 326.
Wrestler *v.* Custer, 10 Wr. 502.

The English cases cited by appellant's counsel are not authority in Pennsylvania under our Act.

Miller *v.* McNeil, 11 Casey, 217.
See, also, Smith *v.* Smith, 14 W'kly Rep. 648.
Hart *a.* Roberts, 12 Moore, P. C. 158.
Beckett *v.* Howe, 18 W'kly Rep. 75.
Gwillim *v.* Gwillim, 3 Swab. & T. 200.

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January 7, 1884. THE COURT. There appears to be nothing in the evidence that would have justified the Court below in sending the question of testamentary incapacity to a jury. Giving to appellant's testimony on that subject all the weight to which it is reasonably entitled, we think it was insufficient to create even a doubt as to the competency of Mrs. Finlay to make a will. It is true, that on the day the alleged will was signed, she was laboring under great nervous excitement, caused by her misgivings as to the result of the operation, to which she was then about to submit, and intensified by an unpleasant altercation with her father about the same time; but, notwithstanding all this, the evidence clearly shows she had an intelligent understanding of what transpired in her presence, and especially of the business she wished to transact before the operation was performed. In the language of one of the witnesses, Mrs. Finlay "had great fears in regard to her disease. She had great fears in regard to being placed under an anæsthetic, and she had great fears in regard to the operation, from the fact that her mother had died under similar circumstances. These were her fears." Doubtless, in view of these not unreasonable apprehensions, the subject of making a will had been previously considered in all its bearings; and, having determined in her own mind how her property should be disposed of, she had caused the testamentary paper to be prepared beforehand, so that when she concluded to submit to the surgical operation, it was ready, as the testimony shows, for her signature and the signatures of the attesting witnesses. The work of reflection had been previously done and its result was embodied in the paper which is the subject of this contention. The presumption of law is that she was not only *compos mentis* and capable of making a will, but that she knew the contents of the paper the execution of which she requested her attending physicians to witness; and we discover nothing in the testimony that is sufficient to rebut that presumption or warrant a finding to the contrary. The mental condition of Mrs. Finlay, before and at the time the will was signed, is shown by the testimony of the physicians in attendance. One of them, speaking of the consultation with Doctor James King and others, in regard to the surgical operation, says, "Mrs. Finlay and her father also talked very considerably about it and decided to have it done, having agreed to that, we went into the front room and then came the signing process." It thus appears that just before signing the paper, which according to the testimony must have been previously prepared, the testatrix participated in the conversation that took place in regard to the proposed operation, exercised her own judgment as to its propriety, and, in view of the opinions expressed by her chosen medical advisers, and notwithstanding her own serious apprehensions of a fatal result, consented to have it performed. The learned professional gentlemen, to whose judgment she thus deferred, must have considered her competent to decide for herself whether she would submit to the treatment they proposed or not. The circumstances detailed by the witnesses referred to clearly indicate an intelligent exercise of judgment coupled with unusually strong will power. Opposed to this, we have nothing save the fact that she was laboring under great nervous excitement which is fully and satisfactorily accounted for. In view of all the evidence, it is altogether improbable that any jury would be willing to say by their verdict that Mrs. Finlay was not of sound and disposing mind, memory, and understanding at the time the will was executed; and, if they did happen to so find, their verdict should not be permitted to stand. Under such circumstances it was a wise exercise of judicial discretion to refuse an issue.

In view of the facts, that proponent of the alleged will was the scrivener by whom it was written, that he is one of the executors therein named, that he retained the instrument a long time without presenting it for probate, and other circumstances disclosed by the testimony, it is contended that it was incumbent on him to prove affirmatively that the paper was drawn in accordance with previous instructions of testatrix, or that she was fully aware of its contents and legal effect. There is nothing in the testimony to sustain this proposition, or bring the case within the principle of Boyd *v.* Boyd (16 P. F. Smith, 283); Cuthbertson's Appeal (1 Out. 163), and Wilson's Appeal (3 Id. 545). The proponent of the will is not shown to have had any such interest in establishing its validity as could in any manner shift the burden of proof. He is neither devisee nor legatee. The only interest he can be said to have under the will is the compensation to which he may be entitled for his services as executor. We find nothing in the evidence to take this case out of the ordinary rule. When the due execution of a testamentary paper has been proved by the subscribing witnesses, although they did not hear it read to the testator, certain legal presumptions arise, among which is, that he was acquainted with the contents of the paper, notwithstanding he could neither read nor understand the language in which it was written. In the absence of proof to the contrary, the presumptions that arise from the ordinary course of business must be admitted and given due effect. One of these presumptions is, that a person signing any instrument and asking others to attest its execution has taken care to understand its contents. His signing

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shows that he is giving expression to some purpose of his own, and we must presume he knows the writing contains that expression. (Hoshauer *v.* Hoshauer, 2 Casey, 404.) In this connection it may be observed that the learned Judge of the Orphans' Court did not underestimate the value of testimony by which appellants sought to prove that Mrs. Finlay was ignorant of the contents of the will. In summarily dismissing the somewhat remarkable testimony of Robert Karns, as to declarations made to him long after the will was executed, he was quite right in saying that, "If believed, it would be entirely insufficient to cast suspicion even on Mrs. Finlay's knowledge of the contents of the will." After the will was signed her health was measurably restored, and more than a year thereafter she died of a different disease. It is wholly improbable that during that length of time she preserved a testamentary paper, the contents of which she did not know at the time it was signed and witnessed; but, aside from the inherent unreasonableness of such testimony it was insufficient on general principles. The declarations of a party to a deed or will, made to a stranger subsequently to its execution, are a species of hearsay evidence; and, nothing would be more dangerous than to give it the effect claimed for it in this case. It would in a great measure render useless the precaution of making a will. (Stevens *v.* Vancleve, 4 W. C. C. Rep. 265; Hoshauer *v.* Hoshauer, *supra;* Provis *v.* Rowe, 5 Bing. 435.) In view of the undisputed facts in the case the testimony referred to was wholly insufficient for the purpose for which it appears to have been introduced.

It is also contended that the requirements of the Act of April 10, 1848, authorizing married women to dispose of their property by will, have not been complied with, in that the testimony fails to show that the alleged will was either signed or published by the testatrix as contemplated by the Act. The Act referred to being *in pari materia* with the general Act of 1833, both Acts must be construed together. After declaring who shall be competent to make a will, the latter Act provides that every will shall be in writing, and, unless the person making the same be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction; and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses. Under this Act it has been held that subscribing witnesses are not essential, that proof of testator's signature by two witnesses is *prima facie* evidence of due execution. The Act of 1848 was designed to protect married women in the use and enjoyment of their separate property, during life, and guard them from imposition or undue influence in freely disposing of it at their death. Hence, in providing for a testamentary disposition of a married woman's property, the Act requires that her will shall "be executed in the presence of two witnesses, neither of whom shall be her husband." This appears to be the only change effected by the Act in regard to the formality of making a will by a married woman. It was never intended that the witnesses should know the provisions of the will, or be able to testify that the testatrix understood its contents, or published it as her will in their presence. The word "executed," evidently refers to the formality of making a will required by the Act of 1833, with the additional requisite that it shall be done in the presence of the two witnesses. The execution of a testamentary writing consists in the act of signing it, in the mode prescribed by the statute, with the intention and for the purpose of rendering it valid and operative as the will of the person so signing it. Hence, all that is necessary to the valid execution of a married woman's will is that the witnesses required by the Act be present when the testamentary paper is signed by her, and either see her sign it, or receive her acknowledgment of the genuineness of her signature thereto. The testimony of this case clearly proves that Mrs. Finlay took from her person the paper in question, and, addressing the subscribing witnesses, said: "I want you to witness my signing this paper," or words to that effect; that "she then took the paper on her knee, on a writing-stand or portfolio, and went through some motions as though writing." The three witnesses then went forward and appended their names to the attesting clause, which is in these words, viz., "signed, sealed, published, and declared by Jane B. Finlay, the testatrix, as and for her last will and testament, in the presence of us, who, at her request, signed our names as witnesses thereto, in the presence of the testatrix, and of each other." It is not questioned that the signatures of the subscribing witnesses, as well as that of the testatrix, are genuine, nor is it doubted that they witnessed the paper at her request. The evidence that Dr. James King, one of the subscribing witnesses, is dead, and that the signature, purporting to be his, is genuine, is equivalent to positive proof, by one witness, of every fact stated in the attesting clause. The testimony of the other subscribing witnesses warrants the conclusion that Mrs. Finlay signed the paper in their presence, and that they, at her request, witnessed it. No other rational inference can possibly be drawn from their testimony. It was not necessary that they should be able to testify that testatrix knew the instrument she signed was her will, or that she formally published or declared it to be her will, in any other way than by signing it and request-

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ing them to attest her signature. As we have already seen, in the absence of evidence to the contrary, the presumption is that she was familiar with the contents of the testamentary paper. The requirements of the Act of 1848 are sufficiently met by the evidence. There was no error in dismissing the appeal and refusing the issue.

Decree affirmed and appeal dismissed at the costs of appellants.

Opinion by STERRETT, J.

MERCUR, C. J., and PAXSON, J., absent.

W. R. B.

Jan. '83, 308. February 19, 1884.

Stuckert v. Keller.

Sheriff's levy on personal property—Actual and exclusive possession not in all cases necessary.

Where one wrongfully prevents the sheriff from actually taking manual possession of a piece of personal property in his custody which the sheriff nevertheless includes in his return of goods levied upon, and proceeds to sell, and the party is present at the sale and makes no objection, the levy and the title of the purchaser from the sheriff are clearly good as against him.

Such person having himself a judgment against the owner of the property cannot by issuing execution thereon against said property and buying in at the sale acquire a title superior to that of the former purchaser.

Error to the Common Pleas of Lehigh County.

Trover, by Edwin Keller and Samuel S. Keller against George W. Stuckert, for a hearse.

Trial by jury was waived, and the case was tried before ALBRIGHT, P. J., from whose findings of facts it appeared that from 1875 to 1879 Joseph Keller was the owner of a certain hearse which was kept for storage and shelter, when not in use, at the livery stable of the defendant, Stuckert, under an arrangement that Joseph Keller would hire the horses from defendant whenever he had occasion to use the hearse at funerals; and in consideration of that patronage, defendant agreed to charge nothing for the storage of the hearse. During all said time the hearse was kept in the carriage-house of defendant Stuckert, Keller obtaining and using it whenever he chose; the latter had the right to use or remove it whenever he desired to do so. Defendant had no lien or claim upon the hearse.

Joseph Keller confessed judgment to the plaintiffs, and a fi. fa. was issued thereon on October 11, 1879. Under this writ certain property of Joseph Keller was levied on and sold. All of it except this hearse was in his store. The plaintiffs had directed the sheriff to levy on the hearse, and he had gone to defendant's stable in order to do so. It was then in the carriage-house, and the door had been locked by defendant, or by his direction, for the purpose of preventing this seizure by the sheriff under plaintiffs' writ. The sheriff demanded the hearse, was told by the employés that he could not have it, looked for it, failed to find it, and never saw it until after the sheriff's sale. He advertised it, however, and at the sale demanded it from defendant, who was present, but who refused to give it up. It was then offered for sale and bought by plaintiffs for $500.

On November 12, 1879, defendant obtained judgment against Joseph Keller, issued execution, and under this execution the sheriff seized the hearse at defendant's stable, where it had remained in his possession, and on December 4, 1879, sold it to said defendant.

The Court in its opinion said, *inter alia*, "there was no such levy as would be good against other execution creditors under ordinary circumstances; the sheriff did not have the hearse in his power or control, nor was it in his view. (Duncan's App., 1 Wright, 500; Carey *v.* Bright, 8 Smith, 70; Trovillo *v.* Tilford, 6 Watts, 468.) . . . But to sustain defendant's claim to the hearse under his purchase, would be to permit him to reap the benefit of a palpable wrong, committed by himself. He had obstructed the officer in the execution of the writ of fieri facias, issued by the plaintiffs. After establishing title in the defendant in the execution, and a sale by the sheriff, the plaintiff's title is made out *prima facie*. The law presumes that the officer acted regularly and had made a levy. The defendant's attack upon that title, in the way of throwing an informality on the levy, discloses his own illegal act; he demonstrates that the sheriff did not take or see the hearse, because he, the defendant, obstructed the sheriff by locking up the carriage, with a view of preventing its being taken by the officer of the law. The defendant is not entitled to the consideration or protection of the law, either as a subsequent execution creditor, or as the purchaser at the subsequent sale. The old axiom is: "No man shall take advantage of his own wrong."

Judgment was entered in favor of plaintiff for $768.30. The defendant thereupon took this writ, assigning for error, *inter alia*, the action of the Court in not entering judgment in his favor upon the facts found.

R. E. Wright, Jr. (*R. E. Wright*, with him), for plaintiff in error.

While it is true that our Courts have departed somewhat from the strictness of the English rule requiring that actual manual possession be taken of personal property to constitute a good levy, yet there can be no levy in Pennsylvania unless the sheriff has the property in his power, or at

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least within his view—and the only known exception to this modified rule is the one of a defendant voluntarily waiving a levy.

Wood *v.* Vanarsdale, 3 Rawle, 405.
Linton *v.* Comth., 10 Wright, 294.
Duncan's Appeal, 1 Id. 502.
Weidensaul *v.* Reynolds, 13 Id. 76.
Comth. Ins. Co. *v.* Berger, 6 Id. 292.
Carey *v.* Bright, 8 Smith, 81.
McClelland *v.* Slingluff, 7 W. & S. 134.
Schuylkill Co.'s Appeal, 6 Casey, 358.
Welsh *v.* Bell, 8 Id. 17.
Trovillo *v.* Tilford, 6 Watts, 471.
Lowry *v.* Coulter, 9 Barr, 354.
Troubat & Haly's Practice, § 1116.

James S. Biery; for defendant in error.

In a case like the present where the interests of third parties cannot be prejudiced there is no necessity for the strict application of the general rule. And this has been repeatedly held by this Court.

Allentown Bank *v.* Beck, 13 Wright, 394.
Trovillo *v.* Tilford, 6 Watts, 468.
Wood *v.* Vanarsdale, 3 Rawle, 401.
Welsh *v.* Bell, 8 Casey, 12.
Paxton *v.* Steckel, 2 Barr, 94.
Commonwealth Ins. Co. *v.* Berger, 6 Wright, 292.
McGinnis *v.* Preiser, 4 Norris, 115.
Dorrance *v.* Comth., 1 Harris, 160.
Keyser's Appeal, Id. 409.
Wilson's Appeal, Id. 428.
Schuylkill Co.'s Appeal, 6 Casey, 358.
Shaffner *v.* Gilmore, 3 W. & S. 438.
Fitler *v.* Patton, 8 Id. 454.
Lewis *v.* Smith, 2 S. & R. 142.
Ludden *v.* Leavitt, 9 Mass. 104.
Warren *v.* Leland, Id. 265.
Hartwell *v.* Root, 19 Johns. 345.
Monke *v.* Butler, 1 Rolle, 83.
Williams *v.* East India Co., 3 East, 199.
Powell *v.* Milburn, 3 Wilson, 362.
King *v.* Hawkins, 10 East, 216.
Best on Pres. Ev. 63.

March 3, 1884. THE COURT. It is not essentially necessary that the sheriff take actual and exclusive possession in all cases of personal property to make a valid levy. The defendant in the execution may waive the taking of actual possession by the sheriff and consent to a sale when no one interested therein objects. In this case the sheriff did all he could do peaceably to get the possession. The plaintiff without any right interposed the only barrier. The defendant in the execution was present at the sheriff's sale and made no objection thereto. The levy was regularly entered on the execution and the property duly advertised. There was no fraud in the sale or in the purchase. It was clearly good as against the defendant in the execution and against one who had no right to the possession. The plaintiff in error cannot interpose his wrongful act to destroy the validity of the sheriff's sale.

Judgment affirmed.

PER CURIAM. J. D. B. JR.

Jan. '84, 188. March 5, 1884.

Herron et al. v. Fetterman et al.

Ejectment—Limitations—Rule—Practice—Act of June 11, 1879.

Where a party instituted proceedings under the Act of June 11, 1879 (P. L. 127), to compel another to bring an action of ejectment within ninety days, or be forever debarred from such action, the said ninety days must be taken to run from the time the rule is made absolute, and not from the time the proceedings are instituted.

The Court is not in such case deprived of all discretion in regard to the time when it shall hear the rule and enter judgment, and when the entry of judgment is delayed, and before such entry and a decision on the rule an action of ejectment is actually instituted, the rule will be discharged.

Error to the Common Pleas of Columbia County.

Upon petition of Jane Herron and others, under the Act of June 11, 1879 (P. L. 127), the Court below granted a rule on the County Commissioners of Columbia County to compel respondents to bring ejectment for a tract of land mentioned therein, called the "Nathaniel Brown" tract, within ninety days, or show cause why the same could not be brought.

The petition was presented and filed August 22, 1882, the rule issued the same day, and was returned, served on the Commissioners by copy August 24 and 30, and returnable December 4. No answer having been filed, on December 11, 1882, counsel for the rule moved to make the same absolute, but on application of the Commissioners' attorney, the Court granted them five days to file an answer (1st assignment of error), which was done December 12 by leave of Court. The hearing was fixed for January 13, 1883, on which day the respondents made application for leave to amend their answer, which, though objected to, was allowed (2d assignment of error), and the same day the amended answer was filed. The Commissioners in their answer asserted that as far back as 1828 the then Commissioners had purchased said tract at a sale for taxes, and took title for the county, by which it is still held. By the amended answer it appeared that the Commissioners sold the tract in question, August 31, 1882, to Charles G. Murphy, and made a deed to him September 9, 1882, and that said Murphy had brought his action of ejectment January 2, 1883, praying to be permitted to interplead and to prosecute his present action of ejectment to a final determination, as of its original term and number.

The case having been heard on the petition and amended answer, the rule was discharged (5th assignment of error), the Court saying: "If we should now make the rule absolute it could

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not affect the suit already pending" (4th assignment of error): and held that the 29th Rule of Court which provides that on rules to show cause, the respondent may file an answer thereto *at* or before the time fixed for the return of the rule, applied to the present case (3d assignment of error). Petitioners thereupon took this writ, assigning for error the order of the Court, discharging said rule, and the several rulings as above set forth.

A. J. Dietrich (*John G. Freeze* with him), for plaintiffs in error.

On the 5th of December, 1882, the day after the return of the rule, and ninety-six days after the service thereof, the petitioners were entitled to, and it was "the duty of the Court to enter judgment against the parties served and make the rule absolute."

Love *v.* Economy Building Ass., 10 WEEKLY NOTES, 257.

Neither respondent nor any one else had a right to file an answer and claim to be heard after ninety days from the service of the rule. Even an answer filed within the ninety days must have been a good answer to prevent judgment. A writ of error lies in all cases on a final judgment of a court of record.

Act of 22 May, 1722, 1 Purd. Dig. 602.
Commonwealth *v.* Judges, 3 Binney, 273.

If there had been a judgment here, the respondents would have been entitled to a writ of error, and reciprocity of right entitles the petitioners to one upon refusal of judgment. This is not a matter for the discretion of the Court below.

E. R. Ikeler and *S. Knorr*, for defendants in error.

The Act authorizing this proceeding is highly penal, against the course of the common law, in derogation of the right of trial by jury, and must be strictly construed in favor of parties whose rights are affected.

Love *v.* Building Ass., *supra*.

This Act does not authorize a rule on the County Commissioners when they hold title for the county under the Act of March 13, 1815. There is nothing in this Act showing an intention to repeal that of 1815. Implied repeals are not favored.

Erie *v.* Bootz, 22 Smith, 199.

What bars the person holding the title from his ejectment is the making the rule absolute and the entry of judgment by the Court.

Letchford *v.* Dewees, 37 Leg. Int. 493.
Dewees *v.* Letchford, 10 WEEKLY NOTES, 61.

The extension of the time to file the answer, and allowing amendments thereof by the Court, and fixing the time for the hearing, as well as the question whether sufficient cause was shown, are all questions appealing to the exercise of the judicial discretion vested in the Court below, for the exercise of which error does not lie.

Reninger *v.* Thompson, 6 S. & R. 1.
Porter *v.* Lee, 4 Harris, 412.

The order discharging the rule is not a final judgment on which a writ of error lies.

March 17, 1884. THE COURT. The Act of 11th June, 1879 (P. L. 127), limiting the time within which an action of ejectment may be brought upon certain titles therein mentioned, must receive a reasonable construction. It is not the initiation of the proceedings before the Court, which bars the right to bring ejectment; but it is the judgment of the Court on making the rule absolute. It is this judgment, which the Act declares "shall be final and conclusive between the parties, their heirs and assigns; and thereafter no action of ejectment for the recovery" of the land shall be brought by the purchasers therein named, or those claiming or holding under them. The Court is not deprived of all discretion in regard to the time it shall hear and decide the rule and enter judgment. In this case, the action of ejectment was actually brought before a decision was rendered on the rule. The object of the application was substantially obtained in advance of the judgment. The rule was therefore properly discharged.

Judgment affirmed.

PER CURIAM. J. H. W.

Common Pleas—Equity.

C. P. No. 4. June 6, 1884.

Conrow v. Conrow et al.

Partition in equity—Vested remainder with postponement of time of partition—Devise to trustees for fifteen years, and then to part and divide, sustained—Partition will not be accelerated by a clause directing that upon the death of a child his share shall go to and be distributed among his appointees by will—"Upon" in such case is equivalent to the words "in case of."

Hearing on bill for partition and answer.

Bill in equity, by Sara B. Conrow, a minor, by her guardian, etc., against Sarah B. Conrow and others, executors and trustees, and in their individual right, setting forth: that Joseph B. Conrow, of New Castle County, Delaware, died on June 14, 1881, seised of real estate in the city and county of Philadelphia; that by his will, dated February 12, 1881, proved and registered at New Castle, July 6, 1881, an exemplification of which was duly admitted to registry in the county of Philadelphia, on July 11, 1881, after making sundry bequests, he devised all the residue of his estate unto his executors in fee:—

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"In trust for fifteen years after my decease, and to divide the interests, rents, and profits equally among all my surviving children, and lawful issue of deceased children, the lawful issue of any deceased child of mine, if more than one, taking together only such share as their parent would have taken if then living. And it is further my will that when fifteen years have elapsed after my decease, or at any time thereafter, if my trustees shall deem it advisable, they shall divide the corpus or principal of my residuary estate equally among my surviving children and lawful issue of deceased children of mine, the lawful issue, if more than one, taking together only such share as their parent would have taken if then living. But if my trustees shall not deem it advisable to pay over to any of my children his or her share of said residuary estate, or any part or parts thereof, then my trustees shall hold any part of said child's share in trust to pay to him or her the net income thereof for his or her natural life. And upon the death of either of my children leaving lawful issue surviving them, I direct that the corpus or principal of such child's share shall go to and be distributed among the issue of such deceased child in such manner as he or she by last will and testament may appoint. But if no lawful issue as aforesaid shall survive, then the share of the corpus or principal of my residuary estate of any of my children so dying, shall be divided equally among my surviving children, and the lawful issue of my deceased children, such issue, if more than one, taking together only the share which their parent would have taken if then living.

"Provided, however, that no part of the income or corpus or principal of any of my children's share of my estate, as long as the same shall remain in trust, shall be liable or subject to their debts, contracts, assignments, or pledges, or to execution, attachments, or other legal process against them or their property. And provided my trustees are further directed and authorized to retain and withhold any portion or portions of the income of any of my children's share of my estate, until they shall be entitled to the corpus or principal of any estate which shall yield such income, and the accumulation of any surplus income by reason of such retention shall be paid to my children when they shall be entitled to the corpus or principal last aforesaid.

"Provided, also, that my trustees are directed to retain any such portion or portions of the income of my daughters' share for such time as my trustees, by reason of the misconduct, improvidence or intemperance of any husband, or for any other cause, according to their sole and final judgment and discretion, may think proper, and in case any such income of a daughter's share shall be withheld and retained as aforesaid, till the time of her decease, it shall be disposed of to the same person or persons, and in the same manner as directed as to the corpus or principal of my estate yielding such income."

There was also a discretionary power of sale conferred upon the executors and trustees.

The said Joseph B. Conrow left surviving him a widow, Sarah B. Conrow, three sons, Joseph D., George E. B., and Howard F., and two daughters, Caroline D., wife of John C. Hancock, and Mary H., wife of Henry S. Kirby, all of whom are of full age, and yet living, except George, who died November 7, 1881, leaving surviving a widow, and one child, Sara B. Conrow, the plaintiff, who was born September 26, 1881. The said George E. B. Conrow left a will, but did not appoint the manner in which the plaintiff should take his share of his father's estate.

The bill averred that the plaintiff is entitled to one-fifth of the said real estate in fee, discharged from the trusts of said will, and prayed for partition accordingly.

The defendants filed an answer in which they admitted the foregoing allegations as to the will and deaths, but denied the conclusion that the plaintiff is entitled to partition, and claimed that the trustees are entitled to hold the said real estate for fifteen years from the testator's death in trust to collect and distribute the rents, etc., during that time, and to divide the corpus or principal at the expiration of the fifteen years.

It was also alleged that upon a bill filed in the Orphans' Court of this county, against the trustees by the present plaintiff for her share of the rents, the Court dismissed the petition on the ground that as the testator died domiciled in Delaware, and his executors live there, the courts of this State have no jurisdiction over them, and that the Supreme Court affirmed the decree.

Charles L. Lockwood (with whom was *Joseph A. Sinn*), for the plaintiff.

The clause directing the executors to hold the corpus for fifteen years applies only to children and the issue of such children as should die before the testator. The words of survivorship relate to the testator's death.

Ross *v.* Drake, 1 Wright, 373.
Johnson *v.* Morton, 10 Barr, 245.
Womrath *v.* McCormick, 1 P. F. S. 504.
Buckley *v.* Reed, 3 H. 83.
Passmore's Appeal, 11 H. 381.
2 Jarman on Wills, 721.

As to the death of children after testator's death, the other provision applies, "Upon the death of either of my children," etc.

The testator's idea was to create a trust as to his children, and those of his grandchildren who had lost their parents when the will took effect, and who therefore had no person but himself to control their enjoyment of the estate. But as to other grandchildren whose parents should survive him, he left their interests to be protected by their parent's appointment.

The clause, "And upon the death" etc., does not mean *in case of* the death within fifteen years, then the share to go after the fifteen years to the issue, because it says *upon* the death.

If there be a doubt it will be decided in favor of the vesting of an absolute estate as soon as possible.

Fulton *v.* Fulton, 2 Grant, 28.

The trust ceased as to this share when its purpose was served. There are no trust duties imposed as to this grandchild. The spendthrift clause relates only to children and to attachments against them. The accumulation clauses relate only to children, and are of course void.

Washington's Estate, 25 P. F. S. 102.

Hence the only duty of the trustees as to grandchildren is to pay over, and the trust is executed.

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Keonig's Appeal, 7 P. F. S. 352.
Stokes's Appeal, 30 P. F. S. 337.
Megargee *v.* Naglee, 14 P. F. S. 216.
Williams's Appeal, 2 Norris, 391.
Bradley's Appeal, 36 Leg. Int. 38.

The non-exercise of the power of appointment by plaintiff's father is immaterial.

Sugden on Powers, 597.
Perry on Trusts, sect. 251.

The will did not work an equitable conversion.

Lindley's Appeal, 13 WEEKLY NOTES, 65.
Hunt's Appeal, 14 Id. 377.

S. Morris Waln, for the defendants.

The end of fifteen years is the period fixed by the testator for the distribution of his estate. This was the main intent of the testator. The trustees have active duties to perform meanwhile, and they are to divide the corpus. The clause "upon the death of either of my children," refers to the death after the fifteen years, because until then the estate is not vested, and because the testator gave his trustees a discretionary power to withhold any child's share after that time. The power of appointment is in favor of issue only, and in default of lawful issue the estate is limited over.

A positive direction to accumulate is void, but a discretionary power to do so is not.

Barger's Appeal, 12 WEEKLY NOTES, 341.
Conrow's Appeal, 40 Leg. Int. 221.

Washington's Estate is to this extent overruled by Barger's Appeal, and was never held in favor.

It is true the word survivors in its technical sense refers to the death of the testator, but if a different time is fixed by the testator, his intention will control; technical rules must give way to his intent.

Reck's Appeal, 78 Pa. St. R. 432.
Sheetz's Appeal, 82 Id. 213.

June 11, 1884. THE COURT. In this case we are to discover the intention of the testator, and give effect to it. We are without the aid of prior adjudications, as there does not appear to be any precedent to be followed as authority, although Hutchinson's Appeal (82 Pa. St. R. 509), is a striking instance of the denial of partition of a vested estate. In that case it was held that a trust to sell real estate and divide the proceeds equally, will defeat the right to partition. The devise in the present case was to executors in trust for fifteen years, with a direction that the trustees should then or thereafter divide the estate. The testator undoubtedly intended that the corpus or principal of his estate should not be parted and divided during that space of time. The clause of the will which provides that "upon the death" of either of his children leaving issue, the corpus or principal of such child's share shall go to and be distributed among the issue of such deceased child, as he or she may by will appoint, although made a separate paragraph, yet was not intended to conflict with the other portions of the will, so as to accelerate the period for making partition. It merely gives his children the power of appointment of their interests, and their appointees take their share, subject to the direction of the testator, that partition should be deferred for at least fifteen years after his death. The word "upon" is equivalent to the phrase "in case of" the death, etc. (Roberts's Appeal, 59 P. S. R. 70.) It is intended to fix the time of the vesting of devises by deceased children of their shares, but it has no relation whatever to the partition of the estate.

The interest of the plaintiff is a vested remainder in fee with a postponement of the enjoyment of the principal, as has been done in many cases of bequest and devise, of which those considered in Provenchere's Appeal (67 P. S. R. 463) and Conrow's Appeal (40 Leg. Int. 221) may be referred to as examples.

We decide nothing as to the distribution of the income of the plaintiff's share, that question not being before us.

Bill dismissed with costs.

Opinion by ARNOLD, J.

Common Pleas—Law.

C. P. of Schuylkill Co. May, 1884.

Thompson, Foy & Co. v. Wingert.

Wages—Priority of, on proceeds of execution—Act of April 9, 1872—Construction of supplement of June 13, 1883—Character of business engaged in by employers—The benefits of said supplement extend to other kinds of business than those provided for by the original Act—Jacobs v. *Woods, 14 Weekly Notes, 237, not followed—Notice of claim, when insufficient.*

Sur exceptions to the report of an Auditor, distributing the proceeds of a sheriff's sale of personalty, under a fi. fa.

The facts are fully stated in the opinion of the Court.

M. M. L'Velle, for the exceptants.
Wm. A. Marr, contra.

May 19, 1884. THE COURT. The money in Court arises from the sale of a drug-store in Ashland, sold under the above writ. H. A. Wingert made claim to $150 of the fund, "for wages to 6 month's work," as a preferred claim under the Act of 1872, and supplement of 1883. The

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Auditor decided that the notice to the sheriff of this claim did not fulfil the requirements of the law, and under the authority of Allison *v.* Johnson *et al.* (11 Norris, 314; Pardee's Appeal, 4 Outerbridge, 408; and McMillen *v.* First Nat. Bank of Corry, 1 WEEKLY NOTES, 55), disallowed the claim. In this, I think, he was right.

G. R. Schnell also made a claim for $50, for work and labor, as an assistant clerk, done by his minor son within six months. The Auditor decided that the notice in this case was sufficient, but disallowed the claim, on the ground that by the express decision of the Supreme Court in Pardee's Appeal, and Fell *v.* Duffy (6 WEEKLY NOTES, 44), it was not embraced within the Act of April 9, 1872, and that the supplement to that Act, passed June 13, 1883, did not sufficiently enlarge the operations of the original Act so as to embrace this claim. In the foregoing cases the Supreme Court had decided "that the business contemplated by the Act of 1872, and in which a preference is given to miners and laborers, is that of works, mines, manufactories, and business *ejusdem generis;* and that it does not not extend to the protection of employés of an establishment purely commercial in its character—does not protect the wages of a clerk in a store."

Did the supplement passed in 1883 enlarge the scope of the Act of 1872, so as to include the claims of clerks in stores and others? The question has not as yet been passed upon by the Supreme Court, but I find it decided in opposite ways by two of the lower Courts. In the case of Jacobs *v.* Woods *et al.*, in the Common Pleas of Perry County (14 WEEKLY NOTES, 237), Judge BARNETT decided that the wages of a farm laborer were not preferred under the Act of 1883, on the ground that "this Act does not enlarge the class of employers from whom the moneys might become due, nor change the kinds of business in which the wages may be earned;" that "it is still the moneys due from any person or persons, or chartered company, . . . either as owners, lessees, contractors, or under-owners, of any works, mines, manufactory, or other business, where clerks, miners, or mechanics are employed. And it is still restricted to be 'paid out of the proceeds of the sale of such mine, manufactory, business, or other property, as aforesaid.'"

If this construction of the Act is to be adopted, then a very curious and illogical result must follow. The Act of 1872 only gave preference to not only miners, mechanics, laborers, and clerks, as before, but also, "servant girls at hotels, boarding-houses, restaurants, or in private families, or other servants and helpers in and about said houses of entertainment and private houses; porters, hostlers, all persons employed in and about livery-stables; laundrymen and washerwomen, seamsters and seamstresses employed by merchant tailors, milliners, dressmakers, clothiers, shirt manufacturers, and clerks employed in stores; hands, laborers, mechanics, printers, apprentices, hired for wages or salary."

But as it is said that the classes of employers who employ this labor are not enlarged by the Act of 1883, then it must follow that the foregoing described employés are only preferred when the employer is at the same time an operator of some mine, or is running a manufactory, or is conducting some other business *ejusdem generis.* If the owner of a great coal mine, or a large iron manufacturing establishment, should at the same time keep a lager beer saloon, or a livery stable, or a Chinese laundry, or a hotel, then the persons employed by him in his business, whether hostlers, barkeepers, etc., would be preferred, and their claims for wages would be first paid on the sale of his property. But if the employer did not happen to be the operator of a mine or manufactory, then these various employés would not be protected. Such an absurd result as this ought to raise more than a suspicion of the correctness of such a construction of the law. It is well nigh impossible to conceive that the Legislature intended to make a distinction so arbitrary, and so ridiculous, and we should exercise some caution lest, in stultifying the legislators who enacted this law, we unwittingly stultify ourselves by giving it a forced and unnatural construction. A decent respect for a co-ordinate branch of the government ought to incline us to give at least a sensible construction to its Acts—if that is possible. I therefore have come to the conclusion that the Legislature intended to give a preference to the claims of servant girls at hotels, porters, hostlers, etc., whether employed by mine owners manufacturers, etc., or by others. In this opinion I am fortified by the decision of Judge BOYER, of the Common Pleas of Montgomery County, in the case of Periepi *et al. v.* Frankenfield, reported in Leg. Intell. of May 2, 1884, p. 175. While accepting the construction put upon the phrase "other business" in the Act of 1872, as appli-

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ing clerks, miners, mechanics or laborers, either as owners, lessees, contractors, or under owners of any works, mines, manufactory or other business where clerks, miners or mechanics are employed; whether at so much per diem or otherwise, etc." The main difficulty in the adoption of this ingenious method of construction lies in the fact that we find the same phraseology in the Act of 1872, and that the Supreme Court has put a different construction upon it. This is shown in Sullivan's Appeal (27 P. F. S. 107); Allen's Appeal (32 Id. 302); and Pardee's App. (4 Out. 408). It is evident that while the result arrived at by the Common Pleas of Montgomery County may be correct, yet it must be based upon some other method of construction.

I find no difficulty in arriving at the intention or motive of the Act of 1883. It was undoubtedly passed to cure the restrictions which had been placed upon the Act of 1872 by judicial decision, and to enlarge its operations. This is evident from its title. The original Act is amended, "so that wages of servant girls, washerwomen, clerks and others, shall be preferred and first paid out of the proceeds of the sale of the property of insolvent debtors, owing wages to such servants or employés."

Has the Legislature used the proper phraseology to carry out this intention, in the words of the Act, or do the rules of judicial construction require us to put substantially the same limitations upon the Act of 1883 as were put upon the Act of 1872? Must the "other business" in the supplement be limited and construed in the same way as in the original Act? I think most clearly not. These words are now entitled to a broader signification. They must now be referred to the *business* in which servant girls at hotels, etc., porters, hostlers, laundrymen, washerwomen, seamsters, clerks in stores, hands, laborers, etc., are employed, otherwise we make nonsense of the Act of Assembly, and evade its manifest intention. It becomes very evident that they can no longer be referred to "works, mines, manufactories, and other business" *ejusdem generis*, but must necessarily be construed with reference to the business in which those new beneficiaries are engaged. By adopting this construction we preserve the clear intention of the Legislature; and the law itself, even though it still remains subject to unfavorable criticism on account of the inartistic way in which it is drawn, assumes a harmony which no other interpretation can give.

I therefore think the Auditor erred in disallowing the claim of G. R. Schnell, and that his finding must be reversed, and it is ordered that distribution be made in accordance with the foregoing opinion.

Opinion by D. B. GREEN, J.

C. P. No. 4. June 7, 1884.

Collins v. Schoch, Owner and Contractor.

Mechanic's claim—Practice—Sci. fa.—Cannot issue to revive the lien of the claim—Must be to levy the claim, and must be duly prosecuted within five years, otherwise the lien of the claim will be lost.

Sur rules for judgment for want of sufficient affidavits of defence.

On March 27, 1879, the plaintiff filed a mechanic's claim for $132.25, against twenty-three buildings, apportioned so as to charge each house with the payment of $5.75.

On March 24, 1884, he filed a suggestion that George W. Schoch and William Silence were then the present owners of some of the buildings covered by the claim. On the same day he issued writs of scire facias to levy the claim and revive the lien thereof for five years.

The terre tenants filed affidavits of defence, setting forth that the whole amount of the claim was part of a sum due upon a building operation, embracing seventy-one houses, on which only the sum of $61.25 was due, being an average of 86⅓ cents for each house; that the deponents and other terre tenants had paid $109.25 to the plaintiff, thereby having paid $48 more than was due.

William Gorman, for the plaintiff.

The affidavit does not set forth that the claim against any particular house has been paid. We ought to be informed how the money was appropriated. At all events we are entitled to have the lien revived. This is a scire facias to revive the lien.

L. R. Fletcher, for the terre tenants..

THE COURT. There is no writ of scire facias to revive the lien of a mechanic's claim. The Act of June 16, 1836, § 15, prescribes the form of the scire facias. It warns the defendant to show cause why the claim should not be levied. On that a judgment for the debt is entered, which judgment may in turn be revived; but you cannot revive the lien of the lien. The issuing of a scire facias within five years, is sufficient to keep the lien alive for five years longer, to allow the plaintiff to obtain judgment that the debt shall be levied (Act of June 16, 1836, § 24; Sweeny *v.* McGettigan, 8 H. 319), but it must be duly prosecuted within that time (Ward *v.* Patterson, 10 Wr. 372), otherwise the lien will be lost and the property discharged. (City *v.* Scott, 3 WEEKLY NOTES, 562; affirmed by the Supreme Court, 12 N. 25.) The law has been changed as to taxes by the Act of April 16, 1879, which makes them a lien until fully paid; and the Act of June 27, 1883, gives a writ of scire facias upon a municipal claim, issued within five

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years, the additional effect of a scire facias to revive and continue the lien, and authorizes the prothonotary, on the order of the plaintiff's attorney, to enter a judgment of revival for five years from the entry thereof, pending the determination of the issues raised in the case. The purpose of this Act is to prevent the claim from being lost, by reason of the litigation upon it requiring more than five years for its determination, as happened in City *v.* Scott (*supra*). There has been no change in the law as to mechanics' claims, nor has the form of the writ of scire facias been changed in any of the several kinds of cases, but it remains the same—that is, a scire facias to show cause why the sum claimed should not be levied of the building. When the claim or debt has passed into a judgment, it may be revived for another space of five years, and so on indefinitely, until paid, under the Act of March 26, 1827. But the first proceeding must be by scire facias to levy the debt, and not to revive and continue the lien. The practice of writing in the printed writ a summons to show cause "why the lien should not be revived for another period of five years," is a bad practice, and should be abolished. The defendant is not liable to have his property subjected to a lien, kept alive without notice to him, or an opportunity given to make defence to it. A sci. fa. to show cause why the lien should not be revived, seems like a mockery, since the effect of the sci. fa. is to revive the lien of the claim pending the proceedings to levy it, and the defendant cannot prevent that effect, while he can show cause against the recovery of the debt.

These affidavits are sufficient to carry the cases to a jury.

Rule discharged in each case.

Per ARNOLD, J. W. H. W.

C. P. No. 3.

Sweeney v. The Rev. Hugh McLaughlin Beneficial Society.

CORRECTION.

In this case, reported *ante*, p. 466, the decision of the Court should read as follows:—

THE COURT. A member of a society has the right to appeal to the Court to determine whether he had been expelled for sufficient cause, and if not, he may be restored.

A by-law cannot oust the jurisdiction of the Court, or make an appeal to the Court a cause of expulsion.

Judgment for relator.

Per LUDLOW, P. J.

Orphans' Court.

April, 1884.

Griffith's Estate.

Claim on bond after twenty-five years—Presumption of payment from lapse of time rebutted by evidence of the debtor's inability to pay.

Sur exceptions to adjudication.

It appeared before the Auditing Judge (HANNA, P. J.) that the decedent died October 22, 1881, leaving as his estate a fund amounting to $4280.52, the proceeds of a legacy bequeathed to decedent. A claim was made upon two bonds executed by the decedent to Jessie Griffiths, bearing date respectively July 1, 1856, for $4500, April, 1860, for $1160. The execution of the bonds was duly proved, and counsel for one of the creditors having objected to the claim, on account of the lapse of over twenty years, witnesses were called to prove the financial inability of the decedent to pay the bonds from the date thereof until his death.

The Auditing Judge found: "From the uncontradicted testimony it clearly appears that the decedent, some twenty-five years before his death, failed in business, and from that time down to his death was extremely poor, and unable to support himself and hopelessly insolvent, and during all that time it would have been useless to attempt the collection of any debt he contracted. In view of these facts the Auditing Judge is of opinion that the presumption of payment of these bonds does not arise."

To this finding of the Auditing Judge exceptions were filed on behalf of a creditor.

John T. Snare, for exceptant.

John Shallcross, contra.

May 3, 1884. THE COURT. The presumption of payment arising from lapse of time may be more easily dispelled than that created by the Statute of Limitations. Nothing short of a promise, or an acknowledgment which involves a promise, can be interposed to the latter; whilst facts raising a counter-presumption of inability to pay may be successfully pleaded to the former. Why the bounds to litigation should be less stable when fixed by an unwritten rule than when prescribed by statute, is hard to say; but the distinction has been avowed. (Eby *v.* Eby, 5 Barr, 435; Foulk *v.* Brown, 2 W. 215; Reed *v.* Reed, 10 Wr. 239.) The inability to pay, however, must be shown with the force of a substantive fact. Mere insolvency will not establish it, because a man may pay one creditor, and be utterly unable to pay ten creditors. In this case the decedent, within a year after giving his bond, failed in business, and became, if he was not already, insolvent. The record debts which appear against

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him, and which were kept alive, show that his insolvency continued until his death. His efforts to maintain himself during all this period did not secure him subsistence; he was forced to borrow, and even to beg. His mother and sister gave him a home, and a neighbor sometimes supplied him with clothes. The fund which now constitutes his estate accrued to him through a legacy, and was recovered by his administrator. These circumstances are the very opposite of those from which in Beale *v.* Kirk (3 Norris, 415) the fact of payment was implied, and they should justly lead to an opposite conclusion. The only point of agreement between the cases is the failure to ask payment; but there the creditor made no demand because he had been paid, and here he made none because he could not be paid. The legal inference which made against him in that case, is therefore in his favor in this. The present case differs, too, although by a narrower margin, from Willaume *v.* Gorges (1 Camp. 217), Taylor *v.* Megargee (2 Barr, 225), and Kline *v.* Kline (8 Har. 503). They held that the bare fact of poverty is not a bar to the presumption, because opportunity to pay might exist, and in Taylor *v.* Megargee was expressly found to have existed along with poverty. The proof here is, however, that the debtor, after his failure, followed a business from which he could not extract a livelihood; that other creditors, so vigilant that they revived their judgments, could obtain nothing, and that this claimant regarded the debt as so worthless, that he neither demanded payment nor issued process against the decedent. The acts of the creditors themselves, therefore, furnish affirmative proof, which was wanting in the authorities last cited, of an absolute inability to pay.

The exceptions are dismissed and the adjudication is confirmed.

Opinion by ASHMAN, J. E. F. H.

March 19, 1884.

Bunting's Estate.

Attachment of legacy—Amendments—Cannot be made in derogation of other intervening rights.

Sur exceptions to adjudication.

This was a contest between the assignee of the interest of a legatee and his attaching creditor, which arose under the following state of facts as they appeared before the Auditing Judge:—

"Sarah Clark died in 1869, and gave by will a share in her residuary estate to her executors in trust to sell it and distribute the proceeds among the children of her sister, Elizabeth A. Bunting, and in further trust as to the portion of Elizabeth T. Bunting, one of said children to pay her the income, and, if necessary, part of the principal, for her use for life, the balance, at her death, to 'be divided among her brothers and sisters then living and the issue of such then deceased.' Elizabeth A. Bunting, the sister of the testatrix, died in February, 1878, after making a will, the executors of which were the same as those under the will of Sarah Clark. Elizabeth T. Bunting, the life tenant, died June 3, 1883, leaving two brothers, of whom Samuel C. Bunting was one. On February 25, 1878, an attachment sur judgment issued against Samuel C. Bunting as defendant, and against the executors of Elizabeth A. Bunting as garnishees. The judgment was afterwards revived by sci. fa. On June 5, 1883, the defendant assigned for value all his interest in Sarah Clark's estate. It was not shown whether he took anything under the will of Elizabeth A. Bunting, nor whether, when the writ named the garnishees as executors of Elizabeth A. Bunting, it was really intended to summon them as executors of Sarah Clark. A mistake, however, is hardly presumable, because the writ was taken out a few days after the death of the former testatrix."

The Auditing Judge sustained the claim of the attaching creditor, and to this finding exceptions were filed.

A. S. Letchworth, for the exceptant.

James P. Townsend and *J. Cooke Longstreth*, contra.

March 22, 1884. THE COURT. The task of determining between the claim of the attaching creditor and that of the assignee is not free from entanglements. The writ of attachment described the garnishees as executors and trustees under the will of Elizabeth A. Bunting, whereas they held the moneys of the debtor legatee under that of Sarah Clark. The liberal interpretation which the amending acts have received enables us to say, that any descriptive appellation applied by the writ to the garnishee may be regarded as surplusage. (Bentley *v.* Kaufman, 12 Ph. 439; Hoyt *v.* Christie, 51 Vert. 48.) The reason is apparent. The grasp of the creditor upon the money of his debtor ought not to be broken by a faulty description of the title of its custodians, concerning which the creditor cannot always be supposed to have accurate knowledge, and which the garnishees are bound to correct in their answers; and the Courts have even allowed the name of a new party to be added to the writ. (Sullivan *v.* Langley, 128 Mass. 235.) The doubt is whether the indulgence will be extended where the rights of third parties have supervened. To appreciate the importance of this question in its relations to both parties, a few facts must be recited. [Here the facts are recited *ut supra.*]

It is apparent from this recital that the plaintiff in the attachment must base his claim to a recovery over the head of the subsequent purchaser upon the ground of a mere coincidence

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in the personnel of the executors. The claim might be admitted if the identity of names involved a similar blending of interests; but the rights and liabilities of the executors in respect of the separate estates, were as distinct as if those estates had been committed to different parties. This proposition is elementary.

"It is a maxim," says GIBSON, J., "that where two rights meet in the same person, they are to be viewed as if they existed in different persons." (Allison *v.* Wilson, 13 S. & R. 333.) Certainly a purchaser for value may claim the protection of this principle. Against his right the only answer which the creditor's case admits of, is that the attachment is in law an assignment to the creditor of the property belonging to the debtor (Rushton *v.* Rowe, 14 P. F. Sm. 65); and that just as an assignment by the latter would have passed the title before the attachment, so an assignment by the law will be equally efficacious to defeat a conveyance to a subsequent purchaser. The objection to this argument is its universality. The debtor's conveyance of his interest in A.'s estate would not prejudice the right of a creditor to attach his interest in B.'s estate; and an assignment by act of the law in favor of the creditor who has levied upon the former estate, will not, at least against a purchaser, cover the latter estate which the creditor has failed to attach. The demand before the Auditing Judge necessarily went upon the theory that an amendment of the writ must be presumed to have been made in the Common Pleas, although admittedly it had never been applied for. But the doctrine of amendments, however liberally interpreted, will not be permitted to curtail the rights of intervening creditors or of *bona fide* purchasers. (Crutcher *v.* Commonwealth, 6 Wh. 340; Zimmerman *v.* Briggans, 5 W. 186; Smith *v.* Hood, 1 Cas. 218.) We think that the interest of Samuel C. Bunting should have been awarded to Mary Bunting, the assignee. We therefore sustain the exceptions, and amend the adjudication accordingly.

Opinion by ASHMAN, J. W. H. W.

February 21, 1884.

Stevens's Estate.

Mutuality of contract—Assignment by decedent of her estate to the "Old Ladies' Home" on

She remained in the institution until her death, which occurred April 18, 1881.

Letters of administration were granted to Mrs. Emeline Claridge, the president of the Home, but these were revoked at the instance of William L. Stevens, her only son, and next of kin of decedent, to whom new letters were granted, and to whom, upon the settlement of the account of Mrs. Claridge, the balance in her hands was awarded as such administrator.

Afterwards suit was brought in the Common Pleas against the administrator, who is the present accountant, by the Home, claiming the entire estate in his hands. On the filing of this account it was agreed by all parties interested that the suit in the Common Pleas should be discontinued, and the question be submitted to the Auditing Judge.

The Auditing Judge awarded the entire estate to the Home. To this finding exceptions were taken by the claimant, the only son and heir of decedent.

R. P. Dechert, for exceptant—

Contended that there was no mutuality of consideration, and cited—

Graham *v.* Graham, 10 Casey, 475.
Bash *v.* Bash, 9 Barr, 260.
Neal *v.* Gilmore, 29 Sm. 421.

Lex and *Diehl*, contra.

February 23, 1884. THE COURT. It could not be objected to the contract between the decedent and the claimants that it lacked either mutuality or certainty. The decedent paid the sum of $200 in cash, and assigned all her property to the charity, and the claimants for that consideration bound themselves to provide for her wants until death. It is a frivolous answer to this claim that the managers of the charity had charged a less sum to other beneficiaries for similar services; they were privileged by their charter to demand all which those who sought the aid of their institution were willing to pay. The broader exception that the consideration might outweigh in value any possible benefits to be conferred in return, is wholly untenable. Neither in law nor equity will the Court inquire into the prudence of a bargain, because to do that would be to contract for the parties. Fraud, which vitiates everything, and mistake or hardship so great that it has all the consequences of fraud, may alone be relieved against. (1 Addison on Contracts, 21, and authorities there cited.)

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JULY 10, 1884.* [NO. 31.

Supreme Court.

July, '83, 200. February 14, 1884.

Lund v. Brown.

Title by Statute of Limitations—Adverse entry and holding—Payment of taxes—Parol contract for sale of land—Statute of Frauds.

An entry upon land is not adverse which is made under a license to lay water pipes to springs thereon, and to change the effect of this entry and make the holding adverse it is not enough to drive stakes around the springs to keep cattle off, but the tenant must keep up the fences and prevent the land from being turned into common.

Payment of taxes assessed upon real estate without the requisite possession cannot make title under the Statute.

Where title is claimed under a parol contract of sale, the evidence of such contract, and of performance thereunder, must be definite and unequivocal in order to take the case out of the Statute of Frauds.

Error to the Common Pleas of Chester County.

Trespass quare clausum fregit, by James Lund against David M. Brown, for entering upon and cutting down a tree on a piece of uncultivated land, which, it was alleged, belonged to the plaintiff. Pleas, not guilty and *liberum tenementum.*

The following were the facts as they appeared at the trial before FUTHEY, J.: The defendant claimed title by virtue of a devise from his father. The plaintiff claimed through one Dr. McClurg, to whom, he alleged, the defendant had made a parol sale of the land in dispute in 1853. The land was a small piece of ground without any improvements, fenced on two sides, but lying open to the public road; it had several springs of water on it. Dr. McClurg, through whom the plaintiff claims, was the owner of a farm on the opposite side of the road from this piece, and in the year 1850 entered into an agreement with Thomas Brown, father of the defendant, by which he acquired the right to conduct the water from these springs to and across the road to his own property. It was alleged by the plaintiff that in the autumn of 1853, the defendant, who had then come into possession of the property, made a parol sale of it to Dr. McClurg, but the evidence of this sale was "very vague and unsatisfactory." Dr. McClurg afterwards made an assignment for the benefit of creditors, and the assignee conveyed this land to Yeatman; from him through several conveyances it came to the plaintiff. The use of this land by the several persons who succeeded McClurg was simply that which concerned the water, and to which the plaintiff and his predecessors in the title had the right under the first agreement with Thomas Brown. No improvements were made, except a fence erected in front of a part of the property by one of the holders of the opposite farm in 1866. The subsequent taxes were paid by such holder.

The defendant requested the Court to charge as follows:—

(1) In order to recover, the plaintiff must show title to the property in dispute. The legal title was in the defendant. To divest this legal title, the plaintiff must show that he has maintained for twenty-one years an actual occupancy, or possession of the premises, that was adverse to the legal owner, and open and notorious. Such actual occupancy, or possession, must be by residence on the property, or by inclosure and cultivation without residence. *Affirmed.* (2) The plaintiff has shown no residence upon or cultivation of the property in dispute, and no inclosure of the same, for a period of twenty-one years; and the verdict must be for the defendant. *Affirmed.*

Verdict for the defendant and judgment thereon. Whereupon plaintiff took this writ, assigning for error, *inter alia*, the action of the Court in affirming the above points.

Subsequently plaintiff moved for a new trial, presenting depositions and a deed alleged to have been made by David M. Brown to Dr. McClurg, which motion was dismissed because more than one term of Court had elapsed since it was made, and the writ of error had ousted the jurisdiction.

Sidwell & Johnson (*William B. Waddell* and *William H. Staake* with them), for plaintiff in error.

The case was decided against the plaintiff, simply on the question of possession, which should have been submitted to the jury as a question of fact.

De Haven *v.* Landell, 7 Cas. 120.
Groft *v.* Weakland, 10 Cas. 304.
Potts *v.* Everhart, 2 Cas. 493.

The land was used in every way in which it was useful or could be enjoyed, which was all the law requires to constitute possession.

Criswell *v.* Altemus, 7 Watts, 566.
Alden *v.* Grove, 6 Har. 377.
Baker *v.* Findley, 8 Har. 169.

The open, notorious possession for over thirty years was sufficient of itself to give a good title.

Read *v.* Goodyear, 17 S. & R. 350.
McCall *v.* Neely, 3 Watts, 70.

A possession under a contract relation, continued until the statute bars the remedy on the

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contract, or until law or equity presumes that the duty owed by the person in possession has been released, is sufficient.

Harris *v.* Bell, 10 S. & R. 39.
Dixon *v.* Oliver, 5 Watts, 509.

The finding of the deed from Brown to McClurg gives the plaintiff a complete title, and this Court, under its chancery powers, may give relief against the inequitable judgment.

Gallup *v.* Reynolds, 8 Watts, 425.
Kellogg *v.* Krauser, 14 S. & R. 143.
Huston *v.* Mitchell, 14 S. & R. 307.
Dickerson's Appeal, 7. Barr, 257.

Alfred P. Reid, for defendant in error.

This Court cannot take cognizance of the after-discovered evidence. The equitable jurisdiction by bill in this State is exclusively created by statute.

Dohnert's Appeal, 14 Smith, 313.
Bakewell *v.* Keller, 11 WEEKLY NOTES, 300.

This Court has no general original jurisdiction in equity between private parties.

Hottenstein *v.* Clement, 3 Grant, 316.
Constitution of 1874, Art. 5, § 3.
Wheeler *v.* Philadelphia, 27 Smith, 344.

This Court is confined to an adjudication upon the errors of law which appear on the record.

Cathcart *v.* Commonwealth, 1 Wright, 108.
Jewell *v.* Commonwealth, 10 Harris, 99.
Jamison *v.* Collins, 2 Norris, 359.
Lee *v.* Keys, 7 Norris, 175.

The parol contract upon which title was claimed was not unequivocally established as required by law.

Goucher *v.* Martin, 9 Watts, 106.
Van Loon *v.* Davenport, 1 WEEKLY NOTES, 320.
Overmyer *v.* Koener, 2 WEEKLY NOTES, 6.

Whether the evidence is sufficient to take the case out of the Statute of Frauds is for the Court.

Dettrick *v.* Sharrar, 14 Norris, 521.
Bowers *v.* Bowers, 14 Norris, 477.

When title is claimed under the Statute of Limitations, it is for the Court to say whether there is sufficient evidence of all the requisites for such a title.

Huffman *v.* McCrae, 6 Smith, 95.
Groft *v.* Weakland, 10 Casey, 304.

The use of an unseated tract of land as a wood lot is not an adverse possession, although taxes may be paid for it.

Wright *v.* Guier, 9 Watts, 172.
Sorber *v.* Willing, 10 Watts, 141.
Hole *v.* Rittenhouse, 1 Casey, 491.

March 24, 1884. THE COURT. The Court, in this case, instructed the jury to find for the defendant; we do not see how, under the evi-

pipes with the assent or license of Brown. There is here, then, in the outstart, the absence of an essential constituent of title by the statute: adverse entry. When, then, did the notoriously adverse possession, on which the plaintiff professes to claim, commence? Not certainly during McClurg's time, for he did nothing that was not consistent with the license under which he entered. He neither cleared nor cultivated the land; he commenced to build a fence along the road, but abandoned the job before it was finished, and contented himself with driving in some stakes around the springs in order to preserve them from the cattle, which were wont to stray over the lot at pleasure. It also appears from the testimony of Benjamin Thompson, who resided on this property from 1859 to 1864, that there was no fence during that period along the public road, and that the lot lay open and uncared for. And though John Fisher says he thinks there was a worm fence there in 1854, yet that the property lay open for a long while, and that the fence was not there when Weiler came into possession. This then seems to have been its condition until about the year 1866, when Charles Weiler inclosed it with a post and rail fence. But as he did not clear or cultivate the property, it might be doubtful whether this act could be regarded as an assertion of title in the soil, rather than as a means used to guard the springs from trespassing cattle. If, however, we treat this as the beginning of a notoriously adverse possession, and that possession was continued down to the bringing of this suit, yet as it extends over a period of but seventeen years, it must be linked to some other preceding acts of possession to make it effective under the statute. But there are no such precedent acts of a continuing character. When Weiler entered he found but the remains of an old worm fence on the road side, of which he says, "There were a few panels standing and a few down. I presumed that they had been carried away." This then, aside from the use of the water, is all that we have to sustain the plaintiff's claim under the statute. But a possession so uncertain and so wanting of continuity would amount to nothing even had the original entry been adverse.

As it was said by GIBSON, J., in Stephens *v.* Leach (7 Har. 262), when the adverse possession is by inclosure, it behooves the tenant to keep up the fences and prevent the place from becoming vacant, or the ground from being turned into a common.

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there had been I do not see how such payment could have helped the matter, seeing that this lot was not assessed separately, but as part of the Yeatman or Thompson tract of twenty or twenty-three acres.

But it is further urged, on part of the plaintiff, that he is entitled to recover by virtue of a parol sale of this land in 1853, by David M. Brown to Dr. McClurg. *Prima facie* a sale of this kind is within the prohibition of the Statute of Frauds and Perjuries, and it rests with the person alleging the sale to show such a contract, and such a performance of that contract as will deliver it from the grasp of the statute. Let us, then, see what the plaintiff proved as to the alleged oral sale. As we have already seen, all the possession of the premises in dispute which McClurg ever had he acquired by virtue of the license of Thomas Brown to enter and take the water. He, McClurg, says, however, that in the fall of 1853, after the death of Thomas Brown, David M. Brown and himself made some arrangement of an exceedingly indefinite character for the sale and purchase of this land; that the price fixed was $175, for which he gave Brown his note, which he is satisfied was paid, but of this he is not certain; thinks further, that if it were paid for at all, it was paid in instalments; he is also satisfied that he never got a deed, and never asked for one; in fact, did not care whether he got a deed or not. This, then, is the kind of a contract on which the plaintiff relies to take his case out of the statute, and yet the only reasonably certain thing about it is, that Dr. McClurg gave his note to Brown for $175. But when and how that note was to be paid remains unknown, and whether it was ever in fact paid is left in uncertainty; not a word about when or how Brown was to convey, if at all; nor is anything said whether the title and right of possession were to vest when the note was given, when it was paid, or at some intermediate time. Neither are we informed whether McClurg was to have a fee or only a life estate. Such a contract as this is ineffective to take the case out of the statute. (Woods *v.* Farmare, 10 Watts, 195.) It is not such an agreement as a chancellor could execute were there no Statute of Frauds or Perjuries in the way of such execution. Again, under this uncertainty of the contract it is impossible to say that the possession, such as it was, was even continued under it. That such possession was not taken in pursuance of this subsequent contract is property, but such as were susceptible of estimation and compensation, the transaction falls under the condemnation of the statute. (Moore *v.* Small, 7 Har. 461; Postlethwait *v.* Frease, 7 Cas. 472.)

By way of conclusion, we may add that nothing could better show the utterly mistaken and preposterous character of the plaintiff's contention than the fact that since the trial and judgment in this suit, he has discovered that his title rests not in parol, but upon a deed from David M. Brown to Dr. McClurg executed April 10, 1857.

Judgment affirmed.

Opinion by GORDON, J.

CLARK, J., absent. W. M. S., JR.

Oct. '83, 175. November 7, 1883.

Richardson v. Aiken.

Deeds—Estates—Conveyance by trustee to a married woman "as her separate estate"—When it vests a fee simple.

A., as guardian of his daughter B., held $1300 of her money, and conveyed to her, after her marriage, a piece of land "in consideration of $1300 balance due B. by A., her guardian, and of natural love and affection, . . . as the separate estate of the said B." *Habendum*, "to the said B., her heirs and assigns, . . as the separate estate of the said B." It did not appear that the land, at the date of said conveyance, was worth more than $1300: *Held*, that the daughter took, by said conveyance, an estate in fee simple, and not a sole and separate estate in equity.

Error to the Common Pleas No. 1, of Allegheny County.

Case stated, wherein James H. Aiken and Margaret E. Aiken his wife, in right of said wife, were plaintiffs, and William P. Richardson was defendant, showing the following facts:—

Margaret E. Aiken's father, Jehu P. Smith, held as trustee for her $1300, which had passed into his hands from her mother's estate during her minority. After the daughter's marriage the father conveyed a piece of land to her "in consideration of the sum of $1300 balance due said Margaret from Jehu P. Smith, her guardian, and of natural love and affection," . . . "as the separate estate of said Margaret E. Aiken." *Habendum*, to said Margaret, "her heirs and assigns, for the only proper use and behoof of said Margaret E. Aiken, her heirs and assigns forever, as the separate estate of said Margaret

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with interest. At the time specified plaintiffs tendered a deed, and demanded of defendant a compliance with the terms of the agreement. This defendant refused, alleging that plaintiffs were not seised of an alienable estate in the land, and could not convey a fee in the same.

If the Court were of opinion that plaintiffs were seised of an alienable estate, and could convey an estate in fee, judgment to be entered for plaintiffs for $4000, with stay of execution on $2000 thereof, etc.; otherwise, judgment to be entered for defendant with costs, with right to sue out writ of error, etc.

The Court, after argument, entered judgment in favor of the plaintiffs, and against defendant for $4000, with stay of execution, as agreed on. Thereupon the defendant took this writ, assigning for error the said judgment.

Wm. L. Chalfant (*George K. Lawrence* with him), for plaintiff in error.

The conveyance being "for the separate estate" of the married woman, and a part of the consideration being "natural love and affection," the estate created was a trust for the sole and separate use of the married woman.

Bispham's Equity, sec. 100.
Gilbert *v.* Lewis, 1 De G. J. & S. 38.
Lewis *v.* Mathews, L. R., 2 Eq. 177.
Massy *v.* Rowen, L. R., 4 H. L. Cas. 288.

In the English cases cited, *supra*, the words "separate estate" are used to express the idea of a sole and separate use, and it would seem that an estate given to a feme covert as her separate estate, would create a sole and separate use. Nor is there anything in the Married Woman's Act of 1848 to change this rule, for that Act took away no protection from the wife as against her husband which she had before its passage.

Wright *v.* Brown, 8 Wright, 238.

The expression "separate estate" always refers to an estate held in trust for a married woman.

Todd's Appeal, 12 Harris, 431.
Twining's Appeal, 1 Out. 41.
Morrison *v.* Dollar Savings Bank, 26 Pittsb. Leg. J. 118.
Ringe *v.* Kellner, 3 Out. 461.

It will not do to say that, because a part of the consideration was the trust money in his hands, the grantor could not restrict the estate in his daughter to her sole and separate use; neither the daughter nor her husband objected to taking the land with the restriction, and she has no other title than that found in the deed.

J. Ludwig Koethen, for defendant in error.

The land was conveyed to the daughter in ease of the father and guardian, who was bound to her in $1300 cash, and if she permitted him to convey the land as a substitute for the money, he was bound to convey it with as clear and available a title as she would have had in the money, if it had been paid. But if the land was a gift, the words of the deed will not bear the interpretation claimed, for there is no appointment of a trustee, no declaration of trust, no creation of a use, and no disposition of a remainder. In all the cases cited by plaintiff in error, there was a limitation to the use of the wife. To bar the husband's rights such a use must be expressed in clear terms.

Tritt *v.* Colwell, 11 Casey, 228.
2 Story's Equity, sec. 1381.
Bispham's Equity, sec. 100.
Hill on Trustees, 420.
Morrison *v.* Dollar Savings Bank, 36 Leg. Int. 215.

To defeat the husband's rights the legal and equitable elements of the estate must be separated; and if the legal estate become vested in the wife, the husband's rights cannot be excluded.

Bispham's Equity, sec. 99.
Todd's Appeal, 12 Harris, 429.

In the following cases the language of the deeds justified a much stronger inference of a sole and separate use than in this case, yet this Court decided that in them the wife took a fee simple.

Torbert *v.* Twining, 1 Yeates, 432.
Krause *v.* Beitel, 3 Rawle, 199.
Heath *v.* Knapp, 4 Barr, 228.
Morrison *v.* The Bank, *supra*.
Ringe *v.* Kellner, 3 Out. 460.

January 7, 1884. THE COURT. The only question presented by this record is whether the deed from Jehu P. Smith to his daughter Margaret created a sole and separate use for the said Margaret. The conveyance is to the said Margaret, her heirs and assigns, "as the separate estate of the said Margaret." The same expression occurs in the *habendum* clause of the deed, which is as follows: "To have and to hold the said land . . . . unto the said party of the second part, her heirs and assigns forever, as the separate estate of said Margaret E. Aiken."

An estate limited to a feme covert for her sole and separate use has always been known as, and entitled her separate estate. The word separate, in this connection, has a technical meaning. (Bispham's Equity, § 100.) In Todd's Appeal (12 Harris, 429), it was said: "That expression always refers to an equitable estate held by somebody in trust for a married woman." In Pennsylvania Company for Insurances on Lives *v.* Foster (11 Casey, 134), it was held that the Act of 1848 created a separate legal estate as distinguished from a separate equitable estate, and that the Act does not enable a married woman to dispose of property held by a trustee for her separate use. This conveyance was not to a trustee, but directly to Mrs. Aiken. This, however, is not material, for it was held in Wright *v.* Brown (8 Wright, 224), that the wife's interest is the same, whether the gift is to her directly or to a trustee for her.

We are, however, relieved of the discussion of

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the question, whether, if this had been a settlement by the grantor upon his daughter, the words in the deed would have created a sole and separate use. This was not in any sense a settlement. The grantor was the guardian of his daughter, and the conveyance shows upon its face that it was in consideration of the ward's money in his hands. Under such circumstances it was not in the power of the grantor to impose a separate use trust upon the grant, or any clog upon it whatever, without his daughter's consent. She was a purchaser for value. It is true, the additional consideration of "natural love and affection" is mentioned in the deed, but this is of no importance, as the case stated does not show that the property was worth a dollar more than the money consideration named. The case was argued upon the theory that the property was worth considerably more than the $1300, specified as the indebtedness of the grantor to his ward. This, however, is outside of the record, and we cannot regard it.

Even if the intention had been clear, which it is not, to confine the grantee to a life estate, and bar her husband's marital rights in the property, we are of opinion it was beyond the power of the grantor. There is nothing upon the record to show Mrs. Aiken's consent to such an arrangement; on the contrary, the agreement of herself and husband to convey the land to the plaintiff in error in fee is conclusive that she declines to be bound by the restriction.

We are of opinion that the defendants in error have a good marketable title to the land which they can convey to the plaintiff in error in fee, and the judgment is therefore affirmed.

Opinion by PAXSON, J. W. S. P.

Jan. '84, 366. March 17, 1884.

Appeal of the First National Bank of Muncy.

Practice—Opening judgment—Errors and appeals—Act of April 4, 1877.

Where on an application to open a revived judgment, the testimony taken upon the rule shows a defence going to the merits of the original judgment, it is within the discretion of the Court below to open the original judgment so as to reach the whole case and let the defendant into a defence.

The Act of April 4, 1877 (P. L. 53), allowing an appeal from decisions of the Courts in the opening of judgments entered by virtue of a warrant of attorney or on judgment notes, does not extend to the case of judgments revived by scire facias, though originally entered as above.

Appeal of the First National Bank of Muncy, Pa., from a decree of the Court of Common Pleas of Sullivan County, opening a judgment entered in favor of Edward Lyon, to the use of the said bank, against Griffith Phillips.

The facts, as they appeared from depositions taken on the rule to open judgment, were as follows: On February 17, 1869, Griffith Phillips gave to Edward Lyon his note due one day after date for $800, the note containing a warrant of attorney to confess judgment. Judgment was entered on the note to No. 53, February Term, 1869 for the sum of $800; it was revived by scire facias issued on February 19, 1874, to No. 89, February Term, 1874; judgment entered March 4, 1876, for $467.76. On February 14, 1878, the First National Bank of Muncy, Pa., issued an attachment execution on a judgment held against Edward Lyon, and summoned Griffith Phillips as garnishee. A scire facias was issued to No. 35, February Term, 1881, but before judgment, a rule was entered to show cause why the judgment entered March 4, 1876, should, not be opened and the defendant let into a defence.

The testimony of Phillips in regard to the original note was, that it was not for an adjusted amount; that there were accounts between him and Lyon; that when he signed the note he was so far intoxicated as to be incapable of transacting business; that accounts continued between them, and that Lyon told him that he, Lyon, held the note merely as collateral; that the accounts were paid, and Lyon had agreed to put the payments on the docket. There was corroborating evidence in the deposition of David J. Phillips as to the defendant's condition when he signed the note.

On December 18, 1882, the Court made the following order: "The original and revived judgments are opened, and defendant let into a defence. An issue to be framed; the note to stand for plaintiff's statement and defendant's plea to be *nil debet*, payment with leave, etc."

The plaintiff thereupon took this appeal, assigning for error the above order of the Court, opening judgment No. 53, February Term, 1869.

Clinton Lloyd and *E. M. Dunham* (*W. E. Crawford* with them), for the appellant.

That the Courts of Common Pleas of the various counties have jurisdiction over the judgments entered therein, either upon warrants of attorney or by default, is a proposition that is not denied by the appellants. But the exercise of this authority is subject to certain explicit and well-defined laws and rules. Whenever a plaintiff has been to the expense and trouble of having his judgment properly and legally entered, he has a right to rely upon the well-settled principles of law and equity, that no person, officer, or Court can interfere with, disturb, or in any way injuriously affect the rights he thus acquires, except upon due and proper process, after fair and

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reasonable notice to him; and after giving him an opportunity to be heard by witnesses and counsel. It has so often been decided in the Courts of Pennsylvania "that proceedings to open judgments are in the nature of proceedings in equity," that it is the only substitute we have for the bill in equity on which a Chancellor would enjoin a perpetual stay of execution, having the advantage of simplicity, cheapness, speed, and efficiency.

Lacock *v.* White, 7 Harris, 495.

In our case, the Court made an order opening the judgment and letting the defendant into a defence without any previous petition, rule, or request, simply upon evidence of defendant taken in another rule and application to open another judgment, consequently it seems to us the Court has exceeded its authority and the Supreme Court has the right to review it and set the order aside.

Ellery P. Ingham and *Oliver H. Reighard* (*A. Logan Grim* with them), for appellee.

Since the Act of April 4, 1877 (P. L. 53), appeals may be taken from an order opening a judgment. The equitable powers conferred upon the Common Pleas give the Judges thereof in the exercise of a sound discretion the power to open judgments.

Wernet's Appeal, 10 Norris, 322.

In an appeal the higher Court determines "whether the discretion of the Court has been rightly exercised."

Earley's Appeal, 9 Norris, 323.

This was an equitable proceeding, the petition and rule were equally upon the original and revived judgments, the evidence taken disclosed fraud.

April 7, 1884. THE COURT. This appeal is taken from the decree of the Court of Common Pleas of Sullivan County, opening a judgment entered in said Court in favor of Edward Lyon, to the use of the First National Bank of Muncy, against Griffith Phillips. The judgment was originally entered on February 19, 1869, upon a single bill, with warrant of attorney annexed, to No. 53, February Term, 1869, for the sum of $800; it was revived by scire facias issued on February 19, 1874, to No. 89, February Term, 1874; judgment entered March 4, 1876, for $467.76. A scire facias was again issued to No. 35, February Term, 1881, but before judgment a rule was entered to show cause why the judgment entered March 4, 1876, should not be opened, and the defendant let into a defence. Upon examination of the testimony taken upon this rule, the matters urged by way of defence were found to go to the merits of the original judgment, entered to No. 53, February Term, 1869, whereupon the Court, in the exercise of its discretion, under a power which it undoubtedly possessed, opened not only the judgment upon the scire facias, but the original judgment also, and the defendant was let into a full defence. The opening of a judgment, as we have said in a great many cases, is a matter for the exercise of the sound discretion of the Court; the Act of April 4, 1877, which provides for an appeal, has not changed the law in that respect. (Earley's Appeal, 9 Norris, 319.) Where an appeal is authorized, the only question which can arise for determination in this Court is, whether that discretion has been rightly exercised.

It is true the defendant's application extended to the judgment on the scire facias only, but we do not regard the action of the Court as being in excess of its powers on that account. In an application to open one judgment, the Court might not perhaps open another which is altogether distinct and independent from it, but the original judgment here was the basis upon which the revived judgment rested; it constituted the cause of action upon which the scire facias proceeded; the entire record of both was but the record of one cause. The opening or reversal of the revived judgment, it is true, would not disturb the original, but it was certainly within the equitable powers of the Court, in this form of proceeding, to extend the operation of the rule, so as to reach the whole case, and give the defendant such relief as by the testimony he was shown to be entitled to.

Moreover, the Act of April 4, 1877, which provides for an appeal, only extends to decisions of the Court in the opening of judgments "entered by virtue of a warrant of attorney, or on judgment notes," where the defendant has neither hearing nor notice; it does not extend to judgments revived by scire facias, as the reason for its enactment does not there exist. In Lamb's Appeal (8 Norris, 407) the application was by the defendant to open the original judgment, entered upon a judgment-note, and also a series of revivals thereof; it was there held that the Act was intended to apply only to judgments remaining unchanged by subsequent judicial proceedings, and when the defendant never had his day in Court. A judgment upon a scire facias duly served, whether taken for want of an appearance, plea, or affidavit of defence, or by confession in the ordinary form, is not a judgment entered upon a warrant of attorney. To secure the right of appeal the remedy must therefore be exercised before revival; for, as the present Chief Justice said in Lamb's Appeal (*supra*), "It would be a strange application of equitable principles to hold that no appeal would lie for a refusal to open the revived judgment, yet that it will to a refusal to open the original judgment, on which the later judgment rests."

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It is equally clear that if in such case the defendant can have no appeal in the event of a refusal to open, the plaintiff can have none when the decision is otherwise. It follows, therefore, that the appeal in this case is not authorized by law.

Appeal quashed.

Opinion by CLARK, J. A. B. W.

Oct. '83, 132. October 10, 1883.

Mercer County Mutual Fire Insurance Company v. Stranahan.

Corporations—Delegation of power to agents.

The above named insurance corporation has power under its charter to enact a by-law delegating to agents other than its board of directors, power to compromise and settle disputed claims by and against it.

Error to the Common Pleas of Mercer County.

Covenant, between the Mercer County Mutual Fire Insurance Company, plaintiff, and James A. Stranahan, defendant, to recover the amount of two assessments for losses and expenses, made by the plaintiff on policies of insurance issued to defendant.

On the trial, before MCDERMITT, P. J., the following facts appeared: The plaintiff company was incorporated to insure against loss by fire, and was authorized and required by its charter to assess all losses and expenses incurred in its business upon its members and policy-holders in proportion to the amount of insurance represented by the policies, and the policy-holders were required to pay these assessments annually or as often as the board of directors should levy them. The payment of these assessments was the consideration of the insurance of the policy-holders. The defendant was the holder and owner of two policies in the plaintiff company, viz., policy No. 86, dated Jan. 13, 1873, insuring defendant's property in the sum of $3086 for one year; policy No. 290, dated Jan. 16, 1874, insuring other property in the sum of $1280 for one year. After policy No. 86 had expired, and while No. 290 was in force, the insured property was destroyed by fire, and plaintiff after an adjustment of the loss paid to the defendant in settlement $800. The terms of that adjustment constituted the principal question of fact. Defendant contended that it was agreed at the time of the adjustment that a reduction of $480 should be made from the face of the policy in consideration of the release of defendant by plaintiff from all assessments for which he would otherwise be liable under the policies. Plaintiff denied this, and the evidence adduced by the respective parties was conflicting. Plaintiff's agents to make the adjustment were its president and two other of its directors.

Section 4 of the plaintiff's charter was as follows:—

"The affairs of this corporation shall be managed by a board of directors consisting of twelve members, to be elected and chosen in accordance with sections four and five of Act of 2d April, 1856, who shall have full power to appoint other officers, and employ such agents, clerks, and attorneys, as may be found necessary for the transaction of the business of said company; and shall determine the rates of insurance, the sum to be insured, and the sum to be deposited for any insurance; and to make, execute, and perfect such and so many bargains, policies, and other instruments, as shall or may be necessary, and as the nature of the case may require. A majority of said board shall constitute a quorum to do business."

Art. I. sec. 3, of the by-laws provided as follows:—

"SEC. III. The president . . . shall have full power to examine, adjust, and settle, in all cases of loss not exceeding one hundred dollars. In all cases exceeding this amount, he may call to his assistance one or more directors, as he may think necessary, and shall call special meetings of the board of directors when necessary, and shall have a general supervision over the affairs of the company."

The plaintiff company made no assessments during the terms defendant's policies were in force, nor until April 30, 1880, when under a writ of mandamus they made the assessments on which this suit was founded.

Plaintiff requested the Court to charge the jury, that neither the president of the plaintiff company, nor the committee appointed to adjust defendant's loss in 1874, had any authority to make an agreement that either of defendant's policies of insurance should not be assessed for losses and expenses the same as other policies belonging to the same class, and so far as any defence based upon such an agreement is concerned the plaintiff is entitled to recover.

This point the Court refused, and charged that the assessment made against policy No. 86, was barred by the Statute of Limitations, and submitted to the jury whether or not there had been such an agreement as was claimed by defendant, between the parties, instructing them that the agents who made the adjustment had power under the company's by-laws to make the agreement for the company.

Verdict and judgment for the defendant, whereupon plaintiff took this writ, assigning for error *inter alia*, the refusal of the foregoing point, the instruction as to the Statute of Limitations, and as to the power of plaintiff's agents to make the agreement.

Edwin W. Jackson, for plaintiff in error.

The Statute of Limitations did not begin to run until the assessment had been made. Between the issuing of the policy and the assessment defendant's liability was only conditional,

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and did not become absolute and actionable until the happening of the latter event.

Howland *v.* Cuykendall, 40 Barb. 320.
Insurance Co. *v.* Weed, 28 Conn. 51.
Bigelow *v.* Libby, 117 Mass. 359.

After the policies expired though defendant ceased to be a member of the plaintiff company, he was liable for losses during the time of his membership.

Akers *v.* Hite, 13 Norris, 394.
Insurance Co. *v.* Hartshorne, 3 Norris, 453.
Rosenberger *v.* Insurance Co., 6 Norris, 207.

The president and one director had no power to make the ageeement set up by the defendant. The power given by the by-laws comprehends only the adjustment and settlement of the policy-holder's claim.

Bangs *v.* Scidmore, 24 Barb. 29; S. C., 21 N. Y. 136.

Stranahan and *Mehard*, for defendant in error, cited upon the question of the running of the statute—

Pittsburgh and Connellsville R. R. *v.* Byers, 8 Casey, 22.
Pittsburgh and Connellsville R. R. *v.* Graham, 12 Casey, 77.
McCully *v.* The Railroad Co., 8 Casey, 25.

And on the power to make the agreement—

Akers *v.* Hite, 13 Norris, 394.

January 7, 1884. THE COURT. This action is brought to recover assessments upon two policies of insurance of the Mercer County Mutual Fire Insurance Company, one of the said policies, No. 86, issued January 13, 1873, covered an insurance to James A. Stranahan, upon certain property therein described, for one year from that date, to the amount of $3086. The other, No. 290, issued January 16, 1874, after the expiration of No. 86, covered an insurance to Stranahan & Hoagland, upon a portion of the same property, for one year from the latter date, to the amount of $1280.

The company operated under a charter of incorporation, the sixth section of which provides as follows: "Every member of said company shall be bound to pay for all losses or damages, and all necessary expenses accruing in said company, in proportion to the amount he or she may have insured, in the different classes, annually or as often as the directors may make assessments." No premium notes were taken, the assessments being made directly against the policy-holders, under this clause of the charter, which was incorporated into each policy, and formed part of the contract.

The affairs of the company were conducted by a board of twelve directors, no assessments were at any time made, until the 13th April, 1880, when, in obedience to a writ of mandamus awarded by the Court of Common Pleas of Mercer County, the board assessed the policy holders for a sum sufficient to pay the indebtedness of the company. In this general assessment policies Nos. 86 and 290 were embraced, the former to the amount of $246.88, and the latter of $48.00.

On or about the 17th of March, 1874, after policy No. 86 had expired, and while No. 290 was in force, the property insured was wholly or partially destroyed by fire. The company was duly notified of the loss, and on the 13th July, 1874, Seth Hoagland, president of the company, J. P. Kerr, and another composed a committee on behalf of the company to adjust the same.

The third section of the first article of the by-laws of the company provides that the president "shall have full power to examine, adjust, and settle in all cases of loss, not exceeding one hundred dollars," and in "all cases exceeding this amount, he may call to his assistance one or more directors, as he may think necessary, and shall call special meetings of the board of directors when necessary, and shall have general supervision over the affairs of the company." Mr. Stranahan's loss was adjusted under this provision of the by-laws by Mr. Seth Hoagland, president, and Mr. J. P. Kerr, directors of the company, at $800, an abatement of $480 having been agreed upon. The defendant alleges that in this adjustment, and by the agreement upon which it was effected, he was released from all future assessments which might otherwise have been made on his policies Nos. 86 and 290, to cover losses incurred during the period of their continuance, and that the policies were cancelled and surrendered to the company, the release being embodied in a writing thereon indorsed.

We have no doubt, whatever, that an adjustment upon such terms was within the power of the company, and if so, that authority, under the fourth section of the charter, might be delegated, as it was in this case, to an adjusting committee of the board. The president had "general supervision over the affairs of the company," and alone or with the concurrence of any member of the board had full power to examine, adjust, and settle in all cases of loss. This adjusting committee had as much power to effect settlement of losses incurred as the board, and that power was derived from the same source, the action of the committee was not subject to the approval of the board of directors, the committee had "full power."

By the ninth section of the company's charter it is provided that "any member can withdraw from this company at any time by paying his or her proportion of the losses up to date of withdrawal, and surrendering his or her policy." This surrender and settlement, it is alleged, was made and the policies properly cancelled and delivered to the president of the company. If this be true, and the jury have so found, the

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insurance relation was thereby broken, and no further liability remained as against either of the contracting parties. The proportion which the losses incurred bore to the whole amount insured at the time of the loss, gave the ratio of the defendant's liability to the loss. And thus a reasonably approximate estimate could at any time be made.

Whether or not there was in fact an agreement to release the defendant's policies from future assessments, was the specific question for the jury. The release, if given at all, covered both policies, and this defence was to the whole of the plaintiff's claim. Mr. Stranahan's testimony upon this question was positive. He testified as to an existing fact of which he claimed to have actual knowledge. Mr. Hoagland, in rebuttal, testified as positively that no such fact existed, and although he testified in negative form his assertion is positive in effect, that is to say, he testifies positively that no such transaction occurred with him.

There is, however, a difference between the character of the testimony delivered by Hoagland, and that of J. P. Kerr on the precise question before the jury. The Court used language a little strong perhaps in saying that the testimony of Mr. Kerr "amounted to nothing in the shape of contradicting Mr. Stranahan." If this was spoken of the entire testimony of both of these witnesses, we think, however, this language is subject to a qualification, which is contained in the charge as a whole. The vital question for the jury, as has been stated, was whether or not there was an agreement to release the policies from future assessments. Even if there was, in fact, a difficulty in the adjustment, such as Mr. Kerr referred to, arising out of Clingan's alleged purchase that was not at all inconsistent with the agreement; for the adjustment and abatement made might have been in consideration of either, or both of these together.

The distinction between positive and negative testimony was carefully stated, and the jury was fully instructed as to the nature and effect of each; it was certainly manifest to the jury that the reference of the Court in the expression quoted was alone to the negative portion of Kerr's testimony, and to this only was it applied.

We are not inclined, therefore, to reverse the judgment upon this ground, as we are clearly of opinion there is no room for the assertion that the charge as a whole was misleading.

As the defence, embraced in this submission to the jury, was to the whole of the plaintiff's claim, the finding of the jury being for the defendant, it is unnecessary for us to consider the question arising under the Statute of Limitations.

Judgment affirmed.

Opinion by CLARK, J. W. S. P.

Common Pleas—Law.

C. P. No. 4. Jan. 5, 1884.

Brown v. Brightly.

Landlord and tenant—Notice to quit—A tenant from year to year is not bound to give notice of his intention to quit at the end of the current year—The law reviewed and cases explained.

Rule for judgment for want of a sufficient affidavit of defence.

Covenant, on a lease under seal by I. Newton Brown to F. F. Brightly, of the second floor of a building to be used as law offices, for the term of one year from November 1, 1879, at a certain monthly rent. The lease provided "that if the said lessee should continue on the premises after the termination of the above contract, then the same is to continue in force for another year, and so on from year to year, unless either party shall give legal notice in writing to the other party of his intention to terminate said letting."

The action was for rent accrued from November 1, 1882, to October 31, 1883.

The affidavit of defence set forth that, after the expiration of the term, no notice to quit having been given, the defendant held over as tenant from year to year; and, as such, occupied the premises for two years longer than the original contract, to wit, until October 31, 1882, when he terminated his tenancy and delivered up possession; that he did not occupy the premises during the period for which rent is claimed, but delivered up actual possession, as he had a right to do without previous notice. The affidavit further alleged a violation of various covenants of the lease regarding heating, gas, etc., his complaints, and his saying to the plaintiff that he would not remain unless their cause were removed. Also that the plaintiff acquiesced in the defendant's removal, and made no objection until after it had been accomplished.

I. Newton Brown, P. P., for the rule.

The defendant does not allege that he gave the plaintiff legal notice in writing before the end of the current year, as he was bound to do by an express covenant of the lease. Inferences or conclusions of law do not constitute a defence where the facts are not sworn to.

1 Troubat & Haly, 377.

Under the conditions of the lease, the defendant having held over, was bound under the lease to give three months' notice of his intention to quit the premises at the end of the then current year.

Brown *v.* Vanhorn, 1 Bin. 334
Logan *v.* Herron, 8 S. & R. 459.

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Amos Briggs, for the defendant.

The words "unless either party shall give legal notice in writing to the other party of his intention to terminate said letting," can apply in fact to the landlord only. He is bound under the law to give three months' notice; and, under the law, the tenant is not bound to give any notice, for at the end of the term he can be treated as a trespasser.

Hemphill *v.* Flynn, 2 Barr, 144.
Cook *v.* Neilson, 10 Id. 41.

C. A. V.

January 19, 1884. THE COURT. The judgment of the Supreme Court, in Cook *v.* Neilson (10 B. 41), that a tenant from quarter to quarter, who has held over, is not bound to give notice of his intention to quit at the expiration of the current quarter, although made by an equally divided Court, and without reasons assigned, has been acquiesced in and followed by the profession and community, without direct question, ever since it was made, in the year 1848. The case arose in the District Court, and and was decided there by a majority of that Court, in favor of the tenant, Judge SHARSWOOD, then the president of the Court, dissenting in an opinion reported in Brightly's Reports, 463, which was the only opinion filed in the case at any stage of it. Judge SHARSWOOD said that it was supposed that there was a custom contrary to his view in Pennsylvania, but he could not find that it was so clear and unequivocal as to make it a part of the common law of the State; but that judgment relieves us from all uncertainty as to the law and the origin of it.

In Goldsmith *v.* Smith (4 Phila. 33), the judgment in Cook *v.* Neilson received a passing notice by the District Court; and in Wilgus *v.* Whitehead (8 N. 131), the effect of it was left without consideration; while in Milling *v.* Becker (15 N. 182), and Hollis *v.* Burns (4 Out. 206), the principle was applied to leases by the month.

The reason which exempts a tenant by the quarter or month, from the obligation to give notice of his intention to quit, seems to be stronger in the case of a lease for a year, than it is in a lease for a quarter or month.

The case of Logan *v.* Herron (8 S. & R. 459), is sometimes cited as ruling that notice by the tenant is required, but a careful examination of that case will show that it does not sustain the point for which it is cited. Mr. Justice GIBSON, in his opinion, said: "In fact, the rule must be reciprocal; and if the landlord is bound for the succeeding year, so must the tenant be, where neither has given notice." But he was showing that the tenant is not bound to give notice, and thereby proving that notice by the landlord is not necessary, where a lease is for a definite period, as had been previously decided in Bedford *v.* McElherron (2 S. & R. *49), and has been subsequently followed in McGregor *v.* Rawle (7 Sm. 184). It may now be considered as finally settled by these cases, that when a lease is made for a determinate period, the landlord may maintain an action of ejectment for the property, immediately after the end of the term, without giving any previous notice to quit, and the tenant may, in like manner, depart without notice. Lesley *v.* Randolph (4 R. 123), is also cited as ruling that notice is required from the tenant, but in that case, the tenants had entered upon a second year, and removed at the end of the first quarter of it, and they were sued for rent subsequently accruing during that year. Mr. Justice KENNEDY held that the lease was from year to year, and that the tenants, having continued to hold the property until after the second year had commenced, without offering to surrender the possession to the landlord, were entitled to hold for the remainder of that year, and therefore they were liable for the rent. Now, a surrender is a yielding up of an estate, not a notice of an intention to give it up, so that this part of the opinion does not support the principle contended for by the plaintiff in the present suit. That part of the opinion which declares that a lease from year to year is binding on both parties, unless determined by the dissent of either, at the close of any year, by giving three months previous notice to that effect, was not given in response to the real question in the case; it was perhaps considered too broadly stated, as it was not regarded as binding authority in Cook *v.* Neilson.

If the tenant hold over after the expiration of his term, the landlord may re-enter and dispossess him, using no more force than is necessary (Overdeer *v.* Lewis, 1 W. & S. 90; Rich *v.* Keyser, 4 Sm. 86; Adams *v.* Adams, 7 Phila, 160); or, he may immediately sue for the possession, in an action of ejectment, without giving three months notice to quit (Evans *v.* Hastings, 9 B. 273; McCanna *v.* Johnston, 7 H. 434; MacGregor *v.* Rawle, *supra*); or he may give the tenant notice to remove, and three months thereafter proceed against him in a summary manner under the Act of March 21st, 1772 (Logan *v.* Herron, *supra*); or in an action of ejectment (Bedford *v.* McElherron, *supra*); or treat him as a tenant for another year, and compel him to pay rent for the property (Hemphill *v.* Flynn, 2 Barr. 144.)

The three months' notice which has caused so much controversy, is required from the landlord only. To enable him to recover the possession under the Act of 1772, it must be given, not three months before the expiration of a lease which is determinate at a certain time, but it must be given three months before the application to the justices for the summary proceedings

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under that Act; and by the decision of the Supreme Court, it must be given three months before the expiration of any subsequent year during which the tenant holds over (Logan *v.* Herron, *supra*). The Act of December 14, 1863, requires the lessor to give notice of his desire to repossess the property, three months previous to the expiration of the term, in order to obtain the benefit of that Act (Rich *v.* Keyser, *supra*). But no Act of Assembly or judgment of any Court in this State, requires the tenant to give notice of his intention to quit at the expiration of any year.

Rule discharged.

Opinion by ARNOLD, J. W. H. W.

C. P. No. 4. June 7, 1884.

Harmony Building Association v. Berger.

Practice—Execution—Fieri facias—Sci. fa. to revive judgment—A fi. fa. issued on a judgment more than five years old, without a judgment of revival, is irregular and will be set aside.

Sur rule to set aside fi. fa.

The docket entries in this case showed that on January 21, 1879, judgment was entered on a bond and warrant of attorney dated December 29, 1873, for $20,000 conditioned for the payment of $10,000 in one year with interest, etc.

April 27, 1884. Damages assessed at $7964.41.

May 28, 1884. Sci. fa. to revive *exit*, returnable first Monday of June, 1884.

May 29, 1884. Fi. fa. *exit*, returnable first Monday of June, 1884.

June 4, 1884. Rule to set aside fi. fa.

Albert T. Goldbeck, for the rule.

The plaintiff has not been entitled to issue execution since January 21, 1884, without first warning the defendant by sci. fa. to revive, so that he may have a day in court.

Act of June 16, 1836, §§ 1 and 2.
Act of April 16, 1845, § 4.
Comly *v.* Rissel, 1 Phila. 402.
Bannan *v.* Rathbone, 3 Grant, 259.
Gemmill *v.* Butler, 4 Barr, 232.
Marx *v.* Goldsmith, 14 WEEKLY NOTES, 173.

A. L. Hennershotz, for the plaintiff.

The defendant has been warned by scire facias to show cause why an execution should not issue upon the judgment, as required by the Act of June 16, 1836, § 2.

THE COURT. Judgment has not been entered on the scire facias. The defendant is entitled to make a defence, if he has any, at the time fixed by law. The warning would be of no benefit to him, if his property is subject to execution before he has an opportunity to put in his defence to the sci. fa. You can have no fi. fa. until you get judgment on the sci. fa.

Rule absolute. W. H. W.

Orphans' Court.

May 20, 1884.

Lewis's Estate.

Arrears of ground-rent—Orphans' Court sale for payment of debts—What estate passes and what liens are preserved—A purchaser at an Orphans' Court sale of land subject to a mortgage and also to a prior ground-rent, takes subject to the arrears of ground-rent due at the time of decedent's death, although he was the covenantor.

Sur petition and answer.

Upon the application of the administrator of the estate of John D. Lewis, deceased, the Court made an order of sale for the payment of debts. Whereupon Charles Streeper presented his petition alleging that the estate is hopelessly insolvent, and that there is not enough personal property to pay the widow's exemption; that the only real estate is a certain property of which he is ground-rent landlord, and that he holds the first mortgage, which will not be discharged by the sale; that there are other mortgages and judgments; that he is the plaintiff in an action pending in the Court of Common Pleas to recover over $1000 arrears of ground-rent, wherein he is about to recover judgment; that the uncertainty in the law whether or not the purchaser at an Orphans' Court sale would take subject to the arrears, the decedent being the covenantor, places the large interests of the petitioner in great jeopardy; and that the widow, on behalf of whose exemption the sale is really sought, has ample remedy without sacrificing the petitioner's rights.

To a rule to show cause why the order of sale should not be vacated, the administrator filed an answer setting forth that he is advised that the arrears of ground-rent will be discharged by the Orphans' Court sale, that the lien of the second mortgage will be satisfied before the sale, and submitting himself to the Court.

Wm. Herbert Washington, for the petitioner.

We all regard an Orphans' Court sale as more advantageous to the creditors, if the Court will remove our doubts regarding the arrears.

[PENROSE, J. But how have we jurisdiction now?]

The petition and answer give jurisdiction, although a decree will be a precedent and not *res adjudicata* as to a purchaser. The ordering of a sale is a matter of judicial discretion. If the Court will decide one way or the other, the petition should be dismissed and the sale proceed.

[HANNA, P. J. Upon the question as to whether the law is so uncertain as to involve unnecessary sacrifice by the sale, the petition and answer give us jurisdiction.]

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The ground-rent, on which there are several years' arrears due, was created in 1871, and a mortgage, which will be preserved by the Act of 1867, was given in 1873. When a purchaser at a sale takes subject to a fixed lien, he also necessarily takes subject to all prior liens.

Helfrish *v.* Weaver, 11 Sm. 385.
Wertz's Appeal, 15 Id. 306.

Now the priority of the lien for arrears is determinable by the date of the precedent deed, without regard to the time when they accrued.

Devine's Appeal, 6 C. 348.
Field *v.* Oberteuffer, 2 Phila. 271.

In Devine's Appeal the principle contended for was applied to a sheriff's sale. The Act of 23d March, 1867, § 3 (P. L. 44; 1 Purd. Dig. 479, § 111), assimilates the law as to the two processes. So it was held in Terry's Estate (36 Leg. Int. 461). And it is immaterial that the decedent was the covenantor. Quain's Appeal (10 H. 510), permitting arrears arising in the lifetime of the decedent to come upon his personal estate, does not authorize the inference that they *must*. So a bond accompanying a mortgage may come upon the personalty, but if it do not, it simply loses that mode of satisfaction. The bond remains good, and the lien of the mortgage unaffected. Therefore the arrears are not discharged.

N. Dubois Miller (with whom was *John Sparhawk, Jr.*), contra.

The Act of 1834, February 24 (Purd. Dig. 427, pl. 110), provides that under an Orphans' Court sale "such real estate so sold shall not be liable in the hands of the purchaser for the debts of the decedent." This was held to discharge a mortgage even though given by a former owner (Cadmus *v.* Jackson, 2 Smith, 295), and WOODWARD, C. J., said (p. 303): "Whatever doubts may formerly have existed on the subject, none exists now in Pennsylvania that an Orphans' Court sale of a decedent's real estate is a judicial sale, and divests the lien of mortgages as well as of all other debts that are capable of ascertainment in moneys numbered," etc. etc.

The arrears of a ground-rent created by the decedent himself are certainly a *debt* for which his estate is liable in an action of covenant, or they can be collected by distress, and they can be ascertained in "moneys numbered."

See, also, Quain's Appeal, 10 H. 510.

The Act of 1867 (Purd. Dig. 479), only preserves the lien of mortgages. How can it be used to affect a debt not mentioned in it?

The sale for the payment of the debts of the decedent will only be of the interest in his lands in excess of the ground-rent and mortgages, the liens of which are continued and preserved by the Act of 23d of March, 1867 (P. L. 44). That the ground-rent was created by him, and that the arrears falling due in his lifetime are a debt for which he was personally liable—a liability, it may be observed, which would alike have arisen from mere privity of estate if he had not been the original covenantor—is immaterial; the Act preserves the lien of a mortgage, irrespective of the fact that the debt secured may have been that of the decedent himself (Penn Building Association's Appeal, 32 Sm. 330; Grice *v.* Kinsey, 34 Leg. Int. 282), and, equally irrespective of the question of personal liability, it necessarily follows that arrears due on a prior ground-rent are not discharged by the sale. The mortgage cannot be preserved without the preservation of all that precedes it.

The law was different under the Act of 24th of February, 1834, section 20, under which the case of Cadmus *v.* Jackson (2 Sm. 295), was decided. That Act, which provided that the purchaser of lands under an Orphans' Court sale should hold discharged from all liability for the debts of the decedent, was repealed so far as its provisions were inconsistent with those of the later Act; and what was said in Devine's Appeal (6 C. 350) is now entirely applicable to Orphans' Court sales: "The sale passes to the purchaser only that interest which remained in the debtor after a fixed lien had attached. . . . The proceeds of sale are substituted not for the whole estate in the land, but for the interest which the purchaser obtains, and for which, alone, he pays the purchase-money. The fixed lien remaining upon the lands sold, all antecedent liens must necessarily remain. Were it not so, instead of being paramount to that which continues undisturbed, they would become subordinate to it; and, if the fixed liens were equal to the entire value of the property, the prior liens would be worthless." It was accordingly held in that case that a purchaser at a sheriff's sale of land subject to a mortgage, and also to a prior ground-rent, took subject to the arrears of ground-rent due at the time of the sale. (See, also, Wertz's Appeal, 15 Sm. 306; Dickinson *v.* Beyer, 6 N. 274; Hacker *v.* Cozzens, 11 N. 461.)

We have already decided the point in Terry's

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March 19, 1884.

Bonaffon's Estate.

Distribution—Devise, after a life estate of the income, to the "children of B., born and to be born, in equal shares and proportions, until the youngest of such children shall have attained the age of 21 years," when a division of the principal was to be made among the children then living, and the issue of those who should be deceased—Held, that the date of the majority of the youngest child fixed the period of distribution.

Sur exceptions to adjudication.

At the audit of the account of the trustees under the will of Sylvester Bonaffon, deceased, the following facts appeared:—

By his will said decedent devised one-fourth of his residuary estate to the Girard Life and Trust Company, in trust, to pay the net income thereof to his mother during her life, and at her decease to pay the same to the children of his brother Albert, "born and to be born, until the youngest of such children shall have attained the full age of twenty-one years." . . . Then to convert the said trust estate "into money," and divide it equally among the said children, or their representatives. He made a proviso, that if any of these children should die in minority without issue, that such deceased child's or children's share should be divided among the survivors. The will was executed March 8, 1865, the testator died December 5, 1876, and his mother died in March, 1877. When testator died there were five children of his brother Albert living. The youngest, Eugenia Bonaffon, came of age February 22, 1882. Albert L. Bonaffon, the father of these children, is sixty-six years of age, and his wife, whom he married twelve years ago, is about fifty. By her he has had no issue. Adeline F. Bonaffon, one of his children, died in October, 1883, after her youngest sister had come of age, intestate, and without issue, leaving her father as her next of kin.

The Auditing Judge (PENROSE, J.) held as follows: The question now presented is, has the time appointed by the testator for the vesting and distribution of the trust estate yet arrived, or must the estate, in order to provide for the contingency of the birth of other children, and their participation in the income until the youngest shall attain the age of twenty-one, continue to be held by the trustee, or at least during the life of Albert L. Bonaffon?

The language of the testator is: "In trust, to pay the said net income . . . to the children of my brother, Albert L. Bonaffon, born and to be born, in equal shares and proportions, until the youngest of such children shall have attained the full age of twenty-one years. And when the youngest of such children of my said brother shall have attained full age as aforesaid, then to make distribution of the principal among such children," etc.

By the expressions, "born and to be born," he may have intended to provide for the birth of children after the date of his will, in his own lifetime; or the birth of such children in the lifetime of his mother, to whom a precedent estate was given; or he may have intended a birth at any time during the lifetime of his brother Albert. In the latter case, no matter how great the improbabilites of the birth of other children may be, the estate must remain undivided so long as Albert lives, even though, in point of fact, he should have no other children, and the estate may therefore have become vested by reason of the majority of his youngest child long before his death; it cannot now be determined whether Adeline F. Bonaffon had a vested interest at the time of her death or not, and the final settlement of her estate also would have to be deferred until the death of her father, who, if the interest be vested, is entitled to it under the intestate laws. These inconveniences, of course, would be of no consequence if the testator's meaning is clear and unequivocal; but it is to be presumed that he contemplated all the consequences of the provision which he made; and a construction which will satisfy the language used, without leading to absurd or inconvenient results, is to be preferred.

If the words, "to be born," are to be understood as referring to the birth of children at any time during the life of the brother, it might be very difficult to give effect to the direction that the income shall be paid "*in equal shares* and proportions, until the youngest of such children shall have attained the full age of twenty-one years." How could it be known what an "equal share" was until the number between whom the division was to be made could be ascertained? Hence the distribution of income, as well as principal, would have to be suspended during the lifetime of Albert L. Bonaffon.

It is impossible, in the absence of express words, to suppose that the testator intended this. On the contrary, he has said that the distribution of income shall begin at the death of his mother, the tenant for life.

Thus he has defined the persons who are to receive the principal, they are to be the same persons who at the death of the mother are to have an equal share of the income, for it is when the youngest of "such" children attains the age of twenty-one that this distribution of the principal is to take place.

In Gilbert *v.* Boorman (11 Ves. 238), where a residue was bequeathed to A., and all the other children hereafter to be born of B., at their respective ages of twenty-one, it was held that those

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born after one attains that age were excluded; the Master of the Rolls, Sir WILLIAM GRANT, observing, "that children born afterwards are excluded of *necessity*, when a partial distribution *is to take place*, though, if that circumstance did not prevent it, all would be entitled." In other words, where shares (and this must apply as well as to shares of income as of principal) are to be *ascertained at a given time*, persons not in being at the time are not to be considered. (See, also, note 3 to Hill *v.* Chapman, 1 Ves. 405.)

The Auditing Judge is convinced that the words of the will are to be understood as limiting the birth of children after the date of its execution to the lifetime of Mrs. Bonaffon. Thus construed, a meaning is given to all the provisions of the instrument, and no uncertainty can arise as to the time at which the interests become vested.

In Theobald on Wills (ed. of 1876, p. 148), the result of the authorities as to the meaning to be given to the words "born and to be born," in cases of this sort, is thus stated: Where the words are "born or to be born" the rules appear to be, (1) When the gift is *after a life estate* such words will not extend the class (Sprackling *v.* Ranier, 1 Dick. 344; Whitbread *v.* St. John, 10 Ves. 152; Parsons *v.* Justice, 34 B. 598); though of course the case is different if the gift is to children "now born or who shall be born *in the lifetime of the tenants for life.*" (Scott *v.* Lord Scarborough, 1 B. 154.)

(2) The rule is the same where the gift is to children now born or who shall hereafter be born and attain the age of twenty-one. (Iredell *v.* Iredell, 25 B. 435; 6 Eq. 215.)

(3) But in the case of a direct gift to children "now born or to be born hereafter" it would seem all children would be included, at any rate, this is the case with realty. (Mogg *v.* Mogg 1 Mer. 654; Eddowes *v.* Eddowes, 30 B. 603.) And there seems no reason why the same rule should not apply to personalty.

(4) If, however, the gift is of a lump sum to each of the children begotten or to be begotten the class will not be extended beyond the testator's death, as not merely the distribution of what the children are to take, but of the whole estate of the testator, would be indefinitely postponed. (Butler *v.* Lowe, 10 Simons, 317. See, also, Williams on Executors, Perkins ed., 1877, 1172, etc., and notes; Hawkins on Wills, 70, 71.)

In Butler *v.* Lowe (*supra*), it was held, where a lump sum was given to children begotten and to be begotten, that the class would not be only of the distribution of the principal, but also of the income.

It follows as the youngest of the children of Albert L. Bonaffon, now in being, became of age on the 22d of February, 1882, that the interest became vested on that day in such as were living, and as the death of Adeline F. Bonaffon did not occur until after that time, her share must be awarded to her representatives.

The question as to when the estate vested in right of possession is one of some difficulty, and while the views of Mr. Uhle on this subject have been adopted by the Auditing Judge, the accountant is not to be blamed, or made to suffer because a different opinion was entertained by counsel, under whose advice they acted, and whose duty it will be to have the question passed upon by the Court in Banc, and perhaps by the Supreme Court."

To this adjudication exceptions were filed by the trustees.

J. J. Ridgway, Jr., for the exceptants.

J. B. Uhle (with whom was *Guillou*), contra.

March 22, 1884. THE COURT. In a gift to children as a class, the law aims to postpone as far as possible the period of distribution, in order to bring within the scope of the testator's bounty the largest number of beneficiaries. But the rule has been broken, upon the ground of convenience, where a literal adherence to it would sacrifice the interests of living children to secure the possible rights of children who may yet be born. Hence Lord MANSFIELD declared in Baldwin *v.* Karver (Cow. 309) that the point to be determined in gifts of this character, however general in their terms, is, when does the legacy vest. The vesting, whether it be at the death of the testator or of the first taker, or upon the happening of a contingency more or less remote or uncertain, fixes the line between the parties who shall take and those who shall be excluded. In Ellison *v.* Airey (1 Ves. 111) the remainder, if the legatee died before twenty-one or marriage, was to the younger children of the nephew, the eldest son being excluded. The legatee having died unmarried before twenty-one, it was argued that all the children of the nephew were meant, because who would be the eldest child could not be known until the nephew's death; but Lord HARDWICKE decided that the legacy vested at the death of the first taker, and that it was divisible when it vested. Lord THURLOW, in Andrews *v.* Partington (3 Br. Ch. C. 404), assented reluctantly to the rule, but admitted its binding effect.

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THURLOW's objection that the inconvenience of delaying a division until the possibility of the birth of other children should be extinct, would be no greater under a devise than under a marriage settlement, it was answered that in the latter case, no children were in existence at the marriage, and the benefit must, therefore, be intended for all (Baldwin *v.* Karver, *supra*). Mr. Eden, in his note to Andrews *v.* Partington (*supra*), arranges the cases in three classes. (1) Where there is simply a general devise to children or other persons as a class, in which case it comprehends all persons answering that description at the time of the testator's death. (2) Where there is a previous life estate, in which case all the persons answering the description at the extinction of that life are included. (3) Where the bequest is to children generally, payable at a certain period, as at twenty-one or marriage, in which case all children are let in who come into esse before the first child attains the period appointed. Under the second head he cites the case of Walker *v.* Shore (15 Ves. 122), in which, after a bequest to A. for life, the principal was to be divided equally among the children of B. and C., and in which the death of the life tenant was held to fix the period at which the children who were to take must be ascertained. Under the last head may be placed the case of Hubbard *v.* Lloyd (6 Cush. Mass. 522), where the bequest of the residue was to "all the children of B. equally when they shall severally attain the age of twenty-five years." It was held to include the children who were born before one reached that age, though born after the testator's death, and to exclude all who were born after a child had become twenty-five. These and the authorities which were cited by the Auditing Judge make it clear that in the present bequest only the children who were born before the death of the life tenant are entitled to share in the residue. The testator gave one-fourth of his residuary estate in trust for his mother for life, and at her death the income "to the children of my (his) brother, Albert L. Bonaffon, born and to be born, in equal shares and proportions, until the youngest of such children shall have attained the full age of twenty-one years," at which time he directed the division of the principal among the children then living and the issue of those who should be deceased. The youngest child now living is of full age. The Auditing Judge properly decided that the date of her majority fixed the period of distribution.

The exceptions are dismissed and the adjudication is confirmed.

Opinion by ASHMAN, J. W. D. N.

U. S. Circuit Court—Law.

Peoria Sugar Refinery v. The Susquehanna Mutual Fire Ins. Co.

Law of insurance—Payment of premiums—Clause of limitation—Agency—General custom—Parol evidence—Written agreement.

Waiver of an express provision in a policy of fire insurance cannot be proved by parol testimony, showing that the general custom among insurance companies and brokers is otherwise than as stated in the provision, when there is another clause in the policy providing that there shall be no waiver except by the authority of the company expressed in writing.

But such a waiver can be proved by parol testimony, showing the course of business of the company which issued the policy in its dealings with the broker who procured the policy.

A policy of insurance on the plaintiff's factory provided that the company should not be liable, "until the cash premiums be actually paid to the company, or an agent of the company;" that any broker, or other person than the assured, who had procured the policy should be "deemed the agent of the assured and not of the company;" that no person should be considered the agent of the company unless he held the commission of the company; that there should be no waiver by the company of any term in the policy, except by express authority in writing. The insured owning a large factory, placed their insurance in the hands of H. & Co., insurance brokers in New York; H. & Co. applied to B. & Co., insurance brokers in Jersey City, who obtained the policy and delivered it to H. & Co. B. & Co. had previously placed a few risks with the defendant, but was not in fact their agent. H. & Co. sent the premium to B. & Co., who kept it for several days and until the property insured was burnt, when they sent it to the defendant, who refused to accept it:

Held, that B & Co. were not the agents of the company to receive payment of this premium for the company, and that the plaintiff could not recover.

Sur motion to take off compulsory nonsuit.

Assumpsit, on a policy of insurance for $1500, dated August 25, 1881. At the trial before BUTLER, D. J., Nov. 13, 1883, the plaintiffs offered in evidence the policy, proved the total destruction of the property insured on October 27, 1881, and their compliance with all the requirements of the policy as to furnishing proofs of loss, etc. The policy contained the following clauses:—

1. This company shall not be liable by virtue of this policy, or any renewal thereof, until the cash premium be actually paid to the company, or to an agent of the company.

2. If any broker, or other person than the assured have procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance.

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3. Only such person as shall hold the commission of this company, shall be considered as its agents in any transaction relating to the insurance, or any renewal thereof, or the payment of premium to the company. Any other person shall be deemed to be the agent of the assured and payment of the premium to such person shall be at the sole risk of the assured. . . . .

6. The use of general terms, nor anything less than a distinct agreement, clearly expressed and indorsed by this company on this policy, shall be construed to be a waiver of any printed or written term, condition or restriction thereof, nor can any such printed or written term, condition, or restriction, be waived by any agent of this company, either before or after a loss, without special authority in writing from the company.

It appeared from the testimony that the insurance was negotiated by Hamlin & Co., of New York, through W. W. Buckley & Co., insurance brokers of Jersey City. The policy was received by Buckley & Co., from the home office of the defendant company, in the early part of September, 1881, and immediately sent to Hamlin & Co., who forwarded it at once to the plaintiff.

The premium was received by Hamlin & Co., on October 1st or 2d, 1881, from the plaintiff, and sent to Buckley & Co. on October 21, 1881, who sent a check for it to the defendant on October 29, 1881. Meantime, on October 27, 1881, the property insured had been totally destroyed by fire. The defendant thereupon refused to accept the premium, and returned the check to Buckley & Co.

At the trial, after proving the facts as stated, the plaintiff offered to show by a member of the firm of Buckley & Co., the course of business between the witness's firm and the defendant, with a view of proving authority on the part of the witness's firm to accept payment of the premium of the defendant. This offer was admitted and the witness testified in substance, that before this transaction took place his firm had obtained many policies from the Susquehanna Fire Insurance Company. They sent the applications and the company returned the policies to them; and they had a common form of policy. He collected the premiums and forwarded them to the company, sometimes a day, and sometimes a week or more after receiving them. The company never objected to their delivering policies without receiving premiums, and they never wrote to dun him for not sending delayed premiums.

Plaintiffs then offered to show by the witness as an expert in the insurance business, that it is the custom in that business, when carried on through brokers, to issue policies without requiring prepayment of the premium and allowing the broker to remit in payment at stated or convenient intervals.

Upon objection the Court refused the offer. The plaintiff then closed and the defendant moved for a nonsuit, which was granted with leave to move to take it off.

Walter George Smith and *Francis Rawle*, for the motion.

Where the policy is delivered without requiring payment of the premium, the presumption is that a credit is intended; and the rule is well settled where a credit is intended that a policy is valid, though the premium was not paid at the time the policy was delivered.

Miller *v.* The Insurance Co., 12 Wall. 303.
Behler *v.* The Ins. Co., 68 Ins. 347.
Boehen *v.* The Ins. Co., 35 N. Y. 134
Eagan *v.* The Ins. Co., 10 W. Va. 583.

A waiver of the payment of premium may be inferred from any circumstances fairly showing that the insurers did not intend to insist upon the pre-payment of the premium as a condition precedent.

Equitable Ins. Co. *v.* McCrea, 8 Lea, 541.
Heaton *v.* Manhattan Ins. Co., 7 R. I. 502.
Hanley *v.* Life Ass., 4 Mo. App. 253.
Goit *v.* N. P. Ins. Co., 25 Barb. 189.
Bodine *v.* Ins. Co., 51 N. Y. 117.
May on Ins., Sec. 340.

A condition may be waived by parol although there is a clause in the policy saying that no condition can be waived except in writing.

Coursin *v.* Ins. Co., 43 N. J. L. 300.
S. C., 39 Am. Rep. 584.
Insurance Co. *v.* Norton, 6 Otto, 234.
Thompson *v.* Ins. Co., 14 Otto, 252.
Phœnix Ins. Co. *v.* Doster, 16 Otto, 35.

There was sufficient evidence of waiver to give the case to the jury.

Coursin *v.* Penna. Ins. Co., 46 Pa. St. 323.
Patterson *v.* Ins. Co., 22 Pgh. Leg. Jour. 201.

The learned Judge should have admitted plaintiff's offer to show that it was a general custom among insurance companies and brokers to issue policies without requiring payment of premium even when there is a clause of limitation similar to the one in this case.

Helme *v.* The Phila. Life Ins. Co., 61 Pa. St. 107.
Girard *v.* Mut. Life Ins. Co., 86 Pa. St. 236.
Baxter *v.* Massassoit Ins. Co., 13 Allen, 320.
Pino *v.* Merchant Ins Co., 19 La. Ann. 214.
Union Cent. Insurance Co. *v.* Pottker, 33 Ohio, 459.

Fleming and *McCarrell*, contra.

This case is settled by—

Pottsville M. I. Co. *v.* Min. Sp. Ins. Co., 100 Pa. St. 137.

THE COURT (MCKENNAN and BUTLER, JJ., sitting). The motion is refused. S. G. F.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JULY 17, 1884.* [No. 32.

Supreme Court.

Jan. '83, 412. April 24, 1883.

Lewis et al. Receivers of The Philadelphia and Reading Railroad Co. v. Hollahan.

Damages — Negligence — Railroad company — Constitutional law — Constitution of Pennsylvania, Art. III. sect. 21 — Act of April 4, 1868.

A railroad company was entitled to take advantage of the provisions of section 2 of the Act of April 4, 1868 (P. L. 58), limiting its liability to $5000 in case of death caused by its negligence, although it had not accepted the provisions of said Act.

Said section of said Act was avoided by the adoption of Art. III. section 21 of the present Constitution of Pennsylvania.

Error to the Common Pleas of Bucks County.

Case, by Amy K. Hollahan and others, being the widow and minor children of Michael Hollahan, deceased, against Edwin M. Lewis, Franklin B. Gowen, and Stephen A. Caldwell, Receivers of the Philadelphia and Reading Railroad Company, to recover damages for the death of said Michael Hollahan, which was alleged to have been caused by the negligence of the defendants.

On the trial, before WATSON, P. J., it appeared that deceased while riding as a passenger in a railroad train upon a road operated by defendants, had been killed in a collision, which the evidence tended to show was caused by the negligence of defendants in employing and retaining careless servants to operate their trains.

The Court charged, *inter alia*, as follows:—

"An Act of Assembly was passed on the 4th of April, 1868, limiting the recovery in such case to $5000. The defendants' counsel have requested me to instruct you that there can be no recovery here for more than this sum, together with interest upon it from the day of the death.

"I cannot so instruct you. After the passage of this Act a new Constitution was adopted by the people of Pennsylvania for their government. That Constitution forms the fundamental law of the State. The twenty-first section of the third article is in these words: 'No Act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No Act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons, and such Acts now existing are avoided.'

"It is contended on the part of the plaintiffs that the effect of this section is to avoid the limitation, as to the amount, in the Act of Assembly of 1868. The question is by no means free from difficulty. I have had very little time indeed to consider it. I regret that more opportunity has not been allowed me for examination and reflection. I must decide it, however, according to my best judgment, and that is that the constitutional provision is a repeal of the Act of Assembly so far as to avoid the limitation of the amount to be recovered. . . . .

"The facts of the case have been fully and ably discussed before you; you have heard the testimony; you will consider it carefully, honestly, impartially, and arrive at a conclusion which you believe will do justice between the parties and render a verdict for the amount which you find ought to be allowed."

Verdict and judgment for plaintiffs in the sum of $12,268.66. Defendants thereupon took this writ, assigning for error the portion of the charge cited above. The first three paragraphs constituted the first assignment of error, and the fourth paragraph the second assignment of error.

G. & H. Lear, for plaintiffs in error.

The provisions of the Act of 1868, section 2, apply equally in case of accepting and non-accepting companies.

Mulherrin *v.* D., L. & W. R. R. Co., 31 Smith, 366.
North Penna. R. R. Co. *v.* Kirk, 9 Norris, 15.
Cummings *v.* Pittsburgh, C. & St. L. R. Co., 11 Norris, 82.
Cleveland & P. R. Co. *v.* Rowan, 16 Smith, 393.
Pennsylvania R. R. Co. *v.* Keller, 17 Smith, 300.

The adoption of Article III. section 21, of the present Constitution did not avoid the Act of 1868, section 2. The operation of the Constitution was prospective only.

Pennsylvania R. R. Co. *v.* Langdon, 11 Norris, 21.

The Constitution leaves past legislation unaffected except where unequivocal words of repeal are used, notwithstanding the fact that such legislation is prohibited for the future.

Lehigh Iron Co. *v.* Lower Macungie Township, 31 Smith, 482.
Kitty Roup's Case, 32 Smith, 211.
Germania L. I. Co. *v.* Commonwealth, 4 Norris, 513.
Watson *v.* Chester & Delaware R. R. Co., 2 Norris, 254.
Indiana Co. *v.* Agricultural Society, 4 Norris, 357.
Perkins *v.* Slack, 5 Norris, 270.
Commonwealth *ex rel.* *v.* Harding, 6 Norris, 353.
County of Allegheny *v.* Gibson, 9 Norris, 396.
Books *v.* Borough of Danville, 14 Norris, 158.
Coatesville Gas Co. *v.* Chester Co., 1 Out. 476.

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Louis H. James, *George Ross*, and *L. L. James*, for defendants in error.

It has never been definitely decided that a company which has not formally accepted the Act of 1868 is entitled to the protection afforded by section 2 of said Act. We contend that such is clearly not the case.

Said section was avoided by the adoption of Article III. section 21, of the present Constitution. Pennsylvania R. R. Co. *v.* Langdon (11 Norris, 21) must be considered to decide only that such effect is not produced in the case of a company formally accepting the provisions of the Act of 1868 prior to the adoption of the Constitution. Even this is doubtful law. At any rate, it does not rule the present case where no acceptance of the Act by plaintiffs in error is shown.

October 18, 1883. THE COURT. The negligence of the defendants below, on which the action is grounded, was so clearly and conclusively established that the right of the plaintiffs to recover was conceded, and the only question was as to the amount for which a verdict should be rendered.

It was contended that the damages to be recovered by the widow and children, of one whose death has been caused by unlawful violence or negligence, is limited by the Act of 1868 to $5000.00, and in no event can the verdict exceed that sum. The learned Judge refused to so charge, and instructed the jury that the proper measure of damages in this case, is the pecuniary loss suffered by the plaintiffs "without any *solatium* for distress of mind, and that loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his wife and children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure," and that the Act of 1868, in so far as it limits the amount to be recovered in cases like the present, was avoided by the 21st section, Art. III. of the Constitution, which ordains as follows, viz: "No Act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and in case of death from such injuries, the right of action shall survive and the General Assembly shall prescribe for whose benefit such action shall be prosecuted. No Act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons, and such Acts now existing are avoided."

The statutory right of action in cases of death occasioned by unlawful violence or negligence was given by the Act of April 15, 1851 (Purd. Dig. 1093). The persons entitled to recover damages are designated by the Act of April 26, 1855, which also limits the time, within which suit may be brought, to one year from the death. The amount of damages to be recovered "against common carriers or corporations, owning, operating, or using a railroad as a public highway, whereon steam or other motive power is used" is limited by the second section of the Act of April 4, 1868 (P. L. 58), in cases of personal injury to $3000, and in cases of death resulting therefrom to $5000. The third section of this Act authorizes such carriers or corporations to indemnify themselves by insuring the lives and persons of their passengers, etc. The fourth section, after repealing all Acts or parts of Acts inconsistent therewith, declares that "any provisions in the Acts incorporating such common carriers or corporations inconsistent therewith, shall be repealed upon the acceptance of this Act by such carriers or corporations, and upon the acceptance of the provisions hereof, the same shall become a part of its Act of Incorporation."

It is claimed that the judgment of the Court below may be sustained on two distinct grounds: 1st. That the Act of 1868, limiting the amount of damage, is applicable only to such carriers and corporations as have accepted its provisions, as provided for in the fourth section; and inasmuch as plaintiff in error has never accepted the provisions of the Act, it cannot claim the benefit of the statutory limitation contained in the second section thereof. 2d. That, whether this be so or not, the Act itself, in so far at least, as it limits the amount of damages to be recovered, is avoided by the constitutional provision above quoted.

As to the first proposition, we cannot agree with the learned counsel for defendants in error. The second section of the Act is a general law, applicable to non-accepting as well as accepting carriers or corporations of the class therein mentioned, and the only effect of refusal to accept the provisions of the Act is to deprive them of the means of indemnity provided in the third section, as well as the benefits resulting from the modification of their charters provided for in the fourth section.

As to the second proposition, we are of opinion that it is correct. The purpose of the 21st section of the third Article of the Constitution was to nullify, as far as possible, then existing legislation, limiting the amount to be recovered for injuries resulting in death, or for injuries to persons or property, as well as that limiting the time within which suits could be brought against

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corporations for injuries to persons or property, or for other causes, so far at least as said limitation of time differed from that fixed by general laws regulating actions against natural persons; and, at the same time, prevent all such legislation in the future. The phraseology of the section, as well as the discussion that took place during the course of its adoption, clearly indicates that such was the intention of the framers of the Constitution. It commences by declaring "No Act of the General Assembly shall limit the amount," etc. The language thus employed cannot be fairly restricted to future legislation alone. It is quite as applicable to then existing as it is to prospective legislation. If its authors had intended that it should apply only to the latter, they would have used some such expression as we find in the 1st, 6th, 7th, 8th, 11th, and 20th sections of the same article, viz., "No law shall be passed except by bill," etc.; "No law shall be revived," etc.; "The General Assembly shall not pass any local or special law," etc.; "Nor shall the General Assembly indirectly enact," etc.; "Nor shall any law be passed granting powers or privileges," etc.; "No local or special bill shall be passed giving any extra compensation," etc.; "The General Assembly shall not delegate to any special commission," etc. These expressions manifestly have reference solely to future legislation, while the language of the 21st section is applicable to then existing as well as prospective legislation. It is equivalent to saying: No Act of the General Assembly now in force, or hereafter to be passed, shall limit, etc. If this be so, it follows that the second section of the Act of 1868 is inconsistent with the Constitution, and therefore not within the protection of the second section of the schedule. Moreover, in endeavoring to determine the full scope and meaning of the section, it should be considered as a whole, in the light of the evil intended to be remedied by its adoption. It is very evident that the evil at which it was aimed was the obnoxious statutory limitation as to the amount of damages to be recovered, and the time within which suit for the recovery thereof had to be brought in the class of cases therein mentioned; and it is equally clear that the purpose was to apply the constitutional remedy forthwith, and thus avoid the risk of possible tardy legislation on the subject. The closing words of the section "and such Acts now existing are avoided," were doubtless intended to refer to the Act limiting the amount as well as that limiting the time within which suit might be brought for the recovery of damages.

The case of Pennsylvania Railroad Co. *v.* Langdon (11 Norris, 21), cited and relied on by plaintiffs in error, was well decided on other controlling questions, but we do not see our way clear to follow it as authority on the precise constitutional question involved in this case. One of the questions in that case was as to the effect of acceptance by the company of the Act of 1868. In this case that question does not arise.

The second assignment of error is not sustained. Considered as a whole there is no error in the charge.

Judgment affirmed.

Opinion by STERRETT, J. L. L. Jr.

Jan. '84, 232. March 3, 1884.

Appeal of Leaf et al.

Partnership—Property and profits of—Dissolution of—Conversion—Intestate laws—Descent.

The current profits of a partnership business are personal property and descend as such, whether the property of the firm be real or personal.

During the continuance of a partnership agreement all the property of the firm, including real estate acquired with partnership funds and used for partnership purposes, must be regarded as personal estate.

Stipulations in articles of copartnership for the continuance of the partnership after the death of a member are valid and binding, and prevent a dissolution.

Under such stipulations, the interest of a deceased partner, and the profits arising therefrom, are personal property, and descend as such under the intestate laws.

Foster's Appeal, 24 Smith, 391, distinguished.

Appeal of Richard T. Leaf and others from a decree of the Common Pleas of Berks County.

Bill in equity, between Emanuel V. Gerhart, complainant, and Richard T. Leaf *et al.*, defendants, setting forth: That on November 27, 1852, F. S. Hunter and others formed a partnership by articles, acknowledged and recorded, under the name of the Leesport Iron Company, which articles provided, *inter alia*, as follows:—

"2nd. The furnace, real estate . . . and all other stocks and properties necessary for the safe and profitable management and enjoyment of the business heretofore purchased for the partnership, or that may hereafter be purchased or constructed for the same, shall be taken and held as partnership personal property."

"6th. The firm shall not be dissolved by the death, withdrawal, or pleasure of any of its members, nor in any way but by the consent of all the members thereof. . . . In the case of the death of any member, his legal representatives shall hold his property and interest, . . . as the deceased partner held the same."

That F. S. Hunter died August 20, 1863, intestate, leaving a widow and three children; that one-third of his interest in the firm passed to the widow absolutely as personal property, and was so enjoyed by her during her life; that she, on August 22, 1865, married Emanuel V. Gerhart, complainant, and dying, July 18, 1866, be-

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queathed to him all her interest in the firm; that said complainant for a long time enjoyed the profits of the same; that the property of the firm consisted of a furnace, lands, and personal property, bought with firm money, and useful and necessary to the business; that defendants, still carrying on the business, refuse to account to complainant for his share of the profits, and that there was a balance due him.

The bill prayed for an account, and a decree of payment.

The defendants, in their answer, denied that the widow had any absolute property in one-third of Hunter's interest, or that the realty belonging to the firm, except a small portion, was useful or necessary to the business of the firm, and averred that it was real estate in fact, and for the purposes of descent, that none of it is or ever was required for the payment of partnership liabilities, and that F. S. Hunter's interest in the same descended to his heirs subject to a one-third life interest of the widow, and that her will passed no interest to complainant.

The case was referred to Daniel H. Wingerd, Esq., as Master, who, after stating the facts alleged in the bill, and uncontradicted in the answer, reported as follows:—

"The real estate of the firm originally consisted of a furnace and several acres of land, but more was purchased, until the aggregate was 270 acres, on which were erected various buildings. The evidence was contradictory as to whether this was useful or necessary for the business of the firm, but under the evidence and the doctrine expressed in Erwin's Appeal (3 Wright, 535) this realty is partnership property, and part of the partnership stock. The contention then is, whether under the facts and the law the widow of Frederick S. Hunter, afterwards the wife of Emanuel V. Gerhart, took only a dower interest in the said Hunter's share in the Leesport Iron Company, or whether she took one-third thereof absolutely, and by will vested the same in Emanuel V. Gerhart, complainant. The covenant of non-dissolution is valid and binding (Gratz *v.* Bayard, 11 S. & R. 41), and there is no doubt that by the agreement of the partners real estate may be brought into the stock of a partnership and considered as personal property (McDermot *v.* Laurence, 7 S. & R. 437). In for all purposes of the partnership, except sale and conveyance under the Statute of Frauds (Meily *v.* Wood, 21 Smith, 488; Abbott's Appeal, 14 Wright, 234; Foster *v.* Barnes, 31 Smith, 377; Foster's Appeal, 24 Smith, 391). Certainly then the real estate of this firm was converted so that it was not subject to sale, mortgage, or incumbrance by any of the partners, nor to lien by any of their creditors, but was liable, first, for the payment of all firm debts, and, secondly, for the payment of any balances due to the partners. It is equally certain that when the partnership is dissolved, and a balance found due any partner such balance arising from real estate would have been reconverted and descend as realty. But this partnership is not dissolved, nor does it appear how much would have remained for distribution, either of personalty or realty, if it were. And there is no reconversion until the partnership is wound up, either by decree, judgment, or agreement, and it is determined that it no longer forms part of the partnership stock, and is not required for its purposes. (SHARSWOOD, J., in Foster's Appeal, 24 Smith, 399.) Applying these principles to this case, it follows that as the land formed part of the partnership stock it was converted into personalty, and as the partnership has not been wound up, it has never been reconverted. Therefore the widow took her interest therein, as personalty, absolutely, and had the legal right to bequeath it as she did.

"The Master accordingly recommends that the bill be sustained, and that the Court decree that the defendants do forthwith pay unto the said Emanuel V. Gerhart, complainant, his full share of the dividends due and payable upon his interest in said co-partnership, to wit, the sum of $1500, with interest, from January 1, 1880, and costs."

Exceptions to the above report were filed by complainant and respondents, but the Court (SASSAMAN, J.), rendering the opinion, dismissed them all, confirmed the report, and entered a decree as recommended by the Master.

Respondents thereupon took this appeal, assigning for error the dismissal of their exceptions, the confirmation of the report, and the decree of the Court.

G. A. Endlich and *Geo. F. Baer*, for the ap-

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In this case the rights of creditors are in no wise concerned, and this partnership, for the purposes of the present inquiry, must be treated as settled, its debts paid, and its business ready to be resumed by the survivors in conjunction with such parties as may, under the law, be entitled to step into F. S. Hunter's interests; and they are his heirs, and not his personal representatives.

Williamson *v.* Fontain, 7 J. Bax. (Tenn.) 212.
Piatt *v.* Oliver, 3 McLean (U. S.), 27.
Collumb *v.* Read, 24 N. Y. 505.
Fairchild *v.* Fairchild, 64 N. Y. 471.
Tillinghast *v.* Champlin, 4 R. I. 173.
Robertshaw *v.* Hanway, 52 Miss. 713.
Scruggs *v.* Blair, 44 Miss. 406.
McAvoy's Estate, 12 Phila. 83.
And cases cited *supra.*

Under the articles of co-partnership the conversion is expressly limited to "properties necessary for the safe and profitable management and enjoyment of the business." Property not necessary for the partnership is not converted, even if the partnership have the income of it.

Randall *v.* Randall, 7 Sim. 271.
Steward *v.* Blakeway, 6 L. R. Eq. C. 479.
Rammelsberg *v.* Mitchell, 29 Ohio, 22.
Coder *v.* Huling, 3 Casey, 84.

The death of a partner necessarily dissolves the partnership, but provisions in the articles for a continuance prevent an immediate winding-up of the business. They compel an instant reorganization, but are not intended to determine the descent of his interest.

Laughlin *v.* Lorenz, 12 Wright, 282.
Story on Partnership, § 307.

There is no provision in these articles for a dissolution, nor is there any direction to sell and divide in money. They are necessary in England to make a conversion out and out.

Thornton *v.* Dixon, 3 Bro. C. C. 199.
Ripley *v.* Waterworth, 7 Ves. 425.
Bell *v.* Phyn, 7 Ves. 453.
Cookson *v.* Cookson, 8 Sim. 529.
Balmain *v.* Shore, 9 Ves. 500.

This question has not arisen in Pennsylvania, but the principle on which it was decided was recognized in—

Foster's Appeal, 24 Smith, 391, 398.

Under the view of expediency the death of a partner must be regarded as working not only an instantaneous dissolution of the partnership, but an instantaneous adjustment of its affairs, and a reconversion. Otherwise the provision against dissolution would make the partnership a perpetual corporation, and create a tenure of real estate where lands are bought and sold as personalty, descend as personalty, and where judgments and mortgages impose no lien.

Horace A. Yundt, for the appellee.

Under the general law of partnership, when real estate is brought into a partnership, it is treated, in equity, as personal estate, and remains personalty until the partnership is dissolved, and its affairs settled.

Kramer *v.* Arthurs, 7 Barr, 171.
W. H. Mining Asso. *v.* Reed, 30 Smith, 50.
Moderwell *v.* Mullison, 9 Harris, 259.
Erwin's Appeal, 3 Wright, 535.
Abbott's Appeal, 14 Wright, 234.
Meily *v.* Wood, 21 Smith, 494.
Foster's Appeal, 24 Id. 399.
Foster *v.* Barnes, 31 Id. 384.
Du Bree *v.* Albert, 4 Out. 487.

Under the articles of co-partnership it is covenanted that all the firm property "shall be taken and held as partnership personal property." By that agreement the partners themselves have purposely impressed upon the real estate belonging to the partnership the character of personalty, for all intents and purposes, including descent.

Story on Part., § 93.
Adams's Equity, *245.
Brightly's Eq. Jur., § 206.
Gow on Part., *50, 51.
1 Am. Lead. Cases (Hare & Wallace, 1847), 337.
1 Lead. Cases in Eq. (White & Tudor, 4th Am. ed.), 311, 297.
Collyer on Part. (5th Am. ed.), §§ 143, 135.
3 Kent's Comm. (12th ed.), 38, 39, and notes.
Sigourney *v.* Munn, 7 Conn. 11.
Smith *v.* Jackson, 2 Edw. Ch. 28.
Coles *v.* Coles, 15 Johns. 159.
Greene *v.* Greene, 1 Hammond, 535.
Sumner *v.* Hampson, 8 Id. 328.
2 Lindley on Part. (4th ed.), *668 to 672, 652, note 1.
Fisher *v.* Harris, 10 Barr, 459.

By express agreement a partnership may continue after the death of one of the partners. Such a stipulation is legal and prevents a dissolution.

Gratz *v.* Bayard, 11 S. & R. 46.
Laughlin *v.* Lorenz, 12 Wright, 282.
Scholefield *v.* Eichelberger, 7 Pet. 594.
Burwell *v.* Manderville, 2 How. 576.
Story on Part., § 201.

April 28, 1884. THE COURT. The decree made by the learned Court below in this case merely ordered the payment of the sum of fifteen hundred dollars by the defendants to the plaintiff, as his full share of a dividend of profits declared in 1879. There was no decree of dissolution of the partnership asked for in the bill or made by the Court; there was no final account, nor any winding up of the affairs of the partnership. Of course, there was no adjudication either of the status of the parties or of their respective rights to the property of the partnership, as upon a final settlement and distribution of the property and assets of the partnership. The money ordered to be paid was a share of a dividend of the current profits of the firm. The profits realized from the business were of course personal property in any aspect of the case. They represent, not the mere product of real estate distinctively as such, but of a business, to wit, the manufacture and sale of pig iron. Such a business is perhaps quite as largely the result of a dealing with money and personal

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chattels, as with real estate. In this case, the furnace and lands occupied in conducting the business were owned by the members of the firm, and to the extent of their use, they contributed to the general result of profits earned.

The partnership, in which the parties plaintiff and defendants were interested was a continuing one, which commenced in 1852 and which has never yet been dissolved. No question as to the ultimate ownership of the real estate of the firm, after a dissolution has taken place, arises upon the present record. The articles of co-partnership contained an express provision that the firm should not be dissolved by the death, withdrawal, failure or pleasure of any of its members, nor in any way but by the consent of all the members thereof. A method of continuing the partnership after the death of a member is also provided. That such stipulations are perfectly valid and binding cannot be doubted. (Story on Part., §§ 196 to 201; Gratz *v.* Bayard, 11 S. & R. 46; Laughlin *v.* Lorenz, 12 Wr. 282; and authorities cited by AGNEW, J., on p. 283.)

In the present case, in addition to the provision for a continuance of the partnership after the death of a member, there is also a stipulation that the furnace and lands of the firm shall be held as personal property. In point of fact, the real estate of the firm was acquired with partnership funds and used for partnership purposes. In every view of the case, so far as any question which now arises is concerned, during the continuance of the partnership agreement, all the property of the firm must be regarded as personal estate. Certainly, this must be so as to mere dividends of profits earned in carrying on the business. We cannot declare the partnership contract at an end, nor can we dissolve the firm or deal with its assets as though it were dissolved, by any order, which it would be possible for us to make in this proceeding. We have considered the very able argument of the learned counsel for the appellants with great care, but we are not convinced that it is applicable to the present situation in its leading points. The decision in Foster's Appeal (24 P. F. S. 391), much relied upon for the appellants, is predicated of a dissolved firm with all its debts paid and a residuum of unconverted land remaining in specie for mere purposes of distribution. But there are no such facts here. It cannot now be known that the real estate will not be required for the payment of debts. The firm still continues its business under a lawful agreement to that effect. Whenever a dissolution shall be established and a final settlement of accounts shall take place, the positions contended for and the reasoning by which they are enforced, will become entirely applicable, and will exercise a very potent and possibly a controlling influence, upon the questions which will then arise between the present litigants or those who may succeed them. But upon the present state of the record, we think the appellee is clearly entitled to the dividend in question, as the successor to his deceased wife's title.

Decree affirmed at the costs of the appellants.

Opinion by GREEN, J. C. K. Z.

July, '83, 10. March 26, 1884.

Appeal of Yerkes et. al.

Practice—Examiner's fees—Costs—Executors.

The will of a decedent having been admitted to probate, and letters testamentary issued thereon to the executors therein named, A. presented to the Orphans' Court a petition for an issue devisavit vel non. The matter was referred to an Examiner, upon whose report the petition was dismissed. The Examiner, ten days after, received from the executors a portion of his fee, and gave to them a receipt for the same, stating that the payment was in full of the share of the fee payable by them. A. subsequently filed a retraxit:

Held, that under the circumstances the Court should not thereafter, on application of the Examiner, have entered a decree directing the executors to pay him the balance of his fee.

Appeal of Silas Yerkes, Jr., *et al.*, executors of M. G. Whitaker, deceased, from a decree of the Orphans' Court of Philadelphia County, granting the prayer of a certain petition of Alfred Frank Custis, Esq.

The facts of the case were as follows: On July 15, 1879, the last will and testament of the late Mrs. Whitaker was admitted to probate, and letters testamentary issued thereon to the appellants. Soon after John G. Lyle, one of the next of kin of the testatrix, filed his petition in the Court below for an issue devisavit vel non. On March 10, 1881, on motion of Lyle's counsel, Alfred Frank Custis, Esq., was appointed Examiner to take testimony touching Lyle's petition. Testimony was stenographically taken before Mr. Custis, amounting to 550 printed pages. Mr. Custis filed his report May 15, 1882. On June 21, 1882, the following agreement was made and filed in the Court below:—

"*In re* Estate of Mary G. Whitaker, deceased.

"In the Orphans' Court, of July Term, 1879, No. 306.

"Sur reference to Alfred Frank Custis, Examiner, to take testimony upon petition of John G. Lyle, for an issue d. v. n.

"We, the undersigned, counsel for proponents and contestants in above case, agree that the fee of Alfred Frank Custis be fixed at one thousand dollars.

Philadelphia, June 21, 1882.

GEO. W. BIDDLE,
GEO. W. THORN,
For Proponents.
GEO. S. CRAWFORD,
Of Counsel for Contestant."

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On July 8, 1882, Lyle's petition was dismissed. On July 28, 1882, the appellants received from the Examiner the following receipt:—

"Received July 28, 1882, of the Executors of Mary G. Whitaker, deceased, three hundred and fifty dollars, which, with three hundred dollars previously paid, is in full of their share of the Examiner's fees in the above matter. These payments are not to be construed to affect their right to receive from the contestants the moneys now or heretofore paid, in the event of the decision of the Orphans' Court not being appealed from; and if not appealed from, that the ultimate decision should be in their favor. ALFRED FRANK CUSTIS."

Lyle withdrew his claim by writing filed January 6, 1883, and on January 20, Custis filed a petition, alleging that the balance of his fee—viz., $350—had not been paid him by the contestant, Lyle, and praying the Court for orders on both Lyle and the appellants directly to pay him this sum. The Court below granted the prayer of the petition, and ordered the appellants to pay the balance of the Examiner's fee. Whereupon appellants took this appeal, assigning for error the action of the Court.

M. Hampton Todd, *George Biddle*, (*George W. Thorn*, and *George W. Biddle* with them), for appellants.

The executors of a will are not bound to pay the costs of the Examiner appointed to take the testimony of the contestant, after a decree has been entered in favor of the will and the contest abandoned, where no steps had been taken to recover from the unsuccessful litigant.

Nichols *v.* English, 3 Brewster, 264.
Payne *v.* Little, 21 Beavan, 65.
Millner *v.* Josephs, 5 Irish Eq. Rep. 214.

The person who begins the suit, and thus requires the performance of the officer's services, is primarily liable, but entitled to recover, if successful, at the end of the case, from the losing party.

St. Joseph's Asylum, 2 Wright, 535.
Lowenstein *v.* Biernbaum, 8 WEEKLY NOTES, 301.
Large *v.* Davis, 12 Id. 33.
Moore *v.* Porter, 13 S. & R. 101.
In re United States *v.* Cigars, 2 Fed. Rep. 496–7.

No effort has been made to collect this debt from the person who owes it—viz., the contestant.

Devine *v.* Mundell, 13 WEEKLY NOTES, 267.

Richard P. White (*Alfred Frank Custis* with him), for appellee.

In equity, costs are within the sound discretion of the Chancellor.

Appeal of St. Joseph's Asylum, *ut supra.*
Gyger's Appeal, 12 Smith, 74.
O'Hara *v.* Stack, 9 Norris, 477.

The Orphans' Court has a discretionary power over costs.

Stokely's Estate, 7 Harris, 477.

Examiners, masters, and auditors bear the same relation to the Court, and the rule for the payment of compensation should be the same.

The retraxit filed by Lyle operated as an assignment of his demand to appellants, who took it *cum onere*, being entitled to all its benefits, and subject to the liabilities of the assignor.

Jordan *v.* Sherwood, 10 Wendell, 622.
Canby *v.* Ridgway, 1 Binney, 496.
Blood *v.* Harrington, 8 Pickering, 552.

May 19, 1884. THE COURT. After a careful consideration of the facts of this case, we feel ourselves compelled to differ with the Court below. The executors, the appellants, some ten days after the decree in their favor, paid to the Examiner, appellee, what he stated to be their full share of his fees; and notwithstanding this fact, we have before us an order upon them to pay the balance of those fees, for which Lyle, the petitioner in the Court below, was alone responsible. Under no principle of law can the appellants be so charged, neither can we regard this imposition as an equitable one. In the case of the Appeal of the St. Joseph's Orphan Asylum (2 Wr. 535), it was held that the fees of an auditor are primarily payable by the party at whose instance he was appointed, though taxable to and collectible from the losing party. What is here stated is both comprehensible and reasonable; but we can neither understand nor regard as reasonable the imposition of costs on a winning party, at whose instance such costs were not made. Such a party is liable neither by operation of law nor by contract. It is true that a court of equity has a discretionary power over costs, and circumstances may arise under which they may be imposed on one not legally liable, but in such case there must somehow be an equitable liability, otherwise an order of this kind ought not to be made. In the case in hand, however, we can discover neither legal nor equitable liability on part of the appellants. Not on their motion, but that of their adversary, was the Examiner appointed, and they but agreed to the person who should fill this office after the Court had determined upon its creation. For his services, so far as they used them, himself being judge, they paid, and we regard it as out of all conscience that they should be compelled to discharge the liability of Lyle. The rule adopted by the Court below would often put a defendant in equity in a most unfortunate position, for, though the winner, he might be bankrupted by costs made by an insolvent adversary. To a rule so inequitable in its operation we cannot agree.

The decree of the Court below is now reversed and set aside at the costs of the appellee.

Opinion by GORDON, J. J. H. W.

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Common Pleas—Law.

C. P. No. 3. May 3, 1884.

Hermance v. Skinner.

Affidavit of defence law—Appeal by plaintiff from the judgment of an alderman—Judgment against defendant without process or appearance.

Sur rule to strike off judgment.

Appeal by O. Hermance, the plaintiff, from the judgment of a magistrate in favor of Wm. L. Skinner, the defendant. Judgment was obtained before the magistrate on Feb. 27, 1884. The plaintiff then appealed. No process was issued in the Common Pleas, and there was no appearance for the defendant. On April 26, 1884, the plaintiff took judgment for want of an affidavit of defence. On the same day a fi. fa. issued.

A. Simpson, Jr., for the rule.

An affidavit is not required where the plaintiff appeals from the judgment of a magistrate in favor of the defendant.

Tr. & H. Pr. § 406.

Brightly's Digest, 1966, citing Teese *v.* Leiper, Com. Pl. Phila., 24 Apl. 1847, and Gifford *v.* Bockius, Id. 23 Oct. 1847, M. S.; Act of 14 April, 1846, Purd. 1165, pl. 5.

We must assimilate such cases as nearly as possible to the practice in the District Court in cases within its jurisdiction. In the District Court judgment could not be entered for want of an affidavit of defence when the defendant had never been served with process or appeared to the action in that Court. Applying that principle to this case the judgment was improvidently entered. This Court as yet has no control over defendant, and consequently can grant no judgment against him.

Cooper and *Wagner*, for the plaintiff.

Eo die. THE COURT. The point involved in this case was decided many years ago; see Gifford *v.* Bockius, C. P. Oct. 1847, and cited in T. & H. vol. 1, p. 329.

The practice has been uniform from President KING's time to the present, and we do not propose to depart from it.

Rule absolute.

Opinion per LUDLOW, P. J. A. B. W.

C. P. No. 4. June 6, 1884.

Lea v. The Union Transfer Co.

Practice—Title—Sci. fa. sur mortgage—Judgment prematurely entered—Title of purchaser at sheriff's sale, not affected thereby, although he was plaintiff in the execution.

Case stated.

The facts as agreed upon were as follows:—

On July 31, 1874, Albert Schwarz conveyed to Sarah Krusen, wife of William Krusen, in fee, a messuage and lot on Arch Street, in the city of Philadelphia. On October 10, 1874, the said Sarah Krusen presented a petition to the proper Court, praying for the benefit of the Act of April 3, 1872, securing her separate earnings to herself, which petition was duly allowed, filed, and recorded. On February 2, 1877, the said William Krusen and Sarah his wife (both of whom are yet living), executed a mortgage upon the said premises to Henry C. Lea, to secure the payment of a bond, given by the said William Krusen, for the sum of $28,000; and on February 3, 1877, the said Krusen and wife executed another mortgage to said Lea, to secure the payment of another bond of the said William Krusen for the sum of $5000; both of said mortgages being recorded simultaneously.

On August 29, 1878, a writ of scire facias was issued out of the Court of Common Pleas No. 2, on the mortgage of $5000, returnable the first Monday of September, 1878, and returned *nihil habet.* On September 14, 1878, an alias scire facias was issued, returnable the third Monday (which was the 16th) of September, 1878, and also returned *nihil habet.* On September 24, 1878, judgment was entered in favor of the plaintiff on two returns of *nihil habet*, and damages assessed at $4274. The same day a writ of levari facias was issued, returnable the first Monday (which was the 7th) of October, 1878, on which day the property mortgaged was sold by the sheriff for $31,000 to the said Henry C. Lea, who paid for the same by giving a receipt or account of said two mortgages; and on October 19, 1878, the sheriff executed and acknowledged a deed therefor to said Lea, and duly delivered the same to him. The said Lea obtained possession of the property from said Sarah Krusen, after notice to quit served on her, under proceedings before a sheriff's jury, and held possession thereof for more than five years. No steps were ever taken to procure a reversal of said judgment.

The defendant in this suit, The Union Transfer Company, by articles of agreement in writing, agreed to purchase the said property for the sum of $37,000, upon condition that the title of said Lea should be good and marketable, and afterwards refused to accept a conveyance of

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the property and pay the purchase-money therefor, because the counsel of the company advised it that the judgment entered in said action of scire facias on said mortgage was voidable, if not void, and that, therefore, a good and marketable title did not vest in said Lea under the proceedings thereon.

It was thereupon agreed that if the Court should be of opinion that the title of the said Lea is good and marketable, judgment should be entered in his favor for $37,000, conditioned upon the delivery of a good and sufficient deed for the said property clear of all liens; otherwise, judgment to be entered for the defendant.

John G. Johnson, for the plaintiff.

Conceding that the judgment was prematurely entered, that was a mere irregularity which renders it voidable, but not void. But a reversal of it, even if it is now open to attack, will not affect the title of the purchaser. (Act of 1705, 1 Sm. Laws 61, Purd. Dig. 651.) It makes no difference that the plaintiff is also the purchaser. (Arnold *v.* Gorr, 1 R. 223.) This applies to judgments reversed for errors of law as well as of fact, so that a title at sheriff's sale under a scire facias to revive a judgment, which was entered on only one writ of scire facias and return of *nihil habet*, was held good. (Heister *v.* Fortner, 2 Bin. 40.) So a judgment on two returns of *nihil* on a mortgage given by a party who was dead when suit was brought, is erroneous merely and not void, and the purchaser's title is good, although he was plaintiff in the action.

Warder *v.* Tainter, 4 W. 270.

The judgment may be reversed, if it is void and not erroneous merely, and restitution awarded (Feger *v.* Kroh, 6 W. 294); but the title of the purchaser is good (Feger *v.* Keefer, 6 W. 297); mere irregularities, however gross, will not affect the title of the purchaser at sheriff's sale (Shields *v.* Miltenberger, 2 H. 76; McFee *v.* Harris, 1 C. 102).

The fact that the defendant is not given all the time allowed him by law to plead, or that the writ was served by an improper person, on account of which a judgment by default might be reversed upon appeal, will not ordinarily make the judgment open to collateral attack.

Freeman on Judgments, § 126, and notes.
Sterrett *v.* Howarth, 26 S. 438.

A decree of divorce on a subpœna issued only twelve days before the return day, instead of fifteen, as required by the Act, was sustained against the libellant (Miltimore *v.* Miltimore, 4 Wr. 151), who was held to be estopped by her procuring it. She had notice. So had the mortgagors in this case when notified to quit. They should have moved before. Now it is too late. After judgment on two returns of *nihil*, it will be presumed that the defendant was alive, although his death had been suggested of record before judgment (Taylor *v.* Young, 21 S. 81); or that a married woman was a *feme sole* (Hartman *v.* Ogborn, 4 S. 120); or that there was no tenant on the premises to serve the writ upon; (Hawkins *v.* Weightman, 21 S. 128); and in all these cases the purchaser at sheriff's sale takes an indefeasible title.

An execution issued before the expiration of a stay is irregular and not void, and cannot be impeached collaterally (Stewart *v.* Stocker, 13 S. & R. 199); no one but the defendant, can object to it (Lowber *v.* Wilmer's Appeal, 8 W. & S. 387; Wilkinson's Appeal, 15 S. 189); and unless he objects before the sheriff's deed is acknowledged, the title of the purchaser is beyond the reach of attack.

I. Newton Brown, for the defendant.

We are willing to take the property and pay for it, if we can get a good title; but as this judgment was prematurely entered we consider it void, and not voidable only. That the judgment was signed too soon is shown by several cases.

Faunce *v.* Subers, 1 WEEKLY NOTES, 248.
Association *v.* Gardiner, 2 Id. 95.
Haven *v.* Campbell, 4 Id. 216.
Laws *v.* McDanel, 1 Clark's Cases, 421.

June 11, 1884. THE COURT. Judgment for the plaintiff on the case stated. W. H. W.

C. P. No. 4. March 29, 1884.

McCalla v. Brennan, Deft., and The People's Bank, Garnishee.

Attachment execution — Garnishee — Pension money — Where a pension draft is placed in the hands of a bank for collection, and the bank allows a cash credit, the pension is no longer in transitu — Judgment — Satisfaction a bar to opening.

Rule to open judgment and dissolve attachment, and to let defendant into a defence.

Judgment had been taken against the garnishee in an attachment execution under the following circumstances:—

An attachment execution issued January 29, 1884, returnable on the first Monday in February. It was returned *nihil habet* as to the defendant, and "made known" as to the garnishee; of this attachment the garnishee notified the defendant. The attachment was discontinued February 13, 1884. Upon February 9, 1884, another writ of attachment in the same cause had issued, returnable on the first Monday of March, which was returned served as to the garnishee, and *nihil habet* as to the defendant. On February 15,

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1884, interrogatories were filed, and a rule to answer was taken.

The answers were not filed until February 21, 1884, but on the previous day, February 20, 1884, a rule for judgment against the garnishee was taken, which was made absolute February 23, 1884; on the same day the judgment was marked satisfied.

Of these proceedings the defendant had no knowledge, although he was all the while a resident of Philadelphia, and the bank had his address. On February 28, he became aware of what had taken place, and on March 6, 1884, which was within the time for an appearance to the writ of attachment execution, he obtained this rule.

The money which the bank admitted in its answers to be in its possession was pension money in process of transmission, as defendant claimed, a pension draft having been deposited by him with the bank for collection. It was, however, admitted, that the defendant had received a cash credit from the bank, and had drawn checks thereon.

J. H. Shoemaker, for the rule.

A judgment entered before the return day of a writ is irregular, and will be avoided if timely steps be taken.

White *v.* Crow, 17 Reporter, 321, U. S. Supt. Ct.
Act 1836, Purdon, p. 640.
T. & H. Prac., sec. 1200.
Ringwalt *v.* Brindle, 9 P. F. Smith, 51.
Rules C. P., 1884, Rule 21, sec. 92, p. 40.
Crammond *v.* The Trustees, etc., 4 Sand., R. 146.

Where the defendant in an attachment execution is a resident, he must be served; and if this is not done, and he has a good defence to the attachment, the judgment will be opened, even when it is regular, to let him into a defence.

T. & H. Prac., § 1197, and notes.

Pension money received from the United States is not liable by attachment, levy, or seizure, by or under any legal process whatever.

U. S. Revised Stat., § 4747.
Clark *v.* Ingraham, 38 Legal Int. 393.
Folschow *v.* Werner, 51 Wisconsin, 85.
Eckert *v.* McKee, 9 Bush (Ky.), 355.

This draft was placed in the hands of the People's Bank for collection. The pension was still in the "course of transmission to the pensioner entitled thereto."

Charles Gilpin, for garnishee.

THE COURT. A deposit in bank with cash credit was a collection. The money was no longer in the course of transmission. But even if this were not the case this judgment has been marked satisfied, and cannot now be disturbed.

Rule discharged. S. H. F.

U. S. Circuit Court—Bankruptcy.

April, 1884.

In re Glen Iron Works, Bankrupt.

Corporations—Insolvency—Stockholders—Subscription notes—Assessments and calls—Attachment execution—Bankruptcy—Lien of prior attachments.

Unpaid subscriptions to the capital stock of a corporation, which has become insolvent, may be levied upon under writs of attachment execution, although no assessment has been made by the board of directors.

Where the articles of association of a corporation provided for a capital stock of $140,000, and stipulated that the stockholders should give their notes, without interest, for their respective subscriptions, which should not be liable at any time to an assessment for more than fifty per centum of their face:

Held, that in case of insolvency, the whole capital subscribed was liable to creditors; and the corporation having become bankrupt after twenty per centum of the capital had been assessed and paid in, the stockholders were liable to attaching creditors for their respective proportions of the whole unpaid amount subscribed.

The corporation having been declared bankrupt, upon proceedings instituted subsequently to the service upon stockholders of such writs of attachment execution, and the unpaid capital having been awarded to the assignee, without prejudice to the rights of the attaching creditors, and with leave to them to intervene:

Held, upon the intervention of such creditors claiming the amounts of their judgments out of the fund in the hands of the assignee, that the same was liable to the lien of the attachments and should be awarded to the attaching creditors.

Bunn's Appeal, 14 WEEKLY NOTES, 193, not followed.

Bill of review to the District Court, brought by E. P. Wilbur, assignee in bankruptcy of the Glen Iron Works, bankrupt.

The facts are set forth in the report of the decision of the District Court (13 WEEKLY NOTES, 387), and in the following opinion.

W. D. Luckenbach, *Furman Sheppard*, and *Geo. W. Biddle*, for petitioner.

R. E. Wright, Jr., *P. K. Erdman*, and *R. C. McMurtrie*, for claimants.

June 6, 1884. THE COURT. Opinion by BRADLEY, Cir. J. This is a bill of review under the bankrupt law of 1867, brought by the assignee in bankruptcy of the Glen Iron Works, to review the decision of the District Court upon the claim of Charles W. Cooper and others as attachment-execution creditors. Cooper and the other respondents obtained a judgment against the corporation of the Glen Iron Works in the Court of Common Pleas of Lehigh County in January

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Term, 1871, for $25,000, on which an attachment-execution was issued on the 1st of January, 1875, with a clause of scire facias against stockholders of the corporation holding stock therein, on which only twenty *per centum* had been paid, the object of the attachment being to garnishee the unpaid balance. The attachment was served upon the corporation and the garnishees on the 2d of January, 1875. On the 3d of March, 1875, a creditor's petition was filed in the District Court of the United States to have the corporation declared bankrupt, it was adjudicated such on the 30th of March; and on the 5th of May, Wilbur, the assignee, who brings the present bill of review, was appointed assignee in bankruptcy. In November, 1875, the assignee brought suits at law in assumpsit in this Court against the several stockholders of the corporation to recover the amount of their unpaid subscriptions to the stock, to wit, the remaining eighty per cent. The suits were tried and disposed of upon affidavits of cause of action and affidavits of defence filed. It was alleged in the former that the corporation was insolvent, and in the affidavits of defence that there was no assessment either by the board of directors of the corporation or by a Court, and without such assessment there was no liability on the part of the defendants to pay the unpaid stock. The Court held the defence good, and suggested that the proper mode of proceeding was by bill in equity against all the stockholders. The actions at law were thereupon discontinued, and a bill in equity was filed in the District Court, which resulted in a decree that the stockholders should pay the whole amount of their unpaid subscriptions. One of the defences set up by the stockholders in the equity suit was, the service upon them of the attachment executions, which they allege their liability to pay, if they were liable at all on their unpaid subscriptions. But the Court, speaking by Judge CADWALADER (Wilbur *v.* Stockholders, 35 Leg. Int. 346), decided that the attachment executions, which were prior to the commencement of the proceedings in bankruptcy, could not prevent the entering of the decree or its enforcement; but that the decree would be made without prejudice to the rights (if any) of the respective attaching creditors; and that they might, if so advised, intervene for their own interests. This decree was affirmed by the Circuit Court on appeal, 26th of April, 1879, and the assignee collected the fund, or so much of it as was collectable. On the 2d of April, 1881, the attachment execution creditors, acting upon the suggestion of the Court, intervened in their own behalf, presented before the register in bankruptcy proof of their judgment, their attachment execution, and the service thereof on the stockholders, and claimed that the said attachment should be paid out of the money recovered by the assignee. The register decided against the claim, holding that the debt arising upon the unpaid subscriptions was only due, under the contract of subscription, in case of an assessment, and no assessment having been made in January, 1875, when the attachments were served, there was nothing in the hands of the garnishees due the corporation, and nothing passed to the execution creditors. The register's report was made March 31, 1883.

The District Court overruled this decision of the register, allowed the claim of the attachment execution creditors, and referred the matter back to the register, with directions to make a new report in accordance with its opinion. (13 WEEKLY NOTES, 387.) This being done, and a decree in favor of the execution creditors being entered, the assignee brought the present bill of review to reverse that decree.

A preliminary question is raised as to the right of the assignee to bring the bill of review. On this question, however, we have but little difficulty. The section of the bankrupt law which gave to the Circuit Court power to review the decisions of the District Court in matters of bankruptcy (Rev. Stat., sect. 4986) declares that "the Circuit Court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the District Court for such district when sitting as a Court of Bankruptcy, . . and except when special provision is otherwise made, may, upon bill, petition, or other proper process of *any party aggrieved*, hear and determine the case as in a Court of Equity." It is contended that the assignee is not "a party aggrieved" within the meaning of the law; that it is a question of distribution of proceeds amongst the creditors, and that only creditors, namely, general creditors opposed to the claim of priority on the part of the attachment creditors, are the parties aggrieved. But whilst the general creditors may be proper parties to file the bill, in our judgment, the assignee is also a proper party, for the reason that the claim of the attaching creditors is put forward as paramount to his rights, and as standing upon a superior title. The assignee represents the general estate of the bankrupt corporation; but the attaching creditors claim that they have a lien on portions of that estate, to which the interest of the assignee, as transferred to him from the corporation by operation of law, is subject. The assignee, in the interest of the general creditors, opposes this lien, and claims to hold the estate free from it. And whilst we think, therefore, that he is a proper party to file the bill, it is certainly more convenient and less expensive for him to do it than for the creditors to do it, either jointly or separately. The terms of the

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Act ought to be construed liberally in this regard, in order that the proceedings may not be defeated by technical objections as to parties, and that the interest and convenience of all may be subserved. If it be apprehended that the assignee might carry on litigation when the creditors were indisposed to do so, it is no more than might happen in reference to all the interests of the estate in his charge; and their wishes could at any time be made known to the Court, and would undoubtedly be prevailing when expressed by those entitled to weight and importance in the administration of the estate.

Another matter proper to be disposed of before proceeding to consider the principal question in the case, is the point made by the assignee, that the attachment proceedings were waived by the issue of a fi. fa. and levying on and selling the real estate of the corporation pending the proceedings in bankruptcy. But we are satisfied that, under the State law, there is no objection to the suing out of contemporaneous executions. And so far as the bankrupt law is concerned, if a judgment creditor levies on a portion of the bankrupt estate on which his judgment is a prior lien, he may, perhaps; be enjoined from proceeding; but if no action is taken by the Bankruptcy Court, we do not see how such a levy can affect a fixed lien which he has on other property, unless he makes his debt out of that levied on. In the present case, the real estate being incumbered to its full value, only a hundred dollars were realized by the sale, and neither the Bankruptcy Court nor the assignee, nor the creditors, seem to have troubled themselves about the matter. We think there is nothing in the point.

The main ground of contention of the appellant's counsel is, that the liability of the stockholders on their unpaid subscriptions of stock, as it stood in January, 1875, when the attachment was issued, was not a debt due to the corporation, attachable under process of execution by the laws of Pennsylvania. The law under which it is claimed by the execution creditors that the subscription was attachable, is the "Act relating to executions," passed June 16th, 1836, the 35th section of which declares, that "in the case of a debt due to the defendant, or of a deposit of money made by him, etc., the same may be attached and levied in satisfaction of the judgment in the manner allowed in the case of a foreign attachment;" and by the 37th section it is declared that "from and after service of

The Glen Iron Works was incorporated under a charter granted by Act of the Legislature, approved March 16th, 1865, which declared that the capital stock of the company should be divided into shares of fifty dollars each, and should consist of 1000 shares, with power of increasing it to 3000 shares. Under this Act the subscribers, in July, 1870, entered into articles of association, by which they agreed to associate themselves together for the purpose of manufacturing iron, under a capital of $140,000 divided into 2800 shares of fifty dollars each, and to take the number of shares set opposite their respective names, giving their notes without interest for the full amount subscribed, but not liable to an assessment of more than fifty per cent. of the face thereof, and not liable to an assessment of more than twenty per cent. within eighteen months after organization. The stock notes given were in the ordinary form of promissory notes, dated August 1, 1870, payable one day after date to the Glen Iron Works or order, without defalcation; and to each note was appended a memorandum that it was for the full amount of the party's subscription to the capital stock, and subject to assessments from time to time, as the Board of Directors might deem necessary, subject to the condition specified in the agreement as to the amount of assessments, and with a stipulation that dividends declared from profits should be credited upon the note until the note should be paid.

It is this condition that there should be no liability to pay the notes without assessment, and that the assessments should not exceed in the aggregate fifty per cent. of their face, upon which the assignee on behalf of the general creditors relies for the position that there was no attachable debt due to the corporation from the stockholders when the attachment execution was issued, inasmuch as no assessment had then been made of any part of the eighty per cent. still unpaid. A resolution for a call of thirty per cent. had been made, it is true, but had been repealed before the attachment issued. And the question is whether, in that condition of things, the liability on the subscription was attachable or not.

It is contended that there was no debt until an assessment was made, and in proof of this, reference is made to the decision of this Court in the actions at law brought by the assignee against the stockholders, to the effect that such actions would not lie in the absence of an assessment;

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lie, either at the suit of the principal debtor or that of his assignee in bankruptcy, it follows, as a matter of course, that the liability of the stockholders in this case could not be attached in January, 1875. But this does not appear to be universally true, since it has been repeatedly decided by the Pennsylvania Courts that the efficacy of attachment process is not confined to the garnishment of legal demands, but extends to those of an equitable nature as well. Property, assets, debts and choses in action assigned by the principal debtor in a manner valid and binding as against himself, and so as to be only available to his creditors by an equitable proceeding, are nevertheless subject to an attachment execution; as where assignments or conveyances are made in fraud of creditors, or are void as against creditors for want of being recorded as required by law. Whatever is done in fraud of creditors, or calculated to hinder and delay them in recovering their debts, is not allowed to stand in their way. (Flanagin *v.* Wetherill, 5 Wharton, 280; Stewart *v.* McMinn, 5 W. & S. 100; Watson *v.* Bagaley, 2 Jones, 164; Driesbach *v.* Becker, 10 Casey, 152; French *v.* Breidelman, 2 Grant, 319; Robinett *v.* Donnelly, 5 Phila. 361.)

By the flexibility of Pennsylvania procedure, long deprived as it was of the forms of chancery pleading, whereby an expansive application of legal remedies to equitable rights became a necessity, it is possible that some of the cases embraced in the category referred to might have been amenable to some legal remedy, though, as between law and equity, properly speaking, they are all strictly of equitable cognizance. Thus, where the object was to reach goods fraudulently assigned and still in the hands of the assignee, that learned jurist, Judge HARE, in the case last cited, said: Although a conveyance in fraud of creditors, with intent to create a secret resulting estate or interest in the grantor, vests a title in the grantee which is, as between himself and the grantor, as absolute as if the transfer had been made in good faith, and for value, it will, notwithstanding, give rise to a trust in favor of the parties who are meant to be defrauded, which may be enforced in this State through the medium of an action at common law. So far as they are concerned, the trust will be viewed as express, and the trustee, if privy to the fraud, made answerable, as if the duty of holding the property for their benefit had been set forth on the face of the deed." But a mere uncollected debt thus assigned could not certainly be reached by an action at common law, but only by a proceeding in equity, or an attachment.

So, generally, any debt owing to the principal debtor, but not yet due, cannot be made the subject of an action at common law, whether he has assigned it or not. It can only be reached by his creditors by a proceeding in equity, or by an attachment. That it may be reached in this manner is very clear from abundant authority.

It cannot be said, therefore, that the existence of a right to an action at law, for the collection of a claim, is the criterion for determining whether it is or is not attachable. There must be something more, something in the nature of the obligation itself, to put it outside of the reach of an attachment.

It is contended that such an impediment did exist in the case now under consideration; that at the time of issuing the attachment no debt existed; that the condition (namely, an assessment and a call) had not been performed to give it existence, and that those conditions could only be performed by the Board of Directors of the corporation, or by a Court of Chancery.

But, if there was not a technical debt in existence, it must be conceded that there was an obligation in existence, which only required the happening of certain contingencies to make it a technical debt. The word "debt," as used in the statute of 1836, is of very broad application, and embraces many obligations which in strict speech are not debts. This is shown by the cases already referred to, and by many others that might be cited. A contract to pay money at a future day is not strictly a debt until the day of payment arrives, although it is called *debitum in præsenti, solvendum in futuro* and is undoubtedly attachable. When the condition is performed (which in this case is mere lapse of time) it will be a strict debt. So a promise to pay money on any other of many conditions that might be specified comes within the same category. A contract to pay a builder so much money when a house which he has contracted to build is completed, is not a debt until the work is finished; yet, if it be partly completed and requires a little more to be done, as, for example, the painting, or the putting of locks on the doors, or weights on the windows, no one would say that such an obligation is not attachable, or that the condition may not be performed after the attachment has been laid, either by the builder himself, or by the party interested in the attachment. This would certainly be so in all cases except where personal trust and confidence are reposed in the contractor, as in the painting of a picture, and where the performance of the condition by any other person would make a material difference to the other party to the contract.

Now, what was the condition to be performed in the present case in order to convert the obligation of the stockholder into a perfect and complete debt? Nominally, as between the stockholders themselves, or (which is the same

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thing) between them and the corporation (which consisted of themselves), the condition was that there should be an assessment by the Board of Directors, and a call, and this could not extend beyond fifty per cent. of the whole subscription. But every body concedes that this condition need not be strictly and literally performed, and that, as to creditors who cannot otherwise be paid than by a resort to the stockholders, it is void, and does not require strict performance. As a whole, considering it in all its parts, it is an agreement calculated to hinder and delay creditors in the collection of their debts against the corporation; for, as to them, the whole subscribed capital of a corporation is a trust fund (as is sometimes said), but, at all events, it is a sacred fund, absolutely devoted by the law to the payment of all their just demands, notwithstanding any private agreements between the stockholders themselves.

But when such an agreement is adopted in good faith, and without any real intent to defraud, equity will carry it out, or, at least will pay regard to it so far as it can be done without injury to the creditors; and, hence, will not compel any stockholder to pay more than his proportionate share of what may be necessary to pay the creditors; and will, through the judicial machinery at its command, make such fair and equitable assessment as will produce by its application to those who are responsible and able to pay, all that is needed to pay all the debts of the corporation. This gives to the stockholders the substantial benefit of their mutual agreement so far as it can be regarded at all.

But this is not a strict performance of the condition. It is only paying such regard to the terms and effect of it, as will secure to the stockholders the most essential benefits of it consistent with the claims of creditors. It is a substituted performance which answers all the purposes of justice.

But this action of the Court of Chancery does not create the obligation to pay; it only ascertains the just amount to be paid by each stockholder. The obligation to pay is founded, first on the subscription to the stock; secondly, upon the existence of creditors and debts of the corporation requiring the payment of the subscription to satisfy them. As to such creditors and the debts due to them, the condition is but a spider's web, which the first breath of the law blows away. Nevertheless, where the judicial constitution of the Commonwealth or State provides a forum in which full and complete justice may be done to both creditors and stockholders, as is the case where a chancery jurisdiction is established, the equity courts will assume the administration of the estate, and will divide the burden amongst the several stockholders in accordance with the agreement which they have made between themselves. This is what is effected by the interposition of a Court of Chancery. It does not create the duty to pay, it only assesses the equitable amount to be paid by each. It would be too much to say, that in a State where no chancery procedure exists, the Courts would be powerless to enforce the duty, although they might be unable to enforce it in a manner so convenient and complete. In the absence of any other method, they might, perhaps, leave it to the stockholders themselves to obtain just contribution from each other, thus throwing upon them the burden of enforcing an agreement made between themselves, which, strictly speaking, is void as against creditors.

From these considerations it is apparent, that the obligation of the subscribing stockholder, becomes a *debitum in præsenti*, when the debts of the corporation cannot be paid without resort to the unpaid stock; but *solvendum in futuro*, that is when the fair and equitable amount to be paid has been ascertained and liquidated. It becomes a debt when there are debts of the corporation to pay,—the law discountenances any contrary idea; though the amount may be a matter of examination and adjustment. The courts of common law, not having at their command the requisite machinery to ascertain the amount in an ordinary action, will not entertain such an action at the suit of an assignee; especially is this so, where another jurisdiction exists which has all the machinery for effecting complete justice between the parties. But this is a question of procedure, rather than a question of right, and ought not to affect the real and substantial rights of parties. We are aware that a different mode of speaking in relation to the subject has frequently been used; a mode of speaking more in accordance with the view that an assessment and a call, to be made by a Court, or some officer or agent of a Court (if not made by the directors themselves), are necessary in order to create the debt as well as to ascertain its amount. But looking at the matter in its essence and true reason, it seems to us that the substantial thing in addition to the fact of subscription, is the existence of corporation debts which cannot be paid without a resort to such subscription. It is this which overrides the condition on which the subscription is made, by bringing the case within the paramount edict of law, which nullifies all devices for hindering and defrauding creditors.

If we are right in this view of the subject, the question then arises, whether a debt of this nature, before being liquidated by an account showing the proportionate amount due from each stockholder, though not in a situation to be recovered in a common action at law, may be attached on execution. The law gives the credi-

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tor a right by an attachment execution to reach the debts, property and effects of his debtor, however skilfully covered up or concealed, and in whatever hands or condition they may be found. This is a substantial right, and is not to be thwarted unless insuperable difficulties in its attainment present themselves. We have seen that it is not confined to legal demands of the debtor, but extends to those of an equitable nature; that it extends to debts not due, as well as to debts that are past due; that it extends to demands not yet liquidated, as well as to those which are certain in amount.

And, at this point, it is pertinent to ask, whether the attachment execution, and the proceedings which are proper to be had upon it, do not, in their nature, partake of an equitable character. Inquiries are instituted, interrogatories are propounded, and it is, at least, somewhat difficult to assign strictly the limits of the investigation and proceeding which may ensue under the direction of the Court. Had not chancery powers been conferred upon the Courts of Pennsylvania, can there be any doubt that this supplementary proceeding on execution would have been moulded to effect all the results in regard to the satisfaction of creditors which are conceded to be available in equity? Why is not the service of an attachment with scire facias as much of a call as is a formal order of a Court of Equity? And why may not the Court from which the execution issues inquire, as well as a Court of Equity may, as to the percentage necessary to be paid by each stockholder to raise the amount of the judgment? At all events, if it should be shown, as in many cases there would be no difficulty in showing, that the whole subscription would be necessary, what would there be to hinder the establishment of such a fact?

But if, after serving the attachment, it should be found necessary to resort to an equitable proceeding to ascertain the proportional amount which ought to be paid by each stockholder, this need not necessarily have the effect, and we see no reason why it should have the effect to dissolve the attachment, or to destroy the priority acquired by the attaching creditor. It would be an ancillary proceeding in aid of the attachment, and a proper mode of giving it full and complete effect.

The case of Hays *v.* The Lycoming Fire Insurance Company, lately before the Supreme Court of Pennsylvania on two different occasions (2 Outerbridge, 184, and 3 Outerbridge, 621), seems to us directly in point. That was the case of a mutual fire insurance company, in which the members gave notes for their premiums, assessable pro rata for the payment of any loss that might occur, and only payable as, and to the extent, thus assessed. This regulation was not the result of a mere agreement of the stockholders between themselves, but was expressly made in the charter of the company. By a supplement to the charter, the company was further authorized to issue policies for cash premiums, to outside parties, not becoming members, payable, in case of loss, by assessments on the premium notes of the members in the same way as other losses. A loss occurred on a cash policy, and having been adjusted, the president of the company, by order of the directors, gave the insured an order on the treasurer for the amount. This order not being paid was sued on, judgment was recovered, and an attachment execution issued, with a scire facias directed to various members of the company who had given premium notes. The directors had levied an assessment on all notes in force on a certain day, to provide for the payment of the losses and expenses up to that date; and another assessment on all notes in force on a subsequent day, to pay losses occurring between the two dates. These assessments were insufficient to pay more than thirty per cent. of the policies due, which amount was offered to the plaintiff and refused. The defence was that an attachment execution would not lie, because claims could only be paid by way of assessment, and the assessments levied were appropriable to those claims for which they were levied pro rata, and did not really belong to the company, which acted as a mere trustee; the prior assessments could not be attached to pay subsequent losses; and that subsequent assessments could not be attached, because moneys in the hands of the collectors are virtually in the hands of the company itself. This defence was sustained by the Common Pleas, but the Supreme Court reversed the judgment, holding that, as to cash policies, the company was virtually a stock company, and that its premium notes represented its capital stock, and that whenever, by an assessment regularly made, the whole, or any part of such notes becomes due, there is such an indebtedness in favor of the company as may be attached by any of its creditors other than its own members. The case came before the Court the second time on a different state of facts. In October, 1881, the insurance company was dissolved by a decree of the Common Pleas, and a receiver was appointed. He reported that the assets of the company (almost wholly premium notes), amounted to over $1,000,000, and that the liabilities (mostly losses by fire) amounted to over $360,000. The Court thereupon directed the receiver to levy an additional assessment on premium notes, to meet these liabilities, which was done. The plaintiff, whose judgment still remained unsatisfied, filed supplemental interrogatories, and one of the garnishees admitted that the receiver's assessment

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on his note was $96, which he was willing to pay to whomsoever was entitled to it. The Court of Common Pleas again decided adversely to the attachment, principally on the ground that the receiver being an officer of the Court of Chancery, could not be made amenable to an attachment. But the Supreme Court again reversed the judgment. The Court, by Mr. Justice TRUNKEY, said: "The question now presented is, whether assessments on the premium notes of the garnishee, made during the pendency of the attachment suit by the receiver of the company, are bound by the attachment. It can hardly be denied that, if so bound, the plaintiff is entitled to recover and collect the money from the garnishee. If, by virtue of the writ of attachment, he is entitled to the debt attached, neither the company defendant, if still in being, nor the receiver, if the company has been dissolved, can collect the money for him against his will. A receiver has no right to property of the defendant which was taken in execution before his appointment. This proceeding was pending at the time and before the civil death of the company. It is by no means the case of an execution, or an attachment, issued and levied after the appointment of the receiver." The Court then goes on to discuss the question thus presented, and the discussion is so apt to the case before us that we cannot do better than to quote its exact language. The learned Justice proceeds to say: "The garnishee gave his notes to the defendant, to be paid in such portions and at such times as the directors may, agreeably to the Act of incorporation, require. The losses by fire occurred, and this judgment for one of said losses was obtained prior to the proceedings for the dissolution of the company. Before its dissolution the garnishee became indebted on his premium notes for the proportionate sum necessary for payment of said losses, and nothing remained to be done except to ascertain the proper amount of his indebtedness, prior to his liability to an action to enforce payment. The writ of attachment was issued and served before the dissolution of the company, and the debt owing to the defendant by the garnishee became bound by it. After the receiver was appointed by the Court, he ascertained the measure or amount of the debt which had been levied upon by the attachment of the plaintiff. A garnishee is liable for money belonging to the defendant in the attachment which is received by him after service of the writ. (Sheetz *v.* Hobensack, 20 Pa. St. 412.) When the defendant is a corporation, and has been dissolved, and a receiver appointed, the case would be different with respect to money so received after the dissolution. But if a debt was attached before the dissolution and appointment, though not due, it will be held as if due, the garnishee having the right to withhold payment till it becomes due; and if the debt was subject to a condition, he may hold the money until the performance of the condition. In such cases an existing debt is attached, though not presently due, or some action is necessary to ascertain its amount."

As before said, we do not well see how a case could be more directly in point than this. The question now before us was directly in issue, and was the only material question in the case; and the decision appears to have had the unanimous assent of the Court. If this decision correctly declared the law of Pennsylvania as it was in February, 1882, the time when it was pronounced, it was certainly the law which governed the rights of the parties in the case before us, for those rights accrued and became fixed prior to that date.

We are referred, however, to a recent decision of the Supreme Court of Pennsylvania, in the case of Bunn's Appeal (14 WEEKLY NOTES, 193), announced in January of the present year, which seems adverse to the views expressed in Hays *v.* Lycoming Insurance Company, though it professes not to be so, but to be distinguishable therefrom. We have carefully examined the opinion in the case of Bunn's Appeal, and are unable to concur in that part of it which relates to the question under consideration. It was a question which did not necessarily arise in the case; for the jurisdiction of the Court below, as a court of equity, clearly appeared from the other considerations which were so ably expounded by the Supreme Court; and the objection, that one of the creditors might have had relief by an attachment execution, could not have prevailed against the jurisdiction of equity, which was much more adequate and complete, and was competent to the determination of the whole controversy between all the parties. And we are unable to see how the fact of the company's insolvency could distinguish the case from Hays *v.* Lycoming Insurance Company. Surely the substantial rights of an attachment creditor cannot depend upon the question whether the company is solvent or insolvent. The obligation of the stockholder is the same in either case, except as to mere amount, and if liable to be attached in the one case, it must be liable in the other. The lien acquired by the attaching creditor equally binds the debt, whatever may be the financial condition of the corporation. With all due respect for the distinguished Court which rendered the decision in the case of Bunn's Appeal, we feel constrained to abide by its previous decision in Hays *v.* Lycoming Insurance Company, not only because it better accords with our own views, but because it is declarative of the law of Pennsylvania as that law stood in the jurisprudence of the State when the rights of the parties before us were acquired.

The decree of the District Court is affirmed, with costs. A. B. G.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JULY 24, 1884.* [No. 33.

RAILWAY RECEIVERS.

POOR'S Manual for 1884 will report that the 120,551 miles of railway in the United States represented, on the 31st December, 1883, a share capital of $3,638,060,583, and were incumbered by $3,455,046,383 of funded, and $402,371,345 of floating debt. These figures are startling in their magnitude. They show that a considerable proportion of the moneyed capital of the country is invested in railway obligations, which are so widely distributed that any diminution in their yield of income, or any impairment or loss of their principal, causes far-reaching suffering and distress. Railway enterprises are not invariably successful, nor do purchases of railway obligations uniformly yield the anticipated income, or, in all cases, return the invested principal. At the present time the country is passing through one of those periods of depression in which the earnings of all railways are diminished, and the insolvency of some railways confessed. There are, therefore, few chapters of law of as general and timely interest as that which treats of the administration of insolvent railway corporations by means of receivers appointed by courts of equity, the more especially that, within the past year, twenty-five railway companies, whose aggregate share capital and debt exceed $550,000,000, have gone into the hands of receivers.

GIFFARD, V. C., has said, that the appointment of a receiver "is one of the oldest remedies" in equitable procedure. The prætors in Rome were accustomed to decree an *ad interim* possession of property *pendente lite*, and Mr. Spence has quoted from the records of the English Court of Chancery an order appointing a receiver as early as 1588.[1] JESSEL, M. R., has said[2] "A receiver is a term which was well known in the Court of Chancery as meaning a person who receives rents or other income, paying ascertained outgoings, but who does not, if I may say so, manage the property in the sense of buying or selling, or anything of that kind." . . . "If it was desired to continue the trade at all, it was necessary to appoint a manager, or a receiver and manager, as it was generally called." In the practice of the equity courts in this country this distinction seems to have been disregarded, and the rule here is that a receiver exercises whatever powers of management may be designated in the order appointing him.[3] It was held in England in 1866 that the Court of Chancery could not, without statutory authority, undertake the management of a railway, CAIRNS, L. J., saying,[4] "When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, yet it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed, and these duties be discharged by the company. They cannot be delegated or transferred." . . . . "It is impossible to suppose that the Court of Chancery can make itself or its officer, without any Parliamentary authority, the hand to execute these powers, and all the more impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management." As the result of this decision, the "Railway Companies Act 1867"[5] was passed, the 4th section of which exempts from execution the plant and rolling-stock of railways, but gives to judgment-creditors the right of obtaining from the Court of Chancery the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company. In some of the United States statutes have been passed authorizing the appointment of railway receivers, but as SWAYNE, J., said[6] in reference to such statutes, it is now generally assumed that there is "no reason why a court of equity in the exercise of its undoubted authority may not accomplish all the best results intended to be secured by such legislation without its aid." While it is to be hoped that all railway receiverships are not justly liable to the censure which MILLER, J.,[7] so forcibly expressed as to some receiverships, yet it is undoubtedly true, as that learned Judge says, that "the appointment of receivers, as well as the power conferred on them, and the duration of their office, has made a progress, which, since it is wholly the work of courts of chancery and not of legislatures, may well suggest a pause

[1] Hopkins *v.* Canal Proprietors, L. R. 6 Eq. 447; Spence on Equitable Jurisdiction, 378, 673.

[2] *In re* Manchester & Milford Ry., L. R. 14 Ch. Div. 653.

[3] But in Langdon *v.* The Vt. & Can. R. R., 54 Vt. 605, REDFIELD, J., takes the same view as that quoted from JESSEL, M. R.

[4] Gardner *v.* L. C. & D. Ry., L. R. 2 Ch. 201.

[5] L. R. Stat. 1867, vol. ii. part 2, page 1332.

[6] Davis *v.* Gray, 16 Wall. 203, 220.

[7] In his dissenting opinion in Barton *v.* Barbour, 104 U. S. 137.

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for consideration." In this amplification of equitable jurisdiction, the courts of the United States seem to have been somewhat influenced by the complex character of railway corporations as associations organized for purposes of private gain, and also as trustees of public functions.[8] While it is true, as HARLAN, J., has said,[9] that the dispossession of the corporate officers, and the appointment of a receiver is "a proceeding involving the exercise of the highest discretion, and embracing a very wide field of judicial investigation and inquiry," yet it is clear that where the necessary parties are before the Court, and where it is proven, or admitted, that the preservation of the corpus of the corporate property, and the right appropriation of the corporate income require it, a court of equity should not hesitate to give this relief.[10] But the appointment of a receiver is a means, not an end. The Court appoints him only because there is litigation as to property, and because it is essential to the preservation of that property that the Court should take possession *pendente lite*.[11] The recognized definition of a receiver is that quoted by WAYNE, J., in these terms:[12] "A receiver is an indifferent person between parties appointed by the Court to receive the rents, issues, or profits of land or other things in question in this Court, pending the suit, where it does not seem reasonable to the Court that either party should do it." A receiver's appointment is only a method of equitable execution, as SWAYNE, J., has said:[13] "Every kind of property of such a nature, that, if legal, it might be taken in execution, may, if equitable, be put into his possession." He is appointed for the benefit of all parties interested, and not for that of the applicant alone.[14] The property entrusted to him is *in custodia legis*, his possession is that of the Court, does not derange the priority of legal or equitable liens,[15] and cannot be disturbed either by force, or by legal process, without the permission of the Court appointing him, nor can he be sued in any other forum without that permission, even for damages inflicted in operating the road.[16] He is the executive officer of the Court, and the "right arm" of its jurisdiction, and while he can be held to a legal responsibility, the Court is morally responsible for his actions, and for his neglect to act. He has only such power as may be given him by the Court. He must not exceed the prescribed limits of that power, and all who deal with him are bound to take notice of those limits. His receipts, including both principal and income, constitute a trust fund, and they can only be disbursed under the direction of the Court in discharge of liabilities necessarily incurred in the administration of the trust, and in distribution among the parties equitably entitled to come upon the fund. The general rule is, as stated by FIELD, J.,[17] that "a receiver is not authorized without the previous direction of the Court, to incur any expenses on account of the property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment." It is, of course, the duty of the Court to pay from the fund all debts necessarily incurred by the Court in its administration of the trust.[18] While it is true that the payment of debts for operating expenses incurred by the corporation before the receiver's appointment, stands, in the words of BLATCHFORD, J.,[19] "*prima facie* on a different basis from the payment of claims arising under the receivership," yet such payments have been sanctioned only that the railway may continue to be a going concern, and, as that learned Judge added, because they may be said "to preserve the mortgaged property in a large sense by maintaining the goodwill and integrity of the enterprise." The assignee of such a debt has the same right as the original holder, and his priority will not be waived by the renewal at maturity of paper representing the debt.[20] It is, on the other hand, well settled, that a receiver will not be permitted to make payments from the fund to general creditors who have no special equity entitling them to priority;[21] but it is not in all cases easy to distinguish between general, and therefore unsecured, creditors, and those other creditors, who, by virtue of their contribution to the gross income, are deemed to have acquired an equitable lien upon the fund. Nor will the receiver be permitted to appropriate the income of the trust to the payment of interest on mortgage bonds, and by reason of such payment, to incur debt for the purchase of necessary rolling-stock.[22]

[8] Barton *v.* Barbour, 104 U. S. 135; Miltenberger *v.* The Logansport Ry., 106 Id. 312.

[9] Hammock *v.* The Loan & Trust Co., 105 U. S. 85.

[10] Redfield on the Law of Railways, 396; Cheever *v.* Rutland & Burl. Ry., 39 Vt. 653; Langdon *v.* Vt. & Can. Ry., *ut supra*.

[17] Cowdrey *v.* G. H. & H. R. R., 93 U. S. 352.

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The business of railways is, of necessity, done to a large extent upon credit, and the receiver, when put into possession, is generally met by pressing demands for the payment of debts due to material men and to laborers, while the accruing income of the road is not always sufficient to discharge current expenses, without regard to fixed charges. The protection of the property may also require expenditure to purchase necessary rolling-stock, or to complete an unfinished road. It has been held that, under such circumstances, it is the duty of the Court to authorize its receiver, not only to appropriate the income of the trust to such purposes, but also to borrow money and to incumber the property in his hands by the issue of certificates therefor, and the creation of a paramount lien as the security for such certificates. While—as BRADLEY, J., said[23]—the power to issue such certificates should "be exercised with great caution," yet it has been determined to be essential to the judicial administration of railway property that the Courts should possess this power. STRONG, J., has said,[24] that the power exists because of the "plain duty to preserve" the property *in custodia legis*, "not only for the benefit of the lien creditors, but also for the benefit of the company whose possession the Court has displaced;" and WAITE, C. J., has maintained it by more elaborate reasoning.[25] His view is that corporations are in equity admittedly trustees for their several classes of creditors in their relative priorities; that mortgagees out of possession have no lien on the gross income, the fund from which their interest is paid being the net income remaining after payment of operating expenses;[26] that the mortgagees may enforce their rights by entry into possession, or by foreclosure, without appeal to the Court for the exercise of its discretionary power of appointing a receiver, but that if they do invoke the exercise of equitable discretion, it is the duty of the Court to so mould the decree that the corpus and the income of the fund shall be distributed among the parties equitably entitled and according to their equitable priorities, so that the gross income may pay those operating expenses which have produced that income, and so that betterments may be borne by the principal and not by the income.[27] Receivers have been authorized to issue certificates for the purpose of finishing a road, upon whose completion within a definite time was dependent a valuable land grant;[28] for repairs to the road, and for necessary rolling-stock; for balances due to connecting roads, and for pre-existing claims for labor and material.[29] It should, however, be borne in mind that "the Court cannot by authorizing the receiver to create liens upon the property displace or impair the mortgagees' rights of property, any more than the legislature can impair the obligation of a contract,"[30] that is to say, the Court cannot, without the consent, express or implied, of prior incumbrancers, create new liens which would impair the vested rights of those prior incumbrancers. It has been held in England[31] that advances made by liquidators of a corporation under the sanction of an order of Court, will not be given priority of payment out of the corpus of the estate in preference to the claims of mortgagees, JAMES, L. J., saying: "It is said that the transaction was for the benefit of the debenture holders, and that if this property had been sold at that time, in all probability it would have sold badly, and therefore it was for their benefit that the works should be carried on; but then the debenture holders were the persons who had a right to express their opinion, whether the business should be carried on at their risk." . . . "The agreement did not profess to bind, and it could not, in point of law, have bound persons who were not before the Court."

In this country the priority of the lien of a mortgage, as an incumbrance upon a portion of the road built subsequently to the execution of the mortgage, has been sustained as against a contractor who built that part of the road under an agreement made between the company and himself, stipulating that he should retain possession, operate the road, and appropriate the net income to the payment of the cost of its construction.[32] The decision was put upon the ground, that the registry of the mortgage was notice to all the world of the existence and extent of its lien, and that the rights of the bondholders could not be prejudiced by an agreement to which neither they, nor their mortgage trustees, were parties. In a later case[33] this doctrine was reaffirmed,

[28] Jerome *v.* McCarter, *ut supra;* Kennedy *v.* L. & P. R. R., 2 Dillon, 448; Miltenberger *v.* Logansport Ry., *ut supra;* Stanton *v.* A. & C. R. R. Co., 2 Woods, 506.

[29] Wallace *v.* Loomis, *ut supra;* Fosdick *v.* Schall, *ut supra;* Fosdick *v.* Car Co., 99 U. S. 256; Hoover *v.* M. & G. L. Ry., 29 N. J. Eq. 4; Meyer *v.* Johnston, 53 Ala. 237; Gurney *v.* A. & G. W. Ry., 58 N. Y. 358; see

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BRADLEY, J., saying, the unsecured creditor's contention is that "his capital applied to the road conserved it, and rendered it capable of being operated, which it would not have been otherwise; hence, on the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel, he is entitled to priority." . . . "All that is necessary to say is, that the rule referred to has never been introduced into our laws except in maritime cases, which stand on a particular reason." These authorities justify the conclusion that the bondholder's priority of lien cannot be disturbed, save with his express or implied consent, or with the express or implied consent of those who are authorized to act for him.

But it is settled that the mortgage trustees represent the bondholders secured by the mortgages, and notice to those trustees will bind the bondholders.[34] BRADLEY, J., has said:[35] "The bondholders were represented by their trustees, and must be regarded as bound by their acts, at least so far as concerns the power of the Court to act in making the order, and so far as the interests of other persons acting upon the faith of it might be affected." Receivers' certificates in the hands of *bona fide* purchasers for value cannot be subsequently questioned by bondholders whose mortgage trustees had notice of the application, and did not oppose the issue of the certificates.[36] BLATCHFORD, J., has said:[37] "A court of equity, however it may act on the question of original authority or discretion, if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with a receiver within the authority of its orders, consequences which result from the inequitable negligence and supiness of a party to the suit, or of those represented by him."

While there is nothing, either in the adjudged cases or in the principles underlying them, which authorizes the issue of certificates to the prejudice of prior incumbrancers, for the purpose of paying either interest upon, or the principal of, either floating debt or junior incumbrances, or indeed for any purpose not essential to the preservation of the property, which the Court is administering, yet it is the clear result of the authorities, that the decree of the Court authorobjected. It is, therefore, suggested that enlightened selfishness requires mortgage trustees to act promptly in the protection of the interest of their bondholders, and, if necessary for that protection, to make timely opposition to the authorization of certificates, and that under such circumstances it would be well for bondholders to call upon their mortgage trustees to act, and, in default of such action, themselves to intervene in the suit, in which the receiver has been appointed, and thus acquire such a standing in Court as will enable them to maintain the priority of their mortgage lien. Prudent investors in railway bonds have heretofore regarded as the chief element of insecurity the large amount of issues of bonds under particular mortgages and the consequent difficulty of obtaining, in case of foreclosure, combination of action on the part of the bondholders, and they have been accustomed to rely with confidence upon the priority of the lien of the mortgage securing their bonds. They should now realize that the doctrine of receivers' certificates has seriously affected the value of railway bonds, by requiring holders of such bonds to be vigilant, if they would maintain the priority of their mortgage lien.

Receivers' certificates do not import a general liability, for they are a charge upon a specific fund. They are, therefore, not negotiable, and the holder is bound to look to the terms of the order authorizing their issue, and he takes them subject to the equities between the original parties.[38] In the last cited case the receiver had hypothecated the certificates for a loan, and it was held that the certificates were not a lien to the amount of their face, but that the holder could recover upon them only to the extent of his actual money advances.

The English Railway Companies Act, before referred to, provides that "where a company are unable to meet their engagements with their creditors, the directors may prepare a scheme of arrangement between the company and their creditors (with or without provisions for settling and defining any rights of shareholders of the company as among themselves, and for raising, if necessary, additional share and loan capital, or either of them), and may file the same in the Court of Chancery," and advertise the same in the Gazette, and that the scheme shall be deemed

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Supreme Court.

Jan. '84, 75. February 11, 1884.

Needham v. Woollens.

Married women—Contract—Bond and warrant to secure loan of money—Case stated—Separate real estate—Improvements—Judgment.

A married woman cannot bind herself by bond and warrant of attorney except for the purchase-money of land bought by her.

In order to charge a married woman for work done, it must appear that the work was *necessary* for the improvement of her separate real estate. In a case stated, unless it appear by the record that the work procured to be done was necessary for the preservation or improvement of her separate real estate, a judgment against a married woman is erroneous, and will not support an execution.

Error to the Common Pleas of Chester County.

Feigned issue, wherein Ruth T. Woollens was plaintiff, and Bridget Needham, defendant.

The facts of the case were as follows:—

Ruth T. Woollens entered judgment for $300 on a bond and warrant of attorney against Bridget Needham, and issued execution thereon. On the suggestion of defendant's coverture, the Court stayed the execution, and by agreement of the parties, directed this issue to determine (1) whether the defendant was, at the time of executing the bond and warrant of attorney, the lawful wife of Daniel Needham. (2) If so, whether, under all the facts and circumstances surrounding said bond, etc., and the dealings of the parties, the said defendant was liable on said bond, or for the debt covered thereby.

On the trial, before FUTHEY, P. J., an agreement in the nature of a special verdict was submitted for the opinion of the Court, containing substantially the following facts: Defendant was married to Daniel Needham in Ireland in 1855. In 1856, they came together to Chester County, where they lived as man and wife. Daniel Needham, being in feeble health, returned to Ireland in 1859, and is now living there. There is no evidence of his communicating directly with defendant before this suit was commenced, except by one letter to her six or more years ago. Since 1859 the defendant has supported and maintained herself by her individual labor. In 1878 she purchased a lot in the borough of Oxford, and proceded to erect thereon a house. At her request, the plaintiff procured work to be done, and materials to be furnished in the erection of said house, and, also, at her request, paid for the same the sum of $300, for which the defendant executed in plaintiff's favor the above judgment bond. On this bond one year's interest was paid in 1879. In 1881 said house burned down, and the defendant received $400 insurance thereon, which she yet retains.

The Court, in an opinion, entered judgment upon the case stated for plaintiff, for the sum of $372.75. Defendant thereupon took this writ, assigning for error the entry of judgment for the plaintiff.

James Monaghan and *R. Jones Monaghan*, for plaintiff in error.

Plaintiff in error is not liable by reason of separation from her husband.

Ardin *v.* Udderzook, 1 Chester Co. Rep. 142.
King *v.* Thompson, 6 WEEKLY NOTES, 241.
Mayberry *v.* R. R. Co., 9 Id. 404.

Nor as a feme sole trader.

Grosser *v.* Hornung, 10 WEEKLY NOTES, 463.
Cleaver *v.* Scheetz, 20 Smith, 499.
Eicholtz *v.* McCaughey, 1 Chester Co. Rep. 185.
Cochran *v.* Garrettson, 1 Leg. Gaz. Rep. 218.
Weiler *v.* Greiner, 34 Leg. Int. 13.
Donaldson *v.* Pflaum, 29 Pitts. L. J. 249; s. c. 11 WEEKLY NOTES, 254.
Bell *v.* Ladd, 8 Id. 129.

The facts of this case create no liability under the Act of April 11, 1848.

Lippincott *v.* Leeds, 27 Smith, 420.

And the Act of June 12, 1878 (P. L. 206), does not extend the liability of a married woman, but simply regulates the process against her.

This case is a mere contract of loan, and married women have never been held bound thereby.

Schlosser's Appeal, 8 Smith, 494.
Grosser *v.* Hornung, *ut supra.*
Raffensparger *v.* Bender, *ut supra.*

A judgment confessed by a married woman either for necessaries or for a debt contracted for the improvement of her separate real estate is absolutely void, and cannot even be ratified.

Glyde *v.* Keister, 1 Grant, 464.
Brunner's Appeal, 11 Wright, 74.
Swayne *v.* Lyon, 17 Smith, 440.
Quinn's Appeal, 5 Norris, 452.
Keiper *v.* Helfricker, 6 Wright, 325.
Hecker *v.* Haak, 7 Norris, 241.

It must be shown that the improvements made on the separate real estate of a married woman were *necessary* for its preservation or proper enjoyment. This must appear both in the pleadings and evidence, and its absence is a fatal defect.

Finley's Appeal, 17 Smith, 453.
Germania Bank's Appeal, 14 Norris, 332.
Hugus *v.* Dithridge Glass Co., 15 Id. 160.
Kuhns *v.* Turney, 6 Id. 497.

Oliver Sidwell and *George B. Johnson*, for defendant in error.

This is the case, not of a loan, but of indebtedness for moneys expended for a married woman, at her request, in the erection of a house. There is no doubt that a married woman has authority to repair and improve her separate real estate, and to contract debts therefor. If she is to enjoy her property, it must needs be that she has the

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power to put and keep it in proper condition for use or profit.

Lippincott *v.* Leeds, 27 Smith, 420.
Kuhns *v.* Turney, 6 Norris, 497.
Germania Saving Bank's Appeal, 14 Id. 329.
Forrester *v.* Preston, 2 Pitts. R. 298.
Hutchinson *v.* Preston, 2 Pitts. R. 304.
Murray *v.* Keyes, 11 Casey, 384.
Lippincott *v.* Hopkins, 7 Smith, 328.

It would appear that the Act of June 12, 1878, was intended by the Legislature to cover just such a case as this.

February 25, 1884. THE COURT. The case stated, which was submitted to the Court below for its opinion and judgment as on a special verdict, contains the following:—

That Bridget Needham, at the time of the execution of the note and warrant of attorney on which judgment was entered, was a married woman, and so continued to be down to the trial of the case; that on the 23d of August, 1878, Theodore T. Woollens and his wife, the plaintiff, conveyed to Bridget Needham a lot of ground in Oxford Borough. On this lot, she shortly thereafter proceeded to erect a small two-story frame house. She procured a cellar to be dug and walled, and paid for the same with her earnings, wherewith also she paid bills for lumber, lime, lath, painting, and labor, in and about the erection of said house. Ruth T. Woollens, at the request of Bridget Needham, engaged Chas. W. Wilson, a carpenter, to do the carpenter work in the erection of said house, and to furnish lumber and materials thereabout, and at the like request of the defendant, paid him for the same the sum of $300. For this the defendant executed, in favor of the plaintiff a judgment bond for $300, in which the judgment in suit was entered. On this bond, $18, being one year's interest thereon, was paid 21st of March, 1879. This bond and judgment are to be considered in evidence, and as part of the case stated. The moneys expended in the erection of the house were about $300, besides $300 so expended by the plaintiff, as just mentioned. In 1881 said house was burned down, and the defendant received $400 insurance thereon, which she yet retains.

The judgment entered against this married woman on the warrant of attorney was void. Except for the purchase-money of land bought by her, she could not so bind herself. (Brunner's Appeal, 11 Wr. 67.) It follows that the case stated must be regarded as an amicable action submitted for the decision of the Court, upon the facts set forth in the submission. But in the statement before us, we search in vain for any allegation that the work done for Bridget Needham was *necessary* for the improvement of her property. But without this she could not be charged. (Hugus & Hacke *v.* Dithridge Glass Co., 15 Norr. 160; Shannon *v.* Shultz, 6 Nor. 481; Kuhns *v.* Turney, Id. 497.) In these cases and many others the question is so fully discussed that further comment is unnecessary. We have but to add that, it nowhere appearing on the record, that the work procured by the plaintiff to be done was necessary for the preservation or improvement of the defendant's realty, the judgment, if allowed to stand, would be worthless, and would not support an execution. (Hecker *v.* Haak, 7 Norr. 238.)

The judgment of the Court below is now reversed, and judgment entered on the case stated for the defendant, with costs.

Opinion by GORDON, J.

CLARK, J., absent. C. K. Z.

Jan. '84, 251. February 13, 1884.

Marsden v. Haigh & Co.

Negligence—Master and servant—Risk of employment—When danger is patent—Duty of master—Contributory negligence.

A servant who voluntarily accepts a dangerous employment, assumes all the patent risks incident thereto, and his master is not liable for damages in case of an accident, occurring from such risk, in the course of such dangerous employment.

It is not negligence in a master to fail to provide against a patent risk unless he has been requested to do so by his servant, or has induced his servant to believe that he would do so.

Unless there is evidence of a request by a servant to provide against a patent risk, the jury cannot consider the question whether it was the duty of his master to remedy it or not.

A master is not liable for injuries to his servants, if they have been guilty of contributory negligence.

Error to the Common Pleas of Delaware County.

Case, by Helen Marsden, widow of John Marsden, deceased, against Samuel Haigh and William Grindrod, trading as Samuel Haigh & Co., to recover damages for the death of her said husband, alleged to have been caused by the negligence of the defendants. Plea, not guilty.

On the trial, before CLAYTON, P. J., the following facts appeared: The defendants are the proprietors of a cotton mill at Bridgewater in Delaware County. They had a picker-room about 17 feet long by 12 feet wide, with one window and one door of the usual size. John Marsden, deceased, husband of the plaintiff, was employed by defendants to operate the picker. Fires in such places are of frequent occurrence,

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and the occupation of attending the picker is a dangerous one. The machine used was not more dangerous than others for the same purpose. There was a pipe connected with the room by which steam could at any time be injected into it for the purpose of extinguishing fires. There had been a fire early in January, 1882, from which the attendant upon the picker had lost his life. This was known to the deceased when he accepted the employment. After that fire, for the purpose of additional safety, the defendants had the room changed by putting the door where the window had been, and the window where the door had been. The window, however, was left with but one sash weight. There was no evidence that this fact was known to the deceased, nor that there was any difficulty in raising it. The door opened inward, and had an ordinary thumb-latch, with the hand-hold on the outside. The only means of opening the door from the inside was by the "sneck" of the thumb-latch. Shortly after the fire aforesaid, one of the defendants, William Grindrod, thinking it would be safer, ordered the door to be hung upon the other jamb, and this order was communicated by the deceased to the carpenter. The carpenter commenced to make the alterations about January 22, 1882, but as the hinges were only suitable for the jamb to which the door was hung, the work was suspended, till other hinges could be secured. This was never done, and the change was never made. The door opened easily, however. The evidence clearly showed that the deceased voluntarily undertook the work with full knowledge of all the surrounding circumstances, and the danger of his employment. There was no evidence that he ever complained of any want of precaution on the part of his employers to prevent danger, or requested any change to be made to lessen the risk. There was evidence that the deceased was a careless workman, and disregarded some precautions which ought to be taken by employés in his position.

On January 30, 1882, a second fire occurred in the picker-room, and the first man who reached the place testified that when he arrived there he heard the deceased kicking on the door from the inside. He kicked the door open, and Marsden came out. He was so badly burned, however, that he died February 1, 1882. On his death-bed he said to Grindrod, "It is your fault. I got to the door four times, and I could not get out. It was too late."

The defendants presented, *inter alia*, the following points:—

(1) If John Marsden, the decedent, accepted from the defendants the employment of attending the picker in the picker-room in question, he thereby accepted and assumed all the risks and dangers belonging to that employment, and the plaintiff cannot recover without proving to the satisfaction of the jury that his death was caused by some neglect on the part of the defendants.

Answer. That point is affirmed without qualification. This is undoubtedly the law.

(3) Some employments are in their nature dangerous, and a man who accepts an employment is bound to know all its dangers, which he can either see or is informed of, or of which he ought to inform himself, and the law holds him to have assumed all the risks incident to that employment.

Answer. This is affirmed, provided the danger is one that could be easily known to the employé, and provided the employer conceals nothing, and according to his best judgment provides the usual means of safety.

The plaintiff requested the Court to charge, *inter alia*, as follows: "If the jury believe that the plaintiff's husband lost his life by reason of a defective construction of the door or window, or both, of the room in which he was at work, and that that defective construction was known by his employer, the plaintiff is entitled to recover, even though the said defective construction was known by John Marsden, provided that the jury believe from the evidence that John Marsden was induced to believe by his employer, that such defective construction would be remedied, and the accident happened by reason of the employer's delay before it was remedied." *Answer*. "This is about the substance of what I have said. This point is therefore affirmed. That is to say, the jury must find sufficient evidence that the accident was the result of the defective construction of the door. If the deceased came to his death in any other way, by endeavoring to extinguish the fire instead of making his escape, if he could have made it without difficulty, and did not do it until he was so badly burned that he could not find it, or if he was guilty of any contributory negligence. That is to say, this point is affirmed if you find the accident was caused by the neglect of the defendants to do what the deceased had requested."

The Court further charged the jury in answer to questions from them: "You cannot consider the question whether it was the duty of the defendants to have hung the door so that it would open outwards, as there was no evidence of any request from the deceased to have it so hung," and "I say to you, that if you find that the failure of the defendants to hang the door as requested by the deceased, or the failure to provide another sash weight, was not the cause of the accident, your verdict should be for the defendants."

Verdict and judgment for the defendants. The plaintiff thereupon took this writ, assigning for

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error, the answer to her point and the portions of the charge above quoted.

W. B. Broomall, for the plaintiff in error.

A master is bound to furnish suitable instruments for the work which he requires of his servants. The latter are not required to assume the risks of the former's negligence in this respect.

Patterson *v.* P. & C. R. R. Co., 26 Smith, 389.
Oak Bridge Coal Co. *v.* Reed, 5 WEEKLY NOTES, 3.
Ford *v.* Fitchburg R. R. Co., 110 Mass. 240.
Flike *v.* B. & A. R. R. Co., 53 N. Y. 549.

A servant by entering into his master's service assumes only those risks of that service which the master cannot control.

Caldwell *v.* Brown, 3 Smith, 453.

A knowledge of the danger on the part of the servant is not necessarily contributory negligence.

Kelley *v.* Silver Spring Co., 12 R. I. 112.
M. Coal Co. *v.* McEnery, 10 Norris, 195.

V. Gilpin Robinson and *John Dolman*, for the defendants in error.

A master discharges his full duty toward his servant, when he provides for him in such a manner as he fairly and reasonably deems prudent and safe.

Sykes *v.* Packer, 3 Out. 465.
Payne *v.* Reese, 4 Out. 301.

The evidence must show the injury to have resulted from the negligence of the defendant, without any negligence on the part of the plaintiff.

Goshorn *v.* Smith, 11 Norris, 435.
R. R. Co. *v.* Feller, 3 Norris, 226.

A servant will be presumed to have contracted to run all the reasonable risks incident to his employment.

R. R. Co. *v.* Bresmer, 1 Out. 103.

The deceased understood the nature of the work, and accepted the position with this knowledge.

February 25, 1884. THE COURT. None of the specifications of error is sustained. The answers to the plaintiff's points and the charge of the Court, are quite as favorable as she was entitled to, under all the evidence.

Judgment affirmed.

PER CURIAM.

CLARK, J., absent. C. K. Z.

Common Pleas—Law.

C. P. No. 2, of Allegheny Co. June 16, 1884.

Commonwealth, to use of County of Allegheny, v. Donaldson.

Obstruction of streets in city of Pittsburgh—Rights of passenger railway company therein—Rights of property owners and traders residing thereon—Act of April 8, 1859—What is an unreasonable obstruction.

Sur motion for a new trial.

This was an appeal from a decision of an alderman of Allegheny County, convicting the defendant of obstructing the track of the Pittsburgh, Oakland, and East Liberty Passenger Railway Company, and imposing upon him a fine of $5 under the provisions of § 12 of the Act of April 8, 1859, incorporating the said passenger railway company (P. L. 704), which provides as follows:—

"That if any person or persons . . . shall, without the consent of said company, obstruct or impede the passage on or over said railway, or any part thereof, the person or persons so offending shall forfeit and pay for every such offence the sum of five dollars, to be paid into the county treasury," etc.

On the trial, before WHITE, J., the facts appeared to be as follows:—

The defendant, Donaldson, was a driver in the employ of R. P. Wallace. The latter was the lessee of a business property fronting on Wood Street, and having an additional entrance on Third Avenue, at which entrance he received and delivered goods. The railway company is a part owner of a single line of track running up Third Avenue. Between the track and the curb of Wallace's pavement, there is sufficient room for a wagon to stand sidewise, but not perpendicularly to the curb. The defendant, however, under direction of Wallace, persisted in backing up his wagon against the curb, for the purpose of loading and unloading, and in this manner impeded the street cars for the space of at times from three to five minutes.

Two other cases, substantially similar, were tried with this case.

The plaintiff presented the following points:—

(1) If the defendants wilfully obstructed the railway company in the lawful operation of their road they are liable under the law to the penalty prescribed by the statute.

(2) The question is not one of usage in loading of wagons, or the mode of building loads upon the defendants' wagons. It was the duty of the defendants to leave the track of the railway company without obstruction to its fair and reasonable use.

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Answer. The above points I think are too broad and unqualified, and I cannot affirm them. I have endeavored to state the law as I understand it in the charge, and refer to that.

The defendants presented the following points:—

(1) Under the pleading and evidence the verdicts should be for defendants. *Refused.*

(2) Before finding for the plaintiffs the jury must be satisfied from the evidence that the obstructions complained of were wanton or malicious, and unless they find that the obstructions were wanton or malicious the verdict must be for defendants. *Refused.*

(3) The law does not require that the defendants shall use any other kind of a wagon than that generally used for the purpose required, nor does the law require that the wagon shall be loaded or unloaded in any other way than the usual manner, taking care, however, not to obstruct the cars any longer than necessary. *Refused.*

The Judge charged the jury as follows: Streets of cities are laid out for the accommodation of the public for travel and business. Every one travelling along the street is entitled, as a general rule, to a free and unobstructed passage the whole width of the street. But this right must of necessity have limitations. The street is used by vehicles passing and meeting each other. Property owners and business houses on the street have a right from necessity to place building materials on a part of the street, or use carts, drays, wagons, etc., in connection with their business. What portion of the street is allowed to be obstructed with building materials, and how long permitted to remain are generally regulated by city ordinances. In the absence of such city ordinance, the extent of the right is limited by the necessities of the case. Such temporary obstructions must always be of a reasonable character both as to extent and time. And that will depend largely upon the width of the street and the amount of travel upon it. No one has a right to block up the street and stop all travel even for one minute except in case of actual necessity.

The tracks of street passenger railways, when authorized by law, are, to a certain extent, an obstruction to travel. The tracks are permanently placed in the street, and the cars travelling on them cannot turn out to pass other vehicles. They have a right to use their tracks in accordance with the law, and other vehicles must turn out to let them pass. These passenger railways are intended for the accommodation of the cars, even temporarily, except in cases of necessity. When the cars run at intervals of four or five minutes, business houses must try to manage their business so as not to obstruct the running of the cars. They cannot back up a dray, cart, or wagon against the curbstone, across the track, and thus stop the cars, even temporarily for one or two minutes, except in cases of necessity. If one did it others might, and thus, perhaps, the cars be prevented from running regularly, to the great inconvenience of the public. If the vehicles can be placed sideways to the pavement so as not to obstruct the running of the cars, they should be thus placed. It may subject business houses to some little delay, inconvenience, and expense; but they must bear that rather than interfere with the accommodation of the public. If necessary to avoid obstructing the cars, they should change the form of wagon-bed and method of loading, if that can be done at a reasonable expense and without unreasonable inconvenience.

According to the evidence the cartway of Third Avenue is about 22 feet wide, the track of the passenger railway is near the centre of the street, leaving about 9 feet between the rail and the curbstone, room enough in ordinary cases for a wagon to stand to be loaded or unloaded, and not to interfere with the running of the cars. If the defendants could have thus placed their wagons and loaded and unloaded them in that position, it was their duty to so place them. That it would take a little longer to load or be less convenient than backing the wagons against the curbstone, would be no justification for backing them across the street and stopping the cars.

The question of fact then for the jury is this: Could the defendants have placed their wagons sideways to the pavement, and in that condition have loaded them without unreasonable delay, trouble, or inconvenience?

In other words, was it necessary to back the wagons across the street and stop the cars in order to load the wagons? If not, the defendants were guilty of an unlawful obstruction of the track.

And if this was done repeatedly and persistently after notice to them not to do it, they are liable to the penalty of the statute of 8 April, 1859, sec. 12.

Verdict for the plaintiff. The defendant moved for a new trial, assigning for reasons, *inter alia*, the refusal of his points and the charge of the Court.

Thomas M. Marshall, for plaintiff.

W. R. Rogers, for defendants.

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by the merchants in whose employ they were. The same question was involved in all three cases, namely, whether the drivers had the right to back their wagons across the railway track, delaying the passage of the cars until they could load or unload. At the trial it appeared that there had been some mistakes and informalities in the proceedings, but as both parties desired to have their legal rights in the premises adjudicated, these informalities were not strongly pressed.

The reasons filed for new trials raise some questions not raised at the trial. They are chiefly technical and do not touch the merits of the controversy.

The cases were fairly tried on their merits. The questions of law involved are clearly presented in the charge of the Court and the verdict. The controversy between the parties can, therefore, be definitely settled by the Supreme Court on this record. I think it much better for both parties to have it settled now, than by granting new trials, cause more delay, and increase the costs.

New trial refused.

PER CURIAM.

Opinion by WHITE, J.

C. P. of Dauphin Co. May, 1884.

Bartman & Co. v. Ensminger, defendant, and The Susquehanna Mut. Ins. Company, of Harrisburg, garnishee.

Justice of the peace—Transcript of judgment to another county for purposes of execution—Jurisdiction of justice unaffected by non-residence of defendant—Non-residence merely dispenses with necessity of service upon defendant—Acts of March 20, 1810; April 29, 1844; March 20, 1845; and April 15, 1845—Minnig v. *King, 8 Weekly Notes, 342, not followed.*

Certiorari to an Alderman of the city of Harrisburg, Dauphin County.

The defendant resided in Lebanon County.

The facts in the case are fully set forth in the opinion of the Court.

John W. Young, for Bartman & Co.

Mumma and *Shopp*, contra.

June 9, 1884. THE COURT. Suit was brought by Bartman & Co. against Ensminger, before a Justice of the Peace, in Cumberland County, and in due course judgment was obtained for $189.93, and on an execution issued a return of *nulla bona* was made by the constable. Thereafter a transcript of said proceedings was delivered to an Alderman of the city of Harrisburg, in Dauphin County, as provided in sec. 17, Act of 1810 (Purd. Dig. 865, pl. 110), who issued thereon an attachment execution against defendant, in which the Susquehanna Mutual Insurance Company of Harrisburg was made garnishee. The constable returned that he had served the garnishee, and that "the defendant living out of the county no service for this reason was made on him."

After judgment was entered on the answers of the garnishee, a certiorari was issued on behalf of defendant, and the specifications of error raise the question whether an attachment execution can be legally issued on a judgment entered by transcript from another county, as provided by the Act of 1810, when the defendant does not reside, and cannot be found, in the county in which the attachment is issued.

The plaintiff in error contends that it cannot, and relies on the words of the Act as construed in Minnig *v.* King (8 WEEKLY NOTES, 342) to support his proposition, which it seems to do. But we do not think that case covers the whole ground. By the Act of April 15, 1845, (Purd. Dig. p. 866), the jurisdiction of Aldermen and Justices of the Peace is extended to the proceedings relating to executions, authorized by sections 32 to 38 inclusive, of the Act of 1836. The Act of April 29, 1844 (P. L. 512), provides that proceedings under sections 35 and 36 of the Act of 1836 shall be valid without service of the writ on the defendant, in case he reside out of the county; and the Act of March 20, 1845 (Purd. Dig. p. 641, pl. 39) repeals so much of sec. 36 of the Act of 1836 as requires service of the attachment on any defendant, "except where the defendant is a resident of the county in which the attachment is issued."

These Acts were held in Hains *v.* Viereck (2 Phila. R. 40) to require service to be made upon the defendant if he resided, or could be found, in the county in which the execution was issued; but it was clearly the opinion of the learned Judge who decided that case that the Acts above cited place attachment executions issued by a Justice of the Peace on the same footing as those issued from a court of record, and in this opinion we concur. In Keeler *v.* Neal (2 W. 424), it is decided that the delivery of a transcript of a judgment is, by the provisions of the Act of 1810, a full authority to proceed in the suit by issuing an execution, wherever the first Justice might have done so. Hence we think as the law now stands, the fact that the defendant does not reside, and cannot be found, in the county in which the attachment is issued does not affect the jurisdiction of the Justice, but merely dispenses with the necessity of service of the writ of attachment upon the defendant.

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The Acts cited above do not seem to have been called to the attention of the learned Judge who decided Minnig *v.* King in 8 WEEKLY NOTES.

The judgment of the Alderman is affirmed.

Opinion by SIMONTON, P. J.

P. C.

C. P. No. 1. June 6, 1884.

Goodman et al. v. The Merchants' National Bank.

Banks and banking—Check—Transmission of, by bank for collection—Agent—Payment—What constitutes—Unless a bank receiving a check on deposit sends it to a suitable agent for collection it is liable to the depositor for resulting loss—The payer is not a suitable agent—Negotiable paper accepted when the creditor might have cash is deemed satisfaction.

Case stated.

The following facts were agreed upon for the opinion of the Court:—

On October 30, 1883, the plaintiffs opened an account as depositors with the defendant, and they then received from the defendant a bank-book, upon the first page of which was printed the following notice:—

"NOTICE.

"In conformity with the rules adopted by all the banks of the city, members of the Clearing House Association, you are hereby notified that you are held responsible as indorser for the non-payment of all cheques upon other banks of this city, members of said association, deposited by you as cash in this bank, until the close of the business day next succeeding that on which such cheques are deposited. This bank receiving such cheques only for collection on your account through the exchange at the Clearing House. Upon all other cheques and drafts deposited by you as cash, your responsibility as indorser continues until payment has been ascertained by this bank."

On November 14, 1883, the plaintiff deposited with the defendant as cash a cheque for $489.20, and dated November 11, 1883, drawn by Ruhman & Co., on the Mississippi Valley Bank, a bank, doing business at Vicksburg, in the State of Mississippi. On the same day the defendant remitted that cheque by letter to the Mississippi Valley Bank, requesting payment thereof. On November 19, 1883, the cashier of the Mississippi Valley Bank mailed to the defendant a letter inclosing in payment for the cheque a draft of the Mississippi Valley Bank upon the Hanover National Bank of New York City, dated November 19, 1883, to the order of the cashier of the defendant, for $489.20. The Mississippi Valley Bank was doing business on the said nineteenth day of November, 1883, but it failed on some day thereafter, and the defendant was not advised of the failure until it received the hereinafter mentioned letter of November 26, 1883, from the Hanover National Bank of New York. The letter from the Mississippi Valley Bank was received by the defendant, in due course of mail, on November 24, 1883, and on the same day the defendant remitted the draft to the Hanover National Bank of New York for payment.

On November 26, 1883, the Hanover National Bank of New York returned the draft to the defendant, notifying the defendant that there were no funds on deposit with it to the credit of the Mississippi Valley Bank. The defendant at once notified the plaintiffs in the following terms:—

"In return for cheque received from you on Mississippi Valley Bank, Vicksburg, we have received the draft of the bank on Hanover National Bank, New York. But there are no funds provided at the bank to meet the same. Shall we order the cheque on Vicksburg returned, that you may receive the money from your customer?"

On November 28, 1883, the plaintiffs wrote to the defendant as follows:—

"In reply to yours just received, please order returned the cheque on the Mississippi Valley Bank. We have written our correspondent there in regard to the matter, but have not received any reply as yet. Do you wish us to send cheque now and cover amount of the deposit, or shall we await the return of the one deposited?"

The defendant then wrote to the Mississippi Valley Bank, calling for the return of the cheque remitted to it, and in reply received a letter from E. S. Butts, receiver of the bank, dated December 4, 1883, saying:—

"The cheque you call for cannot be returned, as it was paid, charged to drawer's account and cancelled. Exchange was remitted you for it, but unfortunately was not paid, the Mississippi Valley Bank having failed. Your claim then stands only as an ordinary debt against that institution. The assets may reach $20,000, while the liabilities will largely exceed $1,000,000."

If, upon the facts above stated, the Court shall be of opinion that the plaintiffs are entitled to recover, then judgment to be entered in favor of the plaintiffs for $489.20, with interest from December 22, 1883, but otherwise judgment to be entered in favor of the defendant.

J. R. Adams and *Samuel B. Huey*, for the plaintiffs.

The title to money paid into a bank as a deposit, and passed generally to the depositor's credit, passes to the bank, and the relation of debtor and creditor is created between them.

Commercial Bank *v.* Hughes, 17 Wend. 94.
Graves *v.* Dudley, 20 N. Y. 76.
Marsh *v.* Oneida Cent. Bank, 34 Barb. 298.
Lund *v.* Seaman's Bank, 37 Id. 129.
Bank of Northern Liberties *v.* Jones, 42 Pa. St. 536.
In re Franklin Bank, 1 Paige, 249.

The notice printed in the bank-book formed no part of the contract; but even if it did, it merely postponed the application of the law until

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payment had been ascertained by the bank, and this occurred when the defendant received the draft on New York.

If the creditors have the choice between cash and negotiable paper and take the latter, this will be regarded as satisfaction.

2 Wharton on Contracts, § 955.
Commercial Bank *v.* Wood, 7 W. & S. 89.

The laches of the defendant would, inevitably, be attributed to the plaintiffs in a suit by them against the maker.

Gallagher *v.* Roberts, 2 Wash. C. C. 191.
Henry *v.* Donnaghy, Add. Pa. 39.
Hoar *v.* Clute, 15 Johns. 224.
Downey *v.* Hicks, 14 How. (U. S.) 240.

The defendant did not send the check to a suitable agent for collection. No firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law to enforce on behalf of another a claim against itself.

C. Stuart Patterson, for defendant.

In the absence of a special agreement the sole duty of a bank receiving a check on deposit is to transmit the check for collection; it is not responsible for the negligence of its correspondent.

Bank of Washington *v.* Triplett, 1 Pet. (U. S. S. C.) 25.
Mechanics' Bank *v.* Earp, 4 Rawle, 386.
Bellemire *v.* Bank of the U. S., 4 Wh. 105.
Lee *v.* Bank of West Chester, 1 Ches. Co. R. 109.
Hyde *v.* The Bank, 17 La. 560.
Baldwin *v.* The Bank, 1 La. Ann. 13.
Fabens *v.* Mercantile Bank, 23 Pick. 330.
Dorchester Bank *v.* New Eng. Bank, 1 Cush. 182.
Lawrence *v.* Stonington Bank, 6 Conn. 521.
East Haddam Bank *v.* Scovil, 12 Id. 303.
Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 247.

In New York alone the contrary doctrine prevails.

Allen *v.* Merchants' Bank, 15 Wend. 482; 22 Id. 215.
Morse on Banks and Banking, p. 353.

The case is different from that of a collection-agent.

Wingate *v.* Mechanics' Bank, 10 Barr, 104.
Bradstreet *v.* Everson, 22 P. F. S. 124.
Hoover *v.* Wise, 1 Otto, 308.

The title to the check did not pass upon deposit to the bank, although the bank permitted the depositor to draw against it.

[BIDDLE, J. If you buy the check, as the bank did, and I indorse it when I give it to you, I have no concern with the collection. You own the check, and my obligation is only that of an indorser.]

That would be the case of a discount. Here the bank did not buy the check. The deposit was for transmission for collection.

and indorsee shall exist between the depositor and the bank as to every check deposited.]

As to the defendant the check has not been paid. It never agreed to accept the draft as payment.

Cumber *v.* Wane, 1 Sm. L. C. 457.
Hays *v* McClurg, 4 Watts, 452.
Weakley *v.* Bell, 9 Id. 273.
Darlington *v.* Gray, 5 Wh. 487.
Dougherty *v.* Hunter, 4 P. F. S. 382.

June 21, 1884. THE COURT. Upon the foregoing statement of admitted facts, the majority of the Court agree that judgment should be entered in favor of the plaintiffs on the case stated. This conclusion is reached, whether the transaction is to be treated as the purchase of the check by the Merchants' National Bank from the plaintiffs, the check having been received and credited by the bank as cash, or whether under the terms of notice which appear on the first page of plaintiffs' deposit bank-book, the transaction is to be considered as a deposit of the check for collection on plaintiffs' account. If the latter view be adopted, the defendants must be regarded as having advanced to the plaintiffs the amount of money for which the check called, until it could be ascertained whether it would be paid upon presentation to the Mississippi Valley Bank. In whatever light it may be viewed, the parties to this action stand to each other in the relation of indorser and indorsee—the indorsee being required to demand and entitled to receive payment from the maker of the check. The contention on the part of the plaintiffs is, that sending the check to the bank on which it was drawn for payment is not such a demand as will release the indorsee from liability to the indorser, when, as it is here admitted, the bank to which it is sent for payment does not return the money nor the check itself, but cancels it on the theory that it has been paid, by charging the account of the drawer with the amount of the check, surrendering the possession of it to him, or at least entitling him to have it delivered up to him, as paid and cancelled.

By reference to the notice, which appears in the first printed page of the case stated, it will be seen that checks on banks in this city, connected with the Clearing-house Association, were received by the defendant bank only for collection on the depositor's account. The second clause of the notice provides, that on all other checks and drafts deposited as cash, your (the

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such checks were deposited; and upon the second class, until payment had been ascertained by the Merchants' National Bank. The defendant, therefore, accepted the check as cash, holding the plaintiffs as indorsers responsible to them in case it should not be paid on presentation to the bank on which it was drawn.

Whatever may have been the rights of the defendant as the holder of the check received under the cicumstances set forth in the case stated, in the opinion of a majority of the Court, their duty under the law required them to forward it to a correspondent or sub-agent, with instructions to present the same for payment, and if payment was refused, to have had it protested and returned at once to the defendant. Had this been done the rights of all parties would have been protected. The conclusion is a legitimate one, that had demand been made by an agent of defendant bank, the money for the check would have been paid to such agent, whose whole duty would have been performed by transmitting the proceeds of the check to the defendant bank, who would thus have secured the advance which it had made to the plaintiffs, and the transaction as to all the parties concerned would have been properly closed out.

It must not be overlooked that the duty which the defendant bank undertook to perform in connection with the collection of the check was voluntarily assumed; it cannot therefore complain if it is held not only to good faith, but also to the exercise of such diligence as would protect the rights of all parties. The law imposes no unreasonable obligations upon one who undertakes to do that which the defendant in this case undertook to perform. The entire measure of that duty was to transmit to a responsible agent for collection, and this the defendant could have done, or declined the performance of the obligation, if it had no correspondent or agent to whom it could have transmitted the check for collection, or it could have declined to accept the performance of any duty connected with the collection of the check, except as acting under the instruction and at the risk of the depositor. This the defendant did not do, but assumed the responsibility of sending the evidence of the plaintiffs' right to have the money for which it called collected for their benefit to the bank which was expected to make payment. Not obtaining the money but a worthless draft in return, the defendant treating the check as not paid, charged the amount of it back to plaintiffs' account, and when they called for the check, as the best evidence of plaintiffs' right to recover against the maker, they were informed: "The check you call for cannot be returned, it was paid, charged to drawer's account, and cancelled."

We do not regard it as a fulfilment of the proper measure of the defendant's duty in the premises, that they sent the check to the Mississippi Valley Bank directly for payment; nor can we agree that a custom such as is here sought to be set up can be successfully pleaded as a defence in an action by the indorser against the indorsee of a check, under circumstances such as those which it is admitted exist in this case. That such a course is frequently adopted may be admitted, but when it is followed it is at the risk of the agent who, of his own choice, transmits the evidence of indebtedness, upon which the right to demand payment depends, to the party who is to make the payment, instead of forwarding it to a sub-agent, with express or implied instructions to do all that is required by way of demand for payment, protest when payment is refused, and return the instrument to the party from whom it had been received.

The agreement to transmit for collection is a contract between the bank and its customer; the valuable consideration which supports the agreement as a contract is the use of the money to be collected by the bank, so long as it shall be allowed to remain in their hands after it has been collected. This binds the collecting bank to do all that is incumbent on them to do; and that entire duty, as we have said, is discharged when the check or draft is transmitted to a responsible sub-agent to collect the money. The agent to whom the instrument is sent to make demand for payment then becomes the agent of the depositor or indorser, and is liable to such depositor for loss arising from failure on his part to perform the duty which is incident to an undertaking to collect the money; and such duty is not discharged when anything but money is accepted as payment, in the absence of special authority to the contrary. The law as we have stated it is well settled on the authority of decided cases in this country. In the State of New York only does a different rule prevail; there, on the authority of Allen *v.* The Merchants' Bank of New York (15 Wendell, 82, and 22 Wendell, 215), it was held that the agents at the place of collection are the agents of the bank receiving the deposit, and not of the depositor.

In our own State the principle has in several instances been maintained that a collecting bank is an agent for transmission to a sub-agent to collect, and when this is properly done its duty is performed, and its responsibility is at an end.

In the case of the Mechanics' Bank *v.* Earp (4 Rawle, 386), the undertaking was to transmit the bills with instructions upon them to their correspondents. The Court held the defendants did not undertake to collect the bills, but were used as the medium of communication between the depositors and the collecting bank in Virginia. In Bellemire *v.* The Bank of United States (4 Whart.

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105), GIBSON, C. J., says: "In the case of Mechanics' Bank *v.* Earp it has been ruled, that a bank employed to transmit for collection is bound to concern itself with the act of transmission alone, and that its correspondent becomes the agent for subsequent measures. What the bank undertook to do was to put the note in the ordinary channel of collection, and it performed its undertaking when, for the purpose of *presentation and notice*, it put it into the hands of its own notary." In Wingate *v.* Mechanics' Bank (10 Barr, 104), the same doctrine is asserted, recognizing the authority of the Bank *v.* Earp (*supra*). In Bradstreet *v.* Everson (22 P. F. S. 124) the rule is again recognized; but that case was held not to come within the rule, because the agreement was that of an attorney undertaking the collection of the demand by the express terms of the receipt.

The leading case, perhaps, on this subject is that of the Bank of Washington *v.* Triplett (1 Pet., U. S. C. C. 25), in which MARSHALL, C. J., says: "That Triplett having deposited a bill with a bank in Alexandria, to be collected in Washington, the Alexandria Bank forwarded the bill to the Bank of Washington, which by negligence failed to collect the bill. By transmitting the bill as directed, the bank with whom it was deposited performed its duty, and the whole responsibility of collection devolved on the bank which received the bill for that purpose." To the same effect are Fabens *v.* The Mercantile Bank (23 Pick. 330); Dorchester and Milton Bank *v.* The New England Bank (1 Cush. 182); East Haddam Bank *v.* Scovil (12 Conn. 303); Ætna Insurance Company *v.* Alton City Bank (25 Ill. 247), and Hoover *v.* Wise (1 Otto, 308).

The weight of authority preponderates greatly in support of the doctrine that it was the duty of the defendant to transmit to a suitable agent to collect; and it seems to us that the Mississippi Valley Bank, on whom the check was drawn, was in no sense a suitable agent to demand payment against itself. Its interest plainly was to delay instead of speeding payment. The defendant put it in the power of the Mississippi Valley Bank to do what it pleased with the check, and that which it did please to do, on the eve of insolvency, was to cancel and surrender the check, and transmit—not money—but a worthless draft in payment.

We think the principle may be stated as a true one, as the plaintiffs' counsel have presented it, that no firm, bank, corporation, or individual, can be deemed a suitable agent, in contemplation of law, to enforce on behalf of another a claim to any party, whether he be depositor and indorser, or the indorsee and holder. In this instance, had the demand for payment been made by such agent, the amount of the check would have been collected over the counter of the Mississippi Valley Bank. It was doing business on the 19th day of November, 1883, and the cancellation of the check on that day shows there was money of the drawer in bank sufficient to pay the check.

We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent to mean, that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment to hinder, postpone, or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions by the depositor shall be given, which will save the collecting bank from all risk or peril. Entertaining the views as above stated, we enter judgment on the case stated in favor of the plaintiffs for the sum of $489.20, with interest from December 22, 1883.

Opinion by ALLISON, P. J.

PEIRCE, J., dissenting: The defendant received on deposit as cash a check on the Mississippi Valley Bank, of Vicksburg, for $489.20, indorsed by the plaintiff under a special agreement with the bank that his liability as indorser was to continue until payment had been ascertained by the bank. On the same day the bank remitted the check to the Mississippi Valley Bank by letter, requesting payment of it. The Mississippi Valley Bank sent a draft on the Hanover National Bank of New York for payment of it, which draft was dishonored, there being no funds to meet it. The defendant gave notice to plaintiff of its non-payment, and wrote to the Mississippi Valley Bank to return the check, which it declined to do, saying that it had charged it against the account of the drawer of it, and returned it to him. When the Mississippi Valley Bank received the check it was doing business. It failed a few days thereafter.

Was the Merchants' Bank, the defendant, guilty of such laches or neglect as to release the plaintiffs from liability to them as indorsers. I do not perceive they were. They forwarded the check in the usual course of business to the bank on which it was drawn, requesting pay-

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fraud of the Mississippi Bank to discharge themselves of liability as indorsers? Their indorsement was a special one to be liable until payment had been ascertained by the bank. The plaintiffs say they have lost their recourse upon the drawer of the check. No, they can sue him as upon a lost or stolen check, or a check unlawfully held by the adverse party. If he should set up his possession of the check as a defence to their suit, he has no better title to the check than the Mississippi Bank had, which obtained it by fraud. That Bank gave nothing for it and had no right to charge it against his account. And when compelled to pay it he may sue them for so much of his deposit as the check represents. The law looks at the right and not at the accident by which it is affected.

The Merchants' Bank discharged its whole duty in forwarding the check for payment, and in giving prompt notice of its dishonor to the plaintiffs when they learned it was not paid.

The English case of Russell *v.* Hankey, 6 T. R. 12, is almost identical with this in its main facts. The defendants were bankers in London in correspondence with the plaintiffs, their customers in the country. The bills in question, which had been indorsed to the plaintiffs in the course of negotiation had been transmitted by them to defendants in order to obtain payment from the acceptor, who resided in London, and to carry the amount to the account of the plaintiffs. The defendants accordingly tendered the bills to the acceptor for payment, when he gave them a check upon a banker in London for the amount, upon the receipt of which check they delivered up to the acceptor the bills in question. It turned out that the check was dishonored, the person on whom it was drawn having no account with the drawer. Upon these facts, which were not disputed, the plaintiffs contended that the defendants had been guilty of negligence in giving up the bills for the check they had received in payment, without previously inquiring whether or not the check would be honored. The defendants on the other hand insisted that they had only done what was usual in the ordinary course of trade and business of bankers, and therefore they ought not to be answerable for the event; and Lord KENYON being clearly of the latter opinion, the plaintiffs were nonsuited. ERSKINE now moved to set aside the nonsuit upon the ground before stated. But, *per curiam*, we dare not even grant a rule to show cause, as it would be putting the whole trade of London in suspense pending it.

There is no ground to impute negligence to the defendants.

For the above reasons I do not concur in the judgment of the majority of the Court.

F. M. L.

C. P. No. 1. June 28, 1884.

Bouvier's Estate.

Ground-rent — Extinguishment of redeemable ground-rent by trustees without an order of Court.

Sur rule to show cause why decree should not be vacated and petition dismissed.

The petition of the terre-tenant for an order to extinguish a redeemable ground-rent set forth that Michael Bouvier died seised of the said ground-rent, and by will devised and bequeathed the residue of his estate, of which the said ground-rent was part, to trustees for purposes therein described, and *inter alia*, after the division therein directed, to hold in trust the share of his daughter Louisa, and pay to her the net income thereof, after deducting taxes, repairs, etc. The petition further set forth that in the division of the estate the said ground-rent was allotted to the share of the said Louisa, and was by the trustees so held; that the petitioner was the owner of the property subject to the said ground-rent, and was desirous of paying the principal thereof; and he therefore prayed an order authorizing the trustees to execute to him a suitable release.

A decree in accordance with the prayer of the petition having been inadvertently entered, and the security fixed at $1200, the trustees took this rule.

C. Knittel, showed cause.

William C. Hannis, for the rule.

The trustees upon the facts disclosed in the petition, have power to extinguish the ground-rent without an order of Court.

Spangler's Est., 4 WEEKLY NOTES, 74.
De Coursey's Est., 39 Leg. Int. 392.
Spangler's Est., 13 WEEKLY NOTES, 535.

THE COURT. Rule absolute.
Per PEIRCE, J. F. M. L.

C. P. No. 2. June 12, 1884.

Commonwealth ex rel. Tuller v. Western Union Telegraph Co.

Telegraph companies— Duties of—Act of March 29, 1849—Conditions imposed on receipt of messages—Reasonable and unreasonable—Judicial notice of notorious facts—General strike of telegraph operators.

Sur rule to take off nonsuit.

Five actions to recover penalties claimed under the Act of March 29, 1849, § 15 (Purdon, 1394, pl. 1), which provides that—

"The various telegraph companies within the limits of this State shall be required to forward and receive over their lines all messages that may be offered for transmission, by individuals or incorporated companies: *Provided*, The parties offering such messages or despatches tender for the transmission thereof the amount of the usual fee

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for such transmission. And in case of a refusal or neglect on the part of any of the agents of the telegraph lines in this State, to send or receive in their regular order, except as hereinbefore excepted" [with regard to priority of the communications of State and Federal officers under certain circumstances], "such messages or despatches, by telegraph, the company shall be liable to a fine of one hundred dollars for each and every message so refused or neglected, to be sued for and recovered before any justice of the peace of this Commonwealth, as debts of like amount are recovered: the one-half of said fine to go to the State, and the other half to the party suing for the same."

At the trial the following state of facts appeared:—

On July 24 and 25, 1883, Chauncey E. Tuller, the relator, tendered at the defendant company's offices in Philadelphia five despatches addressed to different parties, tendering in each case the money for their transmission. The company's agents refused to receive them unless they were marked "accepted subject to mailing or other delay," this condition to be made part of the contract. The relator refused to enter into such a contract. The actual reason for requiring such a contract was a general strike then going on among the operators, but this was not in evidence at the trial.

The defendant's counsel then asked the Court to enter a nonsuit on the ground that the evidence for the Commonwealth did not show "a refusal to send or receive in their regular order," as stated in the narr.

A nonsuit was entered accordingly, whereupon this rule was taken.

Charles S. Keyser, for the rule.

The condition sought to be imposed in this case made the contract valueless, by removing the obligation to transmit by telegraph and without delay. It was an abrogation of the duties of the company, equivalent to an absolute refusal to receive and forward, and therefore within the penal clause of the statute.

It has been repeatedly held that telegraph companies are bound to receive all messages and transmit them exactly as they are received, and that they cannot impose any unreasonable conditions. In these respects they are in the same position as common carriers.

Wolf *v.* W. U. Tel. Co., 12 Sm. 83, 88.
U. S. Tel. Co. *v.* Wenger, 5 Id. 262.
Tel. Co. *v.* Dryburg, 11 C. 301.

Such stipulations against liability as have for their sole object the pecuniary interest of the company have been expressly declared invalid.

Passmore *v.* W. U. Tel. Co., 28 Sm. 238, 243.

Rudolph M. Schick showed cause.

often needlessly delayed owing to rivalry between different companies or combinations of companies. The statute sought to cure this evil by requiring every company to forward messages as soon as received, no matter from what source they came, but it did not impose any penalty upon an absolute refusal to receive and forward.

Being a penal statute, it must be construed strictly. The penalty attaches only to a refusal to send or receive *in the regular order*.

[HARE, P. J. The statute means two things: first, that the companies must not refuse to receive messages; and, second, that, having received them, they must send them in their regular order.]

Even if that be so, the refusal must be absolute, and not conditional as in this case. The condition required here was reasonable. There was, as the relator knew, a general strike among the employés of the company, rendering the transmission of messages irregular and uncertain.

[MITCHELL, J. A refusal to receive messages, except subject to unreasonable conditions, is an absolute refusal. The question is whether the reasonableness of the condition sufficiently appears on the record. The record shows only that the condition was imposed.]

The Court should take judicial notice of the existence of the strike, the fact which made the condition a reasonable one. It was a matter of public notoriety. The newspapers were full of it for weeks.

[MITCHELL, J. The fact that the strike was mentioned in the newspapers does not make it a part of the history of the country, so as to require it to be taken judicial notice of.]

THE COURT. Rule absolute. C. C. B.

Orphans' Court.

1884, July 12th. And now it is ordered that the following be adopted as an additional Rule of Court, to wit:—

Rule IX. § 17, *l.* Auditors and Masters and Examiners appointed by this Court may at any time, with the leave of the Court, require security for the payment of their and the Clerk's costs, and may decline to proceed further until such

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, JULY 31, 1884.* [No. 34.

Supreme Court.

Oct. '83, 6 & 7. October 22, 1883.

Schroeder's and Geist's Appeals.

Assignments —Partial assignments— Municipal corporations not bound by—Auditors.

A partial assignment of a claim upon a municipal corporation is not binding upon the corporation, and the holder thereof has no claim that he can enforce against the general creditors of the assignor. Such an assignment is only an agreement to pay out of a particular fund.

City of Philadelphia's Appeal, 5 Norris, 179, approved.

An Auditor appointed to distribute the balance in the hands of an assignee for benefit of creditors, can only distribute to those claiming under the assignment. Those who claim adversely cannot be heard.

Appeals of F. D. Geist, assignee for the benefit of creditors of Adolph Oberhelman, and of J. F. Schroeder, one of the sureties on the said assignee's bond, from the decree of Common Pleas No. 1, of Allegheny County, in the matter of the audit of the said assignee's account, and the distribution of the proceeds of the assigned estate.

Before the Auditor appointed to pass upon the exceptions to the assignee's account, and to report distribution (T. H. Davis, Esq.), the following facts appeared: On September 10, 1874, Adolph Oberhelman executed a deed of general assignment for the benefit of his creditors, to F. D. Geist. Among the personal assets of Oberhelman was a claim against the city of Pittsburgh, which was designated in the inventory as a "claim against the city of Pittsburgh, on account of contract building bridge assigned to divers parties as collateral security."

Prior to the execution of the deed of general assignment, Oberhelman had made three separate partial assignments of this fund to the several parties, appellees here. There was no dispute that these assignments had been made; nor that they were given into the hands of the City Controller, and by him turned over to his successor. Geist, the assignee for creditors, collected this claim from the city in an action, and disregarded entirely the said partial assignments in his application of the proceeds; and this was the principal subject of contention before the Auditor.

The Auditor ruled that the partial assignments were not binding upon the general assignee, the accountant.

To this ruling exceptions were filed, and the Court, after argument, sustained the exceptions to the above ruling, and directed the Auditor to distribute the proceeds of this claim against the city to the holders of the said partial assignments.

Thereupon Geist, the general assignee for creditors, and Schroeder, one of the sureties on the assignee's bond, took this writ, assigning for error the said decree of the Court.

Miller (*McBride* with him), for F. D. Geist, appellant.

Thomas Herriott, for J. F. Schroeder, appellant.

The partial assignments were not binding upon the city of Pittsburgh.

City of Philadelphia's Appeal, 5 Norris, 179.

At most, these assignments were but promises to pay out of a particular fund. But this would not give the appellees any lien.

Christmas *v.* Russell, 14 Wallace, 70.
Trist *v.* Child, 21 Wallace, 447.
Rogers *v.* Hosack, 18 Wend. 319.

A partial assignment of a claim binds no one unless accepted by the drawee.

Jermyn *v.* Moffitt, 25 Smith, 399.
Bank *v.* Gish's Assignees, 22 Id. 13.

A promise to pay out of a particular fund does not operate as an assignment.

Leading Cases in Equity, 3 Am. Ed. pp. 361–2.

When an Auditor is appointed to distribute the funds in the hands of an assignee for the benefit of creditors, the claimant on the fund must claim under and by virtue of the assignment.

Okie's Appeal, 9 W. & S. 156.
Jefferis's Appeal, 9 Casey, 39.
Wylie & Quail's, Appeal, 11 Norris, 196.
Strickler's Appeal, 10 WEEKLY NOTES, 535.
Bush *et al.* Appeal, 15 Sm. 366.
Williams Bros'. Appeal, 13 WEEKLY NOTES, 217.

Thomas C. Lazear (*Montooth Bros.*, and *Powers, Force & Powers*, with him), for appellees.

The appellees were creditors of the assignor, and claimed that this fund was subject to a trust or equitable lien, by virtue of special or partial assignments, made before the execution of the general assignment. These special assignments were in writing, under seal, and were given to secure the repayment of loans made to Oberhelman, to enable him to carry out his contract for the construction of the work for which the fund in question was the compensation. Oberhelman never denied or attempted to revoke these assignments. The testimony was that Geist also recognized them and promised to pay them. The assignments were good as between the parties, and could be enforced in equity. If the assignments were good against Oberhelman, they were good against his assignee, for a voluntary assig-

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nee is the mere representative of the assignor, bound where he would be bound.

Twelves *v.* Williams, 3 Whart. 485.
Vandyke *v.* Christ, 7 W. & S. 373.
Wright *v.* Wigton, 3 Norris, 166.

The assignments were made for a valuable consideration, and were not mere promises to pay out of a particular fund. Such assignments are always enforced in equity.

East Lewisburg L. & M. Co. *v.* Marsh, 10 Norris, 99.

Even an order to pay a debt out of a particular fund belonging to the debtor, gives the creditor an equitable lien upon the fund.

Trist *v.* Child, 21 Wallace, 447.
Sharpless *v.* Welsh, 4 Dall. 279.
Nesmith *v.* Drum, 8 W. & S. 9.
Burn *v.* Carvalho, 7 Simons, 109.
2 Story Eq., sec. 1044.
Garrison's Appeal, 2 Grant, 216.

The appellees claim not against but under the assignment, and only as creditors. It is true they look to a particular fund. The case is not different from that of judgment creditors or mortgagees of real estate held by assignees under a voluntary assignment.

January 7, 1884. THE COURT. This was an appeal from the decree of the Court below distributing the assigned estate of Adolph Oberhelman. Among the assets of said estate was a claim against the city of Pittsburgh, for $5344.-40. It was inventoried as "a claim against the city of Pittsburgh on account of contract building bridge, assigned to different parties as collateral security."

Prior to his assignment to Geist for the benefit of his creditors, Oberhelman had made partial assignments of his claim to various parties as collateral security. These partial assignments were never accepted or recognized by the city of Pittsburgh, the debtor. The assignee for creditors disregarded them, collected the claim from the city, and used the proceeds for the general purposes of the estate. The Auditor held that the partial assignments did not bind the fund; that the respective assignees had no lien thereon, and gave the proceeds to the general creditors. Upon exceptions filed the Court below reversed the Auditor, and held that the holders of the partial assignments were entitled to payment out of the fund, and surcharged the general assignee with the amounts due them respectively. From this decree the said assignee and his surety have appealed. It was decided in the City of Philadelphia's Appeal (5 Norris, 179), that a municipal corporation is not bound to recognize a partial assignment of a claim against it. Applying that principle to this case, it follows logically that the respective assignees of portions of the claim could not have recovered against the city of Pittsburgh. It is equally clear that appellant, as general assignee for creditors of Oberhelman, had the right to recover it, and in point of fact he did proceed to collect it. Have the appellees, who are the holders of the partial assignments, a claim upon the fund which they can enforce as against the general creditors of Oberhelman? We think not. They have no lien. Oberhelman, prior to the assignments to appellees, could have collected the money from the city and paid his general creditors, or any creditor, with it. The appellant, as his general assignee, has the same power. The partial assignments to the appellees were at most an agreement to pay them out of the fund. It was said by Mr. Justice SWAYNE, in Christmas *v.* Russell (14 Wallace, 70), "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. . . . The assignor must not retain any control over the fund; any authority to collect it, or any power of revocation; if he does it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compelled to do so though forbidden by the assignor." The same doctrine is as cited in Gibson *v.* Stone (43 Barb. 285); Rogers *v.* Hosack (18 Wend. 319); Trist *v.* Child (21 Wallace, 447); Jermyn *v.* Moffitt (25 P. F. S. 399). In Mandeville *v.* Welch (5 Wheaton, 277), the rule is thus clearly stated by Mr. Justice STORY: "When the order is drawn on a general or a particular fund for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft." It is useless to multiply authorities.

Aside from this it has been repeatedly held that upon the distribution of an assigned estate, a claimant upon the fund must claim by and through the assignment. He cannot claim adversely to it. (Okie's Appeal, 9 W. & S. 156; Jefferis's Appeal, 9 Casey, 39; Bush's Appeal, 15 P. F. S. 366; Wylie's Appeal, 11 Norris, 196; Strickler's Appeal, 10 WEEKLY NOTES, 535; Williams Bros.' Appeal, 13 Id. 217.) In the last case it was said in the opinion of the Court: "An Auditor appointed to adjust and settle the accounts of a voluntary assignee for creditors is confined to the accounts between the assignee and the *cestuis que trust.* Third persons claiming adversely cannot interfere in the settlement, but must resort to adversary proceedings."

The appellees are not claiming under the general assignment but against it. The first consists of the proceeds of the assigned estate of Adolph Oberhelman; the appellees are attempting to show that a portion of the fund does not belong to the assigned estate. This cannot be done. If the partial assignments to the ap-

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pellees bind the fund, then to the extent of those assignments the fund does not belong to the assigned estate at all, and should not have been included in the account.

The decree is reversed at the costs of the appellees, and it is ordered that distribution be made in accordance with the principles indicated in this opinion.

Opinion by PAXSON, J.

GREEN and CLARK, JJ., absent. J. M. S.

July, '83, 100. January 18, 1884.

Wilen's Appeal.

Will—Family settlements—Compromise agreement—Contract—Consideration.

A testator by his will gave his widow the income of his residuary estate so long as she remained his widow, and in case of her remarriage one-half of the income during life. At her death or remarriage he gave his mother the income of the residue for life, and after the death of the wife and mother he gave the residue to his brothers and sisters. The mother afterwards died, and subsequently the widow remarried. For the purpose of avoiding litigation as to the disposition of the one-half of the residue during the widow's lifetime, the brothers and sisters joined with the widow in an agreement that the income from the whole residue should be paid one-half to the widow and the other half to the brothers and sisters share and share alike. Subsequently, at the audit of the executor's account, upon demand by the brothers and sisters for the payment of the moiety of the residue before the widow's death:

Held, that the agreement, being in settlement of a family dispute, was founded on a consideration favored in law, and was binding upon the parties thereto.

Held, that the moiety of the income from the whole of the residue as provided by the agreement being possibly more to the widow's advantage than the whole income from one-half the residue of the estate as set apart, it could not be said that she has no standing to object to a division contrary to the terms of the agreement, and that the estate should therefore be disposed of according to the terms of such agreement.

Appeal of William B. Wilen, John Wilen, Mary Ann Gifford, and Robert C. Brodie, Junior, Administrator of Susannah Banes, deceased, residuary legatees named in the last will of George S. Wilen, deceased, from the decree of the Orphans' Court of Philadelphia County, sustaining the exceptions of Emily S. Hales, widow of testator, to the distribution of the residue of the estate of testator as awarded by the Auditing Judge. The facts, as found by the Auditing Judge (ASHMAN, J.), were as follows:—

George S. Wilen, by his will gave his widow, Emily S. Wilen, the income of his residuary estate so long as she should remain his widow, and in case of her remarrying, one-half of said income thereafter during life. After remarriage he gave one-half of said residuary estate to his issue, and the whole at her death. In case he should have no living issue at her death or remarriage he gave to his mother the income of the residue for life, and after the death of his wife and mother he gave the residue in equal shares to his brothers and sisters. Decedent left no issue. His mother afterwards died, and subsequently the widow remarried. At the audit of the account of the executor the Court awarded one-half of the residuary estate to the executor to be invested by him, the income to be paid to the widow during her life, and the principal to the brothers and sisters at her death, and the other half to the brothers and sisters equally payable presently. Subsequently, upon a rehearing of the account at the instance of the widow, counsel for the latter produced an agreement in writing dated June 29, 1872, between the widow and the brothers and sisters, by which it was stipulated that for the purpose of avoiding litigation incident to the determination of the rights of the parties under said will, "it is mutually agreed that the moiety of said income now due and unpaid shall be paid to the said brothers and sisters, and all income hereafter to accrue and become payable until the time that the principal becomes payable on the death of the said widow shall be payable and paid semi-annually by the executors, one half to Mrs. Hales and the one-eighth each to the brothers and sisters."

The Auditing Judge found that while the terms of the will did not provide any disposition of the income of one-half the residue accruing after the death of testator's mother, and before the death of the widow, nevertheless in such event no intestacy occurred as to said income, but the death of the mother before the widow worked an acceleration of the legacy to the brothers and sisters during the lifetime of the widow; and further, that as the distribution of their one-half of the residue during the widow's lifetime worked her no harm, the agreement of June 29, 1872, should be rescinded so far as relates to the payments of their shares. He therefore decreed that the distribution as set forth at the first audit should be allowed to stand.

To this decree exceptions were filed which were afterwards sustained, the Court ordering the distribution to be set aside, and decreeing that the whole balance of the principal in the executor's hands should be retained by him and the income paid semi-annually to the widow and brothers and sisters until the widow's death, in conformity with the agreement of June 29, 1872.

The appellants thereupon took this appeal, assigning for error the action of the Court in sustaining the exceptions, and awarding distribution as aforesaid.

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William Ernst, for appellants.

There being a forfeiture by reason of the widow's remarriage, the estate so forfeited passed into the residue of the estate even though the will did not in express terms so direct. Hence there was no intestacy.

Taylor *v.* Birmingham, 5 Casey, 306.
Hortz's Estate, 2 Wright, 422.
Patterson *v.* Swallow, 8 Wright, 487.
Woolmer's Estate, 3 Whart. 478.
Leake *v.* Robinson, 2 Merivale, 392.
Nyce's Estate, 5 W. & S. 254.
Bondbright's Appeal, 9 WEEKLY NOTES, 475.
Brown's Appeal, 3 Casey, 62.
Coover's Appeal, 24 Smith, 143.

If the effect of the agreement be to establish a trust, not being a testamentary trust, the Orphans' Court had no jurisdiction.

Landis's Estate, 2 Phil. 217.

There is no further need of the trust, and it should therefore no longer endure.

Culbertson's Appeal, 26 Sm. 145.
Henderson's Estate, 39 Leg. Int. (1882) 450.

G. Heide Norris and *S. Henry Norris*, for appellee.

The agreement was a compromise of doubtful rights, and cannot be set aside without the consent of every party to it.

Bispham's Equity, p. 192.
Walworth *v.* Abel, 2 Sm. 373.
Worrall's Accounts, 5 W. & S. 111.
Barton *v.* Wells, 5 Wh. 226.
Lies *v.* Stub, 6 W. 48.
Jourdan *v.* Jourdan, 9 S. & R. 268.

February 4, 1884. THE COURT. It is quite possible that but for the agreement of June 29, 1872, the appellants would now be entitled to the distribution of one-half of the corpus of the estate of George S. Wilen. But upon that day the legatees and the widow, being the only parties in interest, entered into an agreement under seal which provides, *inter alia*, that "to avoid the expense of litigation incident to the determination of the rights of the parties under said will, it is mutually agreed that the moiety of said income, now due and unpaid, shall be paid to the said brothers and sisters, namely, William Wilen, John Wilen, Mary Ann Gifford, and Susannah Banes, and all income hereafter to accrue and become payable until the time that the principal becomes payable on the death of the said widow, shall be payable and paid by the executors as follows: one-half to Mrs. Emily Hales, one-eighth to William Wilen, one-eighth to John Wilen, one-eighth to Mary Ann Gifford, and the death of the widow, one-half of the income in the mean time to be paid to the widow and the other half to be distributed among the appellants in the proportions above stated.

This arrangement appears to have been satisfactory to all the parties concerned until the filing by the surviving executor of George S. Wilen, deceased, of the second account of said estate, when the appellants claimed that under the will of the said testator, they are entitled to receive the one-half of the corpus of the estate now, and are not compelled to wait therefor until the death of the widow. The latter resists such distribution, and in this was sustained by the Court below.

This brings us at once to the validity of the agreement, for its language is so clear that no dispute can arise as to its terms. If it is binding, it is useless to discuss any of the questions of law arising under the will, for in such case the parties have made a law unto themselves.

The parties to this agreement were all *sui juris*, and the instrument was under seal. There is no allegation of fraud, and the contract is not obnoxious to any law or rule of public policy. It was a lawful agreement between parties able to contract. The object of it is expressly stated to be "to avoid the expense of litigation incident to the determination of the rights of the parties under said will." The settlement of family disputes has been repeatedly held to be a sufficient consideration to support a contract. The law is thus laid down by Mr. Bispham in his work on Equity at page 192: "And family compromises, especially if they are made in good faith, and with full disclosure, are favored in equity, and may be sustained by the Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between strangers." It was said by THOMPSON, J., in Walworth *v.* Abel (2 P. F. S. 370), that "Family arrangements are favorites of the law, and when fairly made, are never allowed to be disturbed by the parties or any other for them." See, also, Burkholder's Appeal, decided at the present term (14 WEEKLY NOTES, 234). We might multiply authorities upon this point, but the law is too well settled to require it.

The appellants have received the benefits, whatever they may be, under this agreement, and their turn having been served they now seek to repudiate it. They say that the widow has no

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could not be in anywise affected by the distribution claimed. Under the will, she could only have the interest upon one-half the corpus of the estate. If that half should be lost by a bad investment, or any of the mischances that sometimes occur even with the most careful trustees, she would lose her income entirely. But with the corpus kept together and a portion only lost, it may be a question whether she would not be entitled to one-half the income of the residue. So that we cannot say in this proceeding that one-half the income of the whole may not be more valuable to her than the income of a moiety.

This view renders the discussion of any of the remaining questions unnecessary.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

Opinion by PAXSON, J. J. P. K.

Jan. '84, 138. March 21, 1884.

Herman, Administrator, v. Rinker.

Judgment—Judgment note—Evidence—Statute of Limitations—Pleading—Amendment.

Judgment having been entered upon a judgment note more than ten years after date, without complying with a rule of Court requiring a special application to the Court, accompanied by an affidavit, for leave to enter judgment in such case, it is within the discretion of the Court on application of defendant to permit such judgment to be opened so that the Statute of Limitations may be pleaded.

A judgment as above was entered upon a joint and several judgment note against two of the makers, the third being dead. The Court, on application of one of the defendants opened the judgment as to all of them, and an issue was made up at bar, the note to stand for the declaration and defendant to plead the Statute of Limitations:

Held, that plaintiff should have been allowed to put the note and record in evidence in order to enable him to follow the same up with evidence tolling the statute.

The above offer of evidence being refused, plaintiff offered to prove a payment on account by one of the defendants, and also moved to amend the issue at bar so that it should stand as against the defendant alone making such payment:

Held, that the amendment should have been permitted.

Error to the Common Pleas of Wyoming County.

Judgment was entered by John C. Herman, administrator of George Rinker, against execution. And I, 7 3-10 per cent. interest, hereby confess judgment for said sum with interest and cost of entry. And I also hereby waive the rights of inquisition, and all exemption laws of this Commonwealth.

JOHN W. RINKER.
ABRAHAM RINKER, SEN.
JAS. W. RINKER.

(Indorsed), June 4, 1873. Received on the within note five dollars. Received on the within fifty dollars. June 29, 1877. ABRAHAM RINKER.

Judgment was entered up August 15, 1881, on this note against John W. Rinker, and Abraham Rinker, Senior, James W. Rinker having previously died. The plaintiff omitted to comply with a rule of Court, which provided that if the warrant be above ten and under twenty years old the Court must be moved for leave to enter judgment and an affidavit accompany the motion to the effect that the warrant was duly executed, the money is unpaid, and the parties are living.

A motion was subsequently made upon application of Abraham Rinker, Senior, to strike off the judgment, which was refused. The Court, however, opened the judgment as to both the defendants for the purpose of letting in the plea of the Statute of Limitations. The issue was made up at bar, the note to stand for the declaration, and defendant to plead the Statute of Limitations.

Upon the trial, plaintiff offered the note and docket entries in the case. This offer the Court rejected, as being barred by the Statute of Limitations.

Plaintiff then renewed the offer accompanying it with an offer to show a payment made by Abraham Rinker within six years. This offer was rejected on the ground that there being a joint issue as to two defendants, evidence which would toll the statute as to one only was inadmissible. Plaintiff then moved to amend his declaration so as to declare against Abraham Rinker alone. This motion was disallowed, and the Court instructed the jury to find a verdict for defendants.

Plaintiff thereupon took this writ, assigning for error the action of the Court below in opening the judgment, in overruling his offer of evidence, and in refusing the motion to amend his declaration as above set forth.

John A. Sittster, for plaintiff in error.

The note was joint and several.

The opening of a judgment entered under the Act of 1806 is but the exercise of the equitable power of the Court, and if the [illegible]

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W. M. Piatt & Sons, for defendant in error.

The note was entered up in violation of the rule of Court.

A payment on account or acknowledgment by one of two joint debtors will not take the case out of the statute as to the others.

Coleman *v.* Fobes, 10 Harris, 156.
Levy *v.* Cadet, 17 S. & R. 126.
Searight *v.* Craighead, 1 P. & W. 135.
Houser *v.* Irvine, 3 W. & S. 345.
Schoneman *v.* Fegley, 7 Barr, 433.

The application to declare against one in an issue against two was properly refused.

April 14, 1884. THE COURT. The judgment in this case was entered by virtue of a warrant of attorney against two of the three makers of a promissory note. The third was dead when the judgment was entered, and as to him the warrant was a nullity. The note was not under seal, was dated July 1, 1867, and the judgment was entered August 15, 1881, without a compliance with the rule of Court which requires an application to the Court in term time, or to a Judge in vacation, for leave to enter judgment where the warrant is over ten or under twenty years old, which application must be founded upon an affidavit of the due execution of the warrant or written power, and that the money is unpaid. A motion was subsequently made in the Court below, upon the application of Abraham Rinker, one of the defendants, to strike off the judgment. This motion was refused. The Court, however, opened the judgment as to both the defendants, for the sole purpose, as appears from the record, to let in the plea of the Statute of Limitations. There was a time when the statute was regarded with so much disfavor that it was said in Brown *v.* Sutter (1 Dallas, 239) that the Court would never open a regular judgment to let in the plea of the Statute of Limitations, but as was held by Chief Justice GIBSON in the later case of Ekel *v.* Snevily in 3 W. & S. 272: "As the plea of that statute has since been considered in Shock *v.* McChesney (4 Yeates, 507), and The Bank *v.* Israel (6 S. & R. 294), to be no longer an unconscionable one, the rule of practice would hardly be held so now." And there seems a propriety in the present case of opening the judgment to let in the plea of the statute inasmuch as the judgment was entered without leave of Court, or the affidavit required thereby, upon a note which upon its face was then barred by the statute. In any event it was [illegible] Court opening the same. This offer the Court rejected upon the ground that the note was barred by the statute. We cannot sustain this ruling. It is no reason for rejecting the note that upon its face it was barred by the statute. It is true the Statute of Limitations, if pleaded, may bar it, but evidence may be given which will take it out of the operation of the statute, and this cannot be known until all the evidence is heard. (Boggs *v.* Bard, 2 Rawle, 102.) The plaintiff must make a beginning with his proof. The first step is to offer the note, and if he cannot take the first step he cannot get to the jury at all, although he may have abundant evidence to take the note out of the statute. And in such case the action must be brought upon the original undertaking, and not upon the new promise; and when the statute is pleaded the new promise is proved to show that the objection to the old promise has been waived. (Yaw *v.* Kerr, 11 Wright, 333.)

Failing to get his note in evidence the plaintiff renewed his offer, and accompanied it with an offer to show a payment made by Abraham Rinker within six years. This would clearly take the note out of the statute as to him. The Court rejected this offer also, partly upon the ground that there was a joint issue as to two defendants; that the evidence tolled the statute as to one of them only, and that there could be no judgment against the other; whereupon the plaintiff moved to amend the declaration in the feigned issue so as to declare against Abraham Rinker alone. The amendment was disallowed by the Court. This, with the ruling out of the evidence referred to, put the plaintiff out of Court.

We think the amendment should have been allowed, and the evidence received. The pleadings were of the most informal character. After the jury had been called in the box it was discovered that no issue had been made up. It was then made up at bar; the note to stand for the declaration, and the defendant to plead the Statute of Limitations. It will thus be seen that the issue was made up as to one defendant against whom no judgment had been entered, and as to another defendant who did not ask to have the judgment opened. The issue should have been made up in the first instance as to Abraham Rinker. He was the only actor, and the case should have been tried as to him alone. The note was several as well as joint. The plaintiff was entitled to a judgment against him in the absence of defence. Whether a judgment in

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the informal nature of the pleadings. It was certainly a loose way of framing an issue, and is not to be commended. We think, however, that the ordinary rules of pleading should be applied in such cases, and no good reason is apparent why the amendment should not have been allowed.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J. J. P. K.

Jan. '84, 236. February 8, 1884.

McFate's Appeal.

Boroughs—Incorporation and enlargement of boroughs—Acts of April 1, 1834, and April 3, 1851, construed—Presumptions as to irregular records after lapse of time.

The Act of April 1, 1834 (P. L. 163), providing for the incorporation of boroughs, remains in force so far as it is not repugnant to and is not altered or supplied by later enactments. The 30th sec. of the Act of April 3, 1851 (P. L. 320), requiring the burgess and council, on petition of not less than twenty freeholders, owners of lots in any section wherein the petitioners and others reside, adjacent to the borough, to declare by ordinance the admission of said section as part of the borough, does not repeal the provision of the Act of April 1, 1834, authorizing the Court of Quarter Sessions to declare needful alterations of borough limits whenever expedient.

Where the records in the Quarter Sessions of the original incorporation of a borough, as also those of the subsequent enlargement of its limits, are lost, but the petition and decree are recorded in the Recorder's office as provided for by the Act, such record is evidence, and cannot be questioned in a proceeding in equity to restrain the borough from exercising jurisdiction over a section included in the enlarged limits.

In such case it is presumed that the Court of Quarter Sessions required strict compliance with the provisions of the Act before the decree was made and recorded, especially after lapse of time, and when the citizens residing within the borough limits thereafter acted as if the decree were valid.

Appeal of William McFate and others from a decree of the Common Pleas of Crawford County.

Bill in equity, wherein William McFate, John H. Homan, and Elizabeth Homan were complainants, and the Borough of Cochranton, James Fleming, burgess, and D. H. McFate, Gilbert Doubet, James Coley, James Patton, and James Adams, members of the council of said borough, were defendants, to restrain the latter from exercising jurisdiction of said borough over the lands of complainants.

The Master, to whom the cause was referred (James W. Smith, Esq.), found the facts to be as follows: That on April 5, 1855, the defendant borough was incorporated by decree of the Quarter Sessions, of Crawford County, as was shown by the record of the proceedings in the Recorder's office; that upon the petition of citizens of the borough and of Thos. Cochrane and H. H. Thompson, the then owners of complainants' lands, presented to the Court of Quarter Sessions, and approved by the Grand Jury, August 10, 1858, the Court made a decree, enlarging the limits of said borough, so as to include the lands now owned by complainants, as was also shown by the record of the proceedings in the Recorder's office; that the Clerk of the Court was unable, however, to find in his office any record of either the original incorporation or the extension of the limits of the borough; that the records of the Sessions show that H. H. Thompson was elected a school director in said borough in 1859, and T. K. Cochran, a Justice of the Peace in 1861, and they both paid their taxes, voted, and recognized the authority of the borough over their land; that there never were twenty freehold owners of complainants' lands, and said lands were not annexed to the borough by ordinance of the burgess and council in pursuance of the Act of April 3, 1851 (P. L. 320), but by the decree of the Quarter Sessions by virtue of and in pursuance of the provisions of the Act of April 1, 1834 (P. L. 163), which was not repealed by the Act of 1851 aforesaid.

The Master accordingly recommended that the bill be dismissed.

Exceptions to the report being afterwards filed on behalf of complainants, it was confirmed by the Court, and a decree entered accordingly, whereupon complainants took this appeal, assigning for error the action of the Court in dismissing the bill.

Brawley and *McClintock*, for appellants.

The Act of 1851 is a general Act of Assembly regulating the incorporation of boroughs, and revising the whole subject matter, and, consequently, repeals the Act of 1834.

Sedgwick on Constitutional Law, p. 105.
Johnston's Estate, 9 C. 515.
Com. *v.* Cromley, 1 Ash. 181.
Bartlet *v.* King, 12 Mass. 537.
Nichols *v.* Squire, 5 Pick. 168.
Daviess *v.* Fairbairn, 3 How. 636.
Com. *v.* Cooley, 10 Pick. 36.
Norris *v.* Crocker, 13 How. 429.
U. S. *v.* Tynen, 11 Wall. 92.
King *v.* Cornell, 16 Otto, 396.

The borough of Cochranton was, therefore, incorporated under the Act of 1851, and the borough limits could be extended only in the manner provided by that Act, viz., by the council upon the petition of at least twenty freehold owners. This was not done here; consequently, complainants' land was not legally included within the borough.

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If the borough limits could be enlarged by virtue of the Act of 1834, notwithstanding the Act of 1851, there is no evidence of compliance with the provisions of that Act. It does not appear that the petition was signed by a majority of the freeholders, and there is no evidence that the certificate was entered of record in the Quarter Sessions.

Devore's Appeal, 6 Sm. 164.
1 Green Ev., sec. 501.
Case of the Borough of West Phila., 5 W & S. 281.

John J. Henderson, for appellee.

The Act of 1851 repeals the Act of 1834 only so far as their provisions are repugnant to each other.

Bank *v.* Commonwealth, 10 Barr, 448.
Erie *v.* Bootz, 22 Sm. 199.

Strong presumptions are tolerated in favor of records, after great lapse of time, even though they are incomplete, or appear to have been irregularly kept.

Shaw *v.* Boyd, 2 Jones, 215.

March 3, 1884. THE COURT. By the Act of April 3, 1851, the Courts of Quarter Sessions "shall have power, as provided by law, to incorporate boroughs without regard to the population thereof, which shall be subject to the provisions of this Act." The mode of proceeding is prescribed by the Act of 1834, and that Act remains in force so far as it is not repugnant to, and is not altered or supplied by later enactments. If the several statutes relating to boroughs can stand together the prior are not abrogated by the posterior. This is well settled, as shown in the opinions of the Master and the learned Judge of the Common Pleas. They also refer to the legislative sense, made apparent by the reference to the Acts of 1834 and 1851, in the Act of June 2, 1871.

The first four sections of the Act of 1834, and the Act of 1851 are *in pari materia*, and are to be construed as one enactment. The one is supplementary, and changes some of the provisions of the other. Section 4 of the Act of 1834 contains the only provision for annulling or altering the charters of boroughs. By the third section the Courts are clothed with power to decree such alteration as may be needful to change the limits of a borough, but this can be done only on like proceedings as are requisite for the incorporation of a borough. The limits may be thus changed, either by enlarging or restricting, as may be expedient. By the thirtieth section of the Act of 1851, the burgess and council are directed and required, on the petition of not less than twenty freeholders, owners of lots in any section whereon the petitioners and others reside, adjacent to the borough, to declare by ordinance the admission of said section as part of the borough. This provides for a single case, and upon no other conditions have the borough officers anything to do with changing borough limits. To hold that such enactment repeals a prior one which authorized the Courts to decree needful alterations of borough limits, whenever expedient, would be against all precedents. Manifestly, the Acts of 1834 and 1851 are not in all respects repugnant to each other; the later does not cover the whole subject of the earlier, nor does it contain any substitution for some of the provisions of the first. Little, if anything, can be predicated of the titles of either of these Acts in their construction, for when they were enacted it was not essential that the bill be limited to one subject, clearly expressed in its title. All boroughs incorporated since the Act of 1851, by the Courts, are subject to the restrictions, and possess the powers and privileges which it confers, and the proceedings, including the recording in the Recorder's office, are prescribed by the Act of 1834. It is admitted in the bill that the borough of Cochranton was incorporated by the Court of Quarter Sessions on April 5, 1855, as appears by the record in the Recorder's office. Then, the borough was incorporated not only under the Act of 1851, but under the Act of 1834.

The Master finds that on the petition of citizens of said borough and of T. K. Cochran and H. H. Thompson, the same Court, on November 8, 1858, made a decree enlarging the limits of the borough so as to include the lands of said Cochran and Thompson, which lands are the same now owned by the plaintiffs, and described in the third paragraph of the bill; that the clerk of the Court is unable to find any record in his office either of the original incorporation of the borough or of the enlargement of its limits; and that the petition and decree for said enlargement are recorded in the Recorder's office. He further finds that said Thompson was elected school director in 1859, and said Cochran was elected a Justice of the Peace in 1861 in said borough; that they respectively accepted said offices; that said Thompson and Cochran resided on said lands at the date of the decree, which included them within the borough, and continued to reside thereon until their removal from the county; and that they and their successors to the title to said lands recognized the authority of said borough over them until the filing of this bill. The bill was filed in 1882, and the plaintiffs deny that said lands were lawfully brought within the borough limits.

The application was under the third section of the Act of 1834. On August 10, 1858, the Grand Jury approved of and recommended the prayer of the petition. On the 8th of November then next the decree was made, and on November 9, 1858, the petition and decree were recorded.

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The appellants contend that there is no evidence of the lawful enlargement of the limits. By the terms of the statute, the incorporation takes effect from the date of the recording of the petition and decree in the Recorder's office. Hence, that record is evidence, and it is the only evidence that can be adduced when the records of the Court are lost. Here there is no other evidence of the original incorporation or enlargement of limits. The statute prescribes what matters shall be set forth in the application, and that it shall be signed by a majority of the freeholders. It ought to appear of record that a majority of the freeholders signed the petition, but it is not expressly required that this fact shall be stated therein. The Grand Jury should make investigation, and find that all the conditions of the Act have been complied with, before certifying their approval; and the Court would require evidence that a majority had signed, before referring the petition to the Grand Jury. Strong presumptions are allowed in favor of records irregularly kept, after a great lapse of time. It is presumed, under such circumstances, that Courts did what the law required them to do, and that omissions were the result of carlessness or ignorance on the part of the clerks. (Shaw *v.* Boyd, 12 Pa. St. 215.) The two persons who owned all the lands the plaintiffs now own, joined in the petition; soon after the decree was made, each of them was elected to office in the borough, they and those holding under them residing on said lands for twenty-four years, voted, paid taxes, and exercised the rights of citizens of the borough; all the citizens of the borough, during said time, acted as if the decree were valid, and now it is well "to presume that what has been was done of right and not of wrong."

Decree affirmed, and appeal dismissed at cost of appellants.

Opinion by TRUNKEY, J. J. P. K.

Common Pleas—Law.

C. P. No. 4. March 7, 1884.

Patent v. Philadelphia and Reading Railroad Co.

Constitutional law—Art. XVI. sec. 8 of the Constitution of 1874—Eminent domain—Consequential damages—Form of action—Obligation of a contract—When not impaired by subsequent legislation.

Under Art. XVI. sec. 8 of the Constitution of Pennsylvania, all corporations invested with the privilege of taking private property for public use must make just compensation for property taken, injured, or destroyed; this section was intended to apply to private corporations chartered before the adoption of the Constitution equally with others.

Its provisions do not impair the obligation of a contract, and are not unconstitutional under Art. I. sec. 10 of the Constitution of the United States.

Duncan *v.* Penna. R. R., 7 WEEKLY NOTES, 551, followed.

Where just compensation has not been paid or secured as provided by Art. XVI. sec. 8 of the Constitution for property so injured or destroyed, the proper remedy is an action on the case for damages.

A railroad company chartered before the adoption of the Constitution of 1874, and invested by its charter with the right of eminent domain, shifted and relaid its tracks nearer to the plaintiff's house, thus depreciating its value, though actually taking none of the plaintiff's property:

Held, that an action on the case lay against the railroad company for the damages thus occasioned.

Sur demurrer to plea.

The declaration, in case, set forth that the plaintiff was the owner of the reversion of a certain house on the northeasterly side of Cresson Street; that the defendant was a railroad company invested with the privilege of taking private property for public use; and was in possession of certain tracks on the southwesterly side of Cresson Street, leaving on the northeasterly side of the street a public cartway; that the defendant without making compensation to the plaintiff shifted its tracks to the northeasterly side of Cresson Street close to the curbstone, whereby all access to the front of the said house by vehicles was prevented; that the house was thereby rendered unsafe, and had depreciated in value.

The plea set forth that the Philadelphia, Germantown, and Norristown R. R. Co. was a corporation created by the Act of Assembly approved February 17, 1831, and its supplements, with power to make and establish a double track railroad, not exceeding sixty-six feet in width, on a certain route, and to make and establish all expedient works, edifices, and devices thereto; and set out in full the only provisions of the Acts relating to the power to enter upon lands and liability therefor, which showed no liability except for land taken and occupied, and stone, etc., taken and carried away. That there was a certain street in Manayunk called Cresson Street, and that said railroad was erected and established thereupon.

That the defendant, under an Act of Assembly approved April 23, 1861, became the lessee of the said road and all its franchises.

That by Act approved August 23, 1864, and subsequent legislation, the defendant had power, with the consent of the corporation owning the same, to straighten, widen, or construct additional tracks upon any of the railroads leased by

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it, and in the name of the several roads leased by it to enter upon and hold any land in the manner provided in the Act of Assembly approved February 19, 1849.

That defendant improved the alignment of the said road on Cresson Street, by moving it a short distance, less than eight feet, opposite plaintiff's house, and within the original sixty-six feet, in the manner shown by a plan annexed to said plea; *without this* that the defendant by the said straightening and improving had wrongfully injured the plaintiff in manner and form as in the said declaration set forth.

The plaintiff then demurred, and assigned, *inter alia*, as a reason therefor, that the matters alleged in the plea merely showed that the defendant had authority to make the alleged improvement, but showed no exemption from liability for damages occasioned thereby.

James P. Dolman and *John Dolman*, for the demurrer.

Under the new Constitution consequential damages can be recovered.

Duncan *v.* R. R. Co., 7 WEEKLY NOTES, 551, 556.
Minnig *v.* R. R. Co., 11 Id. 297.
City of Reading *v.* Althouse, 9 Id. 22.
Pusey *v.* City of Allegheny, 10 Id. 561.
R. R. Co. *v.* Bruce, 12 Id. 554.

Section 8 of Art. XVI. was intended to apply to existing corporations. Its collocation shows it to be a regulation of corporations, not a limitation of legislative authority; while section 2 of the same article shows a clear intent that the Constitution should apply to existing corporations, but supposes them, in some respects, beyond the power of the people.

This extension of liability does not impair any of the obligations of a contract. When a State contracts with a private person, it yet in its capacity of sovereign retains the right to control the property or franchise granted "precisely as it might the interest acquired under any contract between two individuals."

Turnpike Co. *v.* Ballard, 2 Metc. (Ky.) 165.
Satterlee *v.* Matthewson, 2 Peters, 380.
Jackson *v.* Lamphire, 3 Id. 280.
Beer Co. *v.* Massachusetts, 97 U. S. 25.
Fertilizing Co. *v.* Hyde Park, Id. 659.

The exact point has been decided in Iowa.

Drady *v.* R. R. Co., 10 N. W. Rep. (N. S.) 754.
Mulholland *v.* R. R. Co., 10 Am. and Eng. R. R. Cases, 99.

The form of action is proper, there being no statutory remedy.

Thomas Hart, Jr., for defendant.

The authority conferred in the Act of incorporation was amply sufficient to enable the railway was entirely within that width. It was not bound to exert its whole authority in the beginning.

R. R. Co. *v.* Williams, 4 P. F. Sm. 103.
R. R. Co. *v.* Speer, 6 Id. 325.
Black *v.* R. R. Co., 8 Id. 249.
R. R. Co. *v.* R. R. Co., 5 Am. and Eng. R. R. Cases, 389.
Wilson *v.* P. & R. R. R. Co., 5 WEEKLY NOTES, 185.
Pierce on Railroads (1881), p. 159, notes 4 to 7; p. 160, notes 1 to 5.

The defendant is not liable irrespective of the new Constitution.

Snyder *v.* R. R. Co., 5 P. F. Sm. 340.
R. R. Co. *v.* Speer, *supra*.

The new Constitution was not intended to apply to existing corporations.

Hays *v.* Commonwealth, 1 Norris, 518.
Ahl *v.* Rhoads, 3 Id. 319.
Lewis *v.* Jeffries, 5 Id. 340.

Where the Legislature omits in the original grant of privileges to annex the liability for consequential damages, after the completion of its contract by the organization of the company, the exercise of the powers conferred cannot be made dependent on a new liability.

Long's App., 6 Norris, 114, 117.
P. R. R. Co. *v.* Langdon, 11 Id. 21.
Navigation Co. *v.* Coon, 6 Barr, 379.
Same *v.* Same, 6 W. & S. 101.
Henry *v.* Bridge Co., 8 W. & S. 85.
Boom Co. *v.* Sanderson, 32 P. F. Smith, 402.
Watson *v.* R. R. Co., 1 Wr. 469.
R. R. Co. *v.* Young, 9 Casey, 175, 181.
Shrunk *v.* Navigation Co., 14 S. & R. 71, 82.

The defendant cannot be made liable in an action founded on tort.

McKinney *v.* Navigation Co., 2 Harris, 65.
Mifflin *v.* R. R. Co., 4 Id. 182.
Struthers *v.* Ry. Co., 6 Norris, 282.
Koch *v.* Water Co., 15 P. F. Sm. 288.
R. R. Co. *v.* McLanahan, 9 Id. 23.
White *v.* McKeesport, 40 Leg. Int. 90.

May 31, 1884. THE COURT. The 8th section of the 16th Article of the Constitution declares that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury or destruction." There can be no doubt that the object of this provision was to redress a grievance from which the people of this State had long suffered, and for which no adequate remedy had been found in the Constitution of 1838 or that of 1790, in consequence of the strict construction put upon the provisions bearing upon this subject by the Supreme Court, and steadily maintained until the organic law itself

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pensation being made," and that "every man for an *injury* done him in his lands, goods, person or reputation, shall have remedy by due course of law." The Constitution of 1838 had retained these provisions and added another, viz.: "The Legislature shall not invest any corporate body or individual with the privilege of taking private property for public use without requiring such corporation or individual to make compensation to the owners of said property or give adequate security therefor before such property shall be taken."

It is not a little remarkable that in the first case which came before the Court involving the right to compensation for consequential injuries, The Philada. & Trenton R. R. Co. (6 Wh. 25), Chief Justice GIBSON who delivered the opinion, of the Court, seems to have regarded the Constitution of 1838 as having "narrowed the former prohibition to a taking of private property for public use *by a corporation*," whereas it is apparent that the Constitution of 1838 contained not only the new clause last quoted, but in addition thereto all the clauses of the Constitution of 1790 bearing upon the same subject. The Philada. & Trenton R. R. Co. (6 Wh. 25) decided that the word "taken" in the Constitution was to be interpreted literally, that is, that it only extended to an *actual seizure* of property, and that when therefore the injury, in the language of Chief Justice GIBSON, extended only to "a depreciation of property by decreasing the enjoyment of it," the Constitution afforded no protection. I have spoken of the Philada. & Trenton R. R. case as the first adjudication upon the subject, because it must be clear to any person who will carefully consider the case of The Commonwealth *v.* Richter (1 Penna. R. 467), that although it is cited in the opinion delivered in the Phila. & Trenton R. R. case, the decision, so far as it related to Richter's claim for damages for the destruction of his spring by the construction of the Pennsylvania Canal, did not rest upon any claim for consequential damages, nor did its denial turn upon any such question. His claim was rejected because the spring was between low and high-water mark on the bank of the Susquehanna River, and the State, it was said by HUSTON, J., in the opinion, had never sold any land below high-water mark, and therefore it was "ridiculous to talk of a man being deprived of the use of what was never his own." The question of consequential damages does not appear to have been either discussed or determined in that case. The case was exclusively between the State and the claimants, was decided under the Constitution of 1790, and no question arose in regard to corporate rights or responsibility. However, in The Monongahela Navigation Co. *v.* Coons (6 W. & S. 101), which arose in 1843, and was decided under the Constitution of 1838, the doctrine laid down in the Philada. & Trenton R. R. case was reaffirmed with greater emphasis in a much longer and more elaborate opinion by the same eminent Judge who had delivered the opinion in the latter case, but not, however, without evidences of a plain perception of the injustice arising from the operation of the rule, and a confessed regret at the supposed compulsion put upon the Court by the words of the Constitution, and also not without a vigorous dissent from at least one member of the Court. "It is not enough," said the Chief Justice (after dwelling upon the necessity of giving a literal interpretation to the word "taken" in the Constitution), "to set before us a case of moral wrong, without showing that we have legal power to redress it." And the injured parties were dismissed with this expression of commiseration for their hard fortune: "The plaintiffs have at least the miserable good luck to know that they have companions in misfortune; would that it were in our power to afford them more solid consolation!" Judge HUSTON did not forget in his dissenting opinion to point out the fact that the clause in the Constitution of 1838 relative to the "taking" of private property was not the only clause applicable to the subject in hand, but that the clause which declared that "every man for an *injury* done him in his lands, goods, person, or reputation, shall have remedy by due course of law," was entitled to its just weight in the decision of such a question of construction, and was comprehensive enough to include the plaintiff's case. But the doctrine had the sanction of a great name and the support of a vigorous intellect. And for more than thirty years the Monongahela Navigation Company *v.* Coons and the Philada. & Trenton R. R. case, with the long train of similar decisions which followed loyally in their wake, were the undeniable law of this State, and a sure panoply of defence for corporations against all attempts to compel them to render satisfaction for consequential injuries to and destruction of private property.

But this state of things was forever ended by the Constitution of 1874, which cuts up all those cases by the very roots, so that not a shred of them can possibly survive, and proclaims a new rule of right founded in better reason and more equal justice. The Constitution of 1874 expressly declares that compensation shall be made not only for property *taken*, but for property *injured* or destroyed. And the effect of these words in the total abrogation of the former rule has been promptly recognized by the Supreme Court (City of Reading *v.* Althouse, 12 Norris, 400; Pusey *v.* City of Allegheny, 2 Outerbridge, 522). It was well said by GORDON,

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J., in the case last cited, that it is now "idle to recur to decisions, the authority of which, as to all present and future cases, is by this provision annulled."

A new effort is, however, now made on behalf of those bodies to open a way of escape from the plain provisions of the Constitution, and to continue the old immunity from responsibility for consequential injuries. If this can be successfully accomplished then the purpose of the Convention which framed the Constitution will have been rendered altogether futile in this respect, and the people who adopted it will learn with surprise that they have been deluded by a vain pretence of words into supposing that they were to be shielded in future from irresponsible aggressions upon their rights.

It is said in the first place that the Constitution did not intend that this provision should apply to existing corporations, but upon what ground this is alleged it is hard to understand. The language of the provision is, "municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation," etc. "Invested" means now invested. It does not say corporations which shall hereafter be invested. The language used imports a reference to all corporations invested with this power, whether now constituted or hereafter to be constituted. There is not a word in the section which furnishes the least foundation for an implication that only future corporations were to be subject to this provision. The Constitution took effect on the 1st January, 1874, and all its provisions were to be enforced after that date unless otherwise expressly provided in the instrument itself. All consequential injuries suffered at the hands of corporations after the Constitution should go into effect were therefore clearly intended to be embraced in this provision. It is an extravagant assumption unsupported by any sound reason to say that the Constitution intended that all existing corporations should continue to the end of time to inflict injuries for which the people could have no redress, and that only corporations thereafter chartered should be amenable to this just and wholesome provision. To say this is to say that the framers of the Constitution intended to perpetuate the old injustice, the old exemption from responsibility, and the old evils which it was supposed to be the purpose of this clause to prevent; that they intended to protect the people against the injurious acts of future corporations, but to leave them forever at the mercy of the old ones. No warrant for such question was intended to apply to existing corporations which have not accepted the provisions of the Constitution of 1874, it is a provision which impairs the obligation of contracts, and is therefore within the prohibition contained in Article I. sec. 10, of the Constitution of the United States. This is in effect saying that because no remedy existed for wrongs of this nature at the time when the State delegated to the defendants its power of eminent domain, and because they might at that time have exercised this power without any possibility of redress for consequential injuries, this amounted to a contract on the part of the State that no Constitution and no laws should ever be adopted or passed by the people of Pennsylvania which should afford a remedy for these wrongs, a contract that the defendants should have a perpetual and irrevocable license to inflict consequential injuries without responsibility for damages. Is it possible that such a power as this exists in our political system—a power to do injustice without the possibility of providing a remedy, even by the reconstruction of the Constitution by the people themselves, and that it exists by an implied contract made by the Legislature with these corporations? Yet this is the power which it is contended all corporations clothed with the right of eminent domain anterior to 1874, and whose charters contain no provisions for requiring satisfaction to be made for consequential injuries, have over the people of this State—a power which it is claimed is backed by Article I. section 10, of the Constitution of the United States, and guaranteed by the whole power of the Federal government. Such an argument carries the doctrine of the inviolability of corporate rights to an extremity never dreamed of before. The answer to this bold assumption is that the constitutional provision in question impairs the obligation of no contract which the State ever made with the defendants. Their corporate franchises remain unimpaired. The right of eminent domain conferred upon them by the State they still possess in the plenitude of the original grant. The State did not contract with them that the people would never change their Constitution, or that in doing so they would never devise means to compel them to render just compensation for injuries to and destruction of private property inflicted in the exercise of the powers delegated to them. The only effect of the change in the Constitution is that a remedy is given where none existed before for the assertion of plain natural rights which always existed, but for the enforcement of which

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just sense an infraction of the compact contained in their charter. We adopt on this subject, without reservation, the opinion so ably expressed by Judge HARE, in the case of Duncan *v.* The Penna. R. R. Co. (13 Norris, 435, 7 WEEKLY NOTES, 556). The illustration put by that learned and distinguished Judge is precisely in point and admits of no answer. "A child was entitled to support from the father at common law, but could not recover damages for the frustration of this right through the parent's death, from injuries occasioned by the negligence of an individual or body corporate. The Act which now affords a remedy for such deprivations, and under which damages are constantly assessed and judgments rendered, is of recent origin, and was passed since the creation of the Penna. R. R. Co., and yet it has never, that I am aware of, been contended that it was invalid as to pre-existing corporations or impaired their chartered privileges. In like manner the citizen has a natural right to compensation for the consequences of acts done for the public benefit that are injurious to his estate or person, and a statute which affords a remedy cannot justly be assailed as unconstitutional. Such an argument would obviously be fallacious if advanced on behalf of an individual, and the principle is the same when the defendant is a corporation." (13 Norris, 435; 7 WEEKLY NOTES, 556.)

None of the cases cited by the defendants' counsel are in conflict with these views. Hays *v.* The Commonwealth (1 Norris, 518), and Ahl *v.* Rhoads (3 Id. 319) were cases which considered the effect of the new Constitution upon charter provisions relating to the internal regulation and administration of pre-existing corporations, and have no bearing upon the present question. Long's Appeal (6 Norris, 114) is an authority against the defendants and not in their favor. The Penna. R. R. Co. *v.* Langdon (11 Norris, 21) was ruled upon the ground that sec. 21 of Art. III. of the Constitution did not repeal the Act of 1868, limiting the amount to be recovered in actions against railroad companies and common carriers to $3000 in cases of personal injuries, and $5000 in case of death, because the words "and such Acts now existing are avoided," applied only to the last clause of sec. 21, respecting limitations of time within which suits may be brought against corporations, and not to the first clause relating to the amount of damages to be recovered. The decision also proceeded upon the ground that the Act of 1868 contained a provision that "upon the acceptance of the provisions hereof by any carrier or corporation, the same shall become a part of its act of incorporation," and that by virtue of this provision the Act of 1868 having been formally accepted by the company had become, in pursuance of the words of the Act, an integral part of their charter, just as if it had been written in the charter when it was granted. The first point ruled in the Penna. R. R. *v* Langdon in regard to the limitation of the repealing clause of sec. 21 of Art. III. of the Constitution, which I have above referred to, is said to have been overruled by The Phila. & Reading R. R. *v.* Hollahan, a recent case not yet reported, which I have not seen.* However that may be, it was never an authority for the position that remedies, given by the new Constitution against corporations in general do not apply to corporations chartered prior to the adoption of that Constitution. On the contrary, Pusey's Appeal (2 Norris, 67) and Bachler's Appeal (9 Norris, 207) are express authorities to the contrary, for it was there decided that the last clause of this very sec. 8 of Art. XVI. which we are now considering, and which constitutes a part of the remedial legislation embraced in the Constitution of 1874, applies to all corporations, whether incorporated before or since the adoption of the Constitution.

Much stress was laid by the defendants' counsel upon the case of the Navigation Co. *v.* Coons (6 Barr, 379), decided in 1847, and, of course, under the Constitution of 1838. Consequential damages were there claimed and allowed, because of an Act of Assembly making the company responsible for such damages, and it was said by the Court that such damages could not have been allowed if the company had not accepted the benefit of another Act, which subjected their charter rights to alteration and control by the Legislature. The reason assigned for this by GIBSON, C. J., in the opinion was, that by the Constitution of 1838 corporations were not liable for consequential injuries where they had not been subjected to such liability by the terms of their charter. In other words, that the Legislature had no constitutional right to impose a liability for consequential injuries except as a part of the condition of the grant of the franchise. If the liability did not appear in the charter, it could not be subsequently imposed, because by the Constitution they were only responsible for an actual taking of the property. The Act would therefore be the imposition of a burden not warranted by the Constitution. It is sufficient to say in answer to this citation that we are not living now under the Constitution of 1838, but under that of 1874, and that the latter in express terms requires the defendants to answer for all consequential injuries occasioned by them since its adoption.

It is unnecessary to follow in detail the multitude of cases upon the law of corporations which the diligent investigation of the defendants' able

* Reported *ante*, p. 505.

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counsel brought to our notice upon the argument of this case. They have only an incidental bearing upon the subject, do not dispose of the vital point at issue, and present no obstacle to the enforcement of the plain language of the Constitution. It is sufficient to say that after a thorough examination of all the cases, and after weighing carefully every consideration presented on that side of the case, we are of opinion that no valid reason can be assigned for making any distinction between municipal and other corporations in construing sec. 8 of Art. XVI. of the Constitution. With regard to the former the effect of the Constitution of 1874, in fixing their responsibility for future consequential injuries, must be regarded as finally settled and determined by The City of Reading *v.* Althouse and Pusey *v.* The City of Allegheny, already cited. The case of the defendants and that of all other private corporations falls within these rulings, for they are alike within the mischief and the remedy, within the reason as well as within the letter of the constitutional provision which makes them alike responsible for property "injured or destroyed" as well as for property "taken."

Upon the other point arising out of the demurrer, viz., the ability of the plaintiff to seek redress in the form of action which he has chosen, an action on the case, we see no reason to doubt that it is the appropriate remedy. Indeed it would seem to be the only available remedy under the circumstances of the case. Neither the charter of the company nor any one of its numerous supplements contains any provision for the assessment of consequential damages. They contemplate damages only where there has been an actual taking of land. There being therefore no special remedy provided by law an action on the case is well brought for the injury. This is the most comprehensive of all forms of action known to the common law. While it will lie for all consequential injuries arising *ex delicto*, and is the appropriate remedy for such injuries, it is also well settled that "where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation and consequential damages," this action lies. (1 Ch. Pl. 135.) And it is for this reason that it embraces within its comprehensive signification the action of assumpsit, which is classified by all writers upon pleading as a species of action on the case. (Steph. on Pleading, 16; 1 Ch. Pl. 132.) Whenever a statute enacts that an individual shall recover damages for an injury, and is silent as to the form of the remedy, this action may be supported (10 Co. 75 b., 2 Inst. 486; 2 Salk. 451; 6 Mod. 26; 1 Ch. Pl. 142), where numerous examples of this are given. "In such action all that is necessary for the plaintiff to do in his declaration in order to make a good cause of action is "to set out the facts out of which the legal obligation arises, the obligation itself, the breach of it, and damage resulting from that breach." (Per LITTLEDALE, J., 5 B. & C. 609; 8 D. & R. 381, s. c.)

These requisites are contained in the plaintiff's declaration in the present case, which sets out in due order the acts committed by the defendants in pursuance of the franchise with which they were invested by the State, the injury thereby done to the plaintiff's property, the defendants' obligation to make just compensation therefor, their breach of the obligation, and the damage resulting to the plaintiff therefrom. It cannot be doubted that these averments constitute a good declaration in case, or that the form of action selected is the appropriate form for the injury of which the plaintiff complains.

As we are of the opinion that the defendants' plea is substantially bad in not setting forth any facts which constitute a defence to the plaintiff's action, it is unnecessary to consider those points of the plaintiff's demurrer which are directed to the mere formal defects of the plea.

Judgment for the plaintiff on the demurrer.

Opinion by THAYER, P. J.

ARNOLD, J., absent at Quarter Sessions.

J. M. G.

C. P. No. 4. June 2, 1884.

Todd v. Lowe.

Practice—Execution—Attachment sur judgment—When it may issue—Attachment sur judgment may be issued on a judgment more than five years old, without being revived, when a fi. fa. has been issued within the five years.

Sur rule to set aside attachment sur judgment.

Judgment was entered against the defendant on March 19, 1877, and a testatum fi. fa. issued on June 5, 1877, which was returned *nulla bona*. On March 22, 1884, a writ of attachment upon the judgment was issued and returned nihil habet as to the defendant and made known to garnishees. On May 24, 1884, the defendant obtained a rule to show cause why the attachment should not be set aside.

Thomas J. Diehl, for the rule.

An attachment sur judgment is an execution as to the defendant. It cannot lawfully be issued on a judgment more than five years old. The judgment must first be revived. A previous execution within the five years will not help it.

Comstock *v.* Kilchenstein, 14 WEEKLY NOTES, 388.

If a testatum fi. fa. be unreturned, a second fi. fa. is irregular and will be set aside.

Gibbs *v.* Atkinson, 1 Clark (P. L. J.), 476.

The return to the testatum fi. fa. in this case was not entered on the docket when this rule

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was taken. Besides, that writ was not supported by a previous affidavit as required by the Act of June 16, 1836, nor preceded by a return of *nulla bona* on a prior writ. Therefore the testatum fi. fa. was irregular and cannot support the attachment.

George M. Conarroe, for the plaintiff.

An alias fi. fa. or other writ of execution may issue after the expiration of five years after the judgment, if a fi. fa. has been sued out within that time, without a sci. fa. to revive.

Young *v.* Taylor, 2 Binn. 218.
Lewis *v.* Smith, 2 S. & R. 142.
Pennock *v.* Hart, 8 S. & R. 378.
Dodge *v.* Casey, 1 Miles, 13.
Landouzy *v.* Seelos, 4 WEEKLY NOTES, 151.

An attachment sur judgment is more than a mere execution; the defendant is warned by it, and he has a day in court, just as he has on a sci. fa. to revive. It may be issued after the expiration of five years with or without a previous execution or judgment of revival.

Shaw *v.* Richards, 2 Miles, 103.
Ogilsby *v.* Lee, 7 W. & S. 444.
Gemmill *v.* Butler, 4 Barr, 232.

It makes no difference whether the defendant is served or not.

Brock *v.* Driebelbies, 2 Leg. Chron. 317.

The testatum fi. fa. has been returned and it is so entered on the docket. Even if it had not been returned that would form no objection to a writ of sci. fa. to revive, nor an attachment sur judgment. Had the money been made on it, that would have been a defence, but it is not cause for setting aside the attachment before the trial.

Stewart *v.* Peterson's Exrs., 13 P. F. Smith, 230.

THE COURT. We think that the practice in this county is supported by the weight of authority. It has prevailed so many years, and been followed in so many cases, that we ought not to depart from it.

Rule discharged. W. H. W.

Orphans' Court.

June 18, 1884.

Eddy's Estate

P. B. Eddy by his will, executed February 10, 1879, after making several bequests to his grand-nephews and nieces, which disposed of only a small portion of his estate, left the residue without direction, saying to his attorney who drew the will, and who told him there was a large residue, "that he would take time to decide about it." Subsequently, on November 22, 1881, he added a codicil, by which he devised the residue to his brother, Josiah Eddy, and his cousin, Isaiah C. Wears, share and share alike. The probate of this will was contested by his grandchildren and heirs-at-law, Frank and Clara Eddy, on the ground of want of testamentary capacity and undue influence; and to the decision of the Register admitting the will to probate an appeal was taken to the Orphans' Court. The facts upon which the contestants relied are fully set forth in the opinion of the Court.

John D. Lewis, *Wm. W. Porter*, and *Ovid F. Johnson*, for contestants.

Arthur Biddle, *Charles F. Corson*, and *George W. Biddle*, contra.

July 5, 1884. THE COURT. Cuthbertson's Appeal (1 Out. 163) laid down a rule of law in the execution of wills, which commends itself to the common understanding no less than to the mind of the profession. Briefly stated, it is that a beneficiary whose legacy is the fruit of his own advice to the testator, backed by the force of a confidential relationship, must show—where that testator is mentally weak—that he fully understood the disposition of his property which is attempted by the will. The testimony now submitted, which has been examined by us with scrupulous care, fails, we think, to bring this case within the operation of that rule, or at least complies substantially with its requirements. It was conflicting, in the sense that there were opposing witnesses and irreconcilable statements; but after eliminating from the mass of irrelevant matter which disfigures the record, the crude opinions, formed upon no perceptible basis of fact, and uttered by persons who could by no courtesy be described as experts, what remains will show that the testator executed the will and codicil with a full and unbiassed appreciation of their meaning. All the circumstances of his history, as they were brought into view by the investigation, disclosed the working of a mind of even phenomenal vigor. By a shrewdness which owed nothing to education, he contrived out of the scanty opportunities which were possible to a

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upon the ground, first, that the testator lacked testamentary capacity when they were executed. It was alleged that he was suffering at their date from one or more attacks of paralysis; and his own declarations to that effect were testified to by a large number of witnesses. The only evidences of this disease which they were able to discover for themselves were his failing memory and his use of a cane, infirmities which they were wholly unwilling to ascribe to his age, then verging on eighty-two years. It was also alleged that he had no knowledge of the value of his property, and that he expected to dispose of it through supernatural agencies. The proof of this was found in his repeated statement that he did not know how many properties he owned, and that the Lord would make his will for him. These statements, the witnesses admitted—without any consciousness that the admission weakened their force—were made in reply to friendly suggestions that certain charities would be suitable objects for his bounty, and to an equally kind, but perhaps impertinent solicitude to know what he was worth. The proneness to generalizing was shown by the declaration of one witness, that he had always regarded the testator as an imbecile, and of another, that no colored man after he had reached the age of fifty is competent to make a will. A minister of decedent's faith, who had unsuccessfully interceded on behalf of a charity, expressed the conviction that the testator was a miser, and was, therefore, and necessarily, insane. This is a candid summary of the contestants' case upon the point of mental unsoundness; and it must read like a burlesque when contrasted with the testator's character in that respect, as drawn by the proponent's testimony, and by the facts which were incidentally developed on both sides. A physician, who had known the testator fourteen years, and who attended him shortly before the codicil was signed, as well as in his last illness, declared that he had no symptoms of having suffered at any time from paralysis, and that he was entirely sane; and he was corroborated in every particular by another physician, who had been acquainted with the decedent for a longer time, and had prescribed for him between the dates of the will and the codicil. It was shown that to the last the testator retained an accurate knowledge of his several properties; that he received their rents and entertained offers for their sale; that he was present in 1882 at different hearings before a Master; that in that year he presided at a meeting of a beneficial society, and advised its incorporation; and, finally, that he attended the class-meetings of his church, and so lately as July, 1882, administered the sacraments. The importance of these facts is apparent, when it is remembered that he wrote his will in 1879, and died in September, 1882.

The other ground of attack, that the testator had been unduly influenced by those to whom he left his residuary estate, cast upon the proponents the burden of showing not only that he was left to his own volition, but that he acted intelligently in the final disposal of his property. The latter point needs no further discussion. If he labored under any misconception, it was in the exaggerated estimate which he put upon its value. Respecting the other point, the only circumstance upon which a doubt can be reasonably hung is, that he gave one-half of the balance of his estate to a relative who, at a remote time, had done him a grievous personal injury. That relative, however, was a brother, and the only one of his blood who, towards the close of decedent's life, appears to have cared for him. Unless we are prepared to believe that neither the lapse of forty years after the occurrence of the wrong, nor the marks of renewed affection on the part of the wrongdoer, could wipe out the hatred which had been engendered, we must explain his generosity in this instance on the same principles by which we account for his parsimony in others. He was estranged, not without cause, from his grandchildren, and in opposition even to the advice of his counsel he cut down the legacy to one of them from $500 to $200. He was opposed to leaving any benefaction to the charities which had been recommended to him, because he had been ill-treated by their officers. On the other hand, his brother had attended him in sickness, and had been entrusted by him with business; and his co-legatee had been raised as a son by the testator, and had certainly never betrayed his kindness. He was reminded, not by the legatees, but by his counsel, both of whom stand high at this bar, that the bulk of his estate was undisposed of by his will. His reply was that he had purposely left his will incomplete in order to gain time for deliberation. The manner of execution of the codicil was in keeping with this utterance. He retained the draft, which had been prepared at his request, for at least a week before signing it, and he executed it in presence of witnesses of his own selection, when both of the residuary legatees were absent. During the ten months which followed, and until within a few hours of his death, he performed acts, both public and private, which were utterly incompatible with the theory of testamentary incapacity. We are averse to the taking from a complainant of the opportunity to submit his controversy to a jury; but upon the proofs before us, which, from their volume, we may safely assume to be exhaustive, we are convinced that a verdict for the proponents would be sustained, and we therefore dismiss the petition for an issue.

Opinion by ASHMAN, J.

PENROSE, J., dissents, on the authority of Cuthbertson's Appeal (*supra*), and Wilson *v.* Mitchell (5 Out. 216). E. F. H.

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WEEKLY NOTES OF CASES.

VOL. XIV.] *THURSDAY, AUG. 7, 1884.* [No. 35.

Supreme Court.

Jan. '84, 139. April 7, 1884.

Swaby's Appeal.

Decedent's estate—Spendthrift trust—Power of appointment.

Where an estate is devised in trust for life, with a power of appointment in the *cestui que trust*, (the estate not to be liable for the debts of the *cestui que trust*) when the *cestui que trust* by will exercises the power, his appointee takes under the will of the original donor, and the estate in his hands is not liable for the debts of the donee.

Appeal, by John H. Swaby, W. and F. Carpenter, John Borden & Bro., and John H. Gemrig, creditors of the estate of William M. King, deceased, from a decree of the Orphans' Court of Philadelphia County, dismissing exceptions to an adjudication made on the audit of the account of F. Gordon Dexter, executor of the will of William M. King, deceased.

Before the Auditing Judge (HANNA, P. J.) the following facts appeared:—

Hon. Edward King, by his last will, devised the residue of his estate to trustees in trust for his nephew, William M. King, during his life, "paying to him the rents, issues, income, and profits thereof as the same shall be received, the same not to be subject or liable to any debt present or future contracted by him, nor by him assignable or transferable, but to remain a permanent provision for him during his life, and upon the death of my said nephew, William M. King, to hold the said estate, real and personal, for such uses and purposes, and for such estates, and for such persons as my said nephew by his last will and testament, or any instrument in the nature of a last will and testament may direct, limit, and appoint," and for want of such appointment, to such persons as would have been entitled to the same under the intestate laws of Pennsylvania, had William M. King died possessed thereof absolutely. He also bequeathed, *inter alia*, an annuity of $200 to Sarah A. Croxton for her life.

William M. King, the nephew of Judge King, died in 1880, having made his will dated the 26th day of January, 1880, as follows:—

"Be it remembered that I, William M. King, of Philadelphia, hereby acting under and by virtue of a power and authority, to and upon me given and conferred in this behalf by the last will of my late uncle, Edward King, as well as in respect to my own individual estate, make this my last will and testament, as follows, namely: I give, devise and bequeath all my individual estate and household goods, plate, furniture, and stores, the estate and property respecting which I have the power of appointment as aforesaid, to my friend, F. Gordon Dexter, of Boston, in the State of Massachusetts, to have and to hold the same, to his heirs, successors and assigns forever, but upon the following uses and trusts concerning the same, namely" to invest and pay the income to his wife during her life, and at her death to convey and pay over the same to such persons as she may by will appoint. And he appointed F. Gordon Dexter executor of his said will.

On the settlement of Judge King's estate in December, 1882, Swaby and the other creditors claimed that the fund was liable for the debts of William M. King, which amounted to over $1700. The Orphans' Court, however, awarded the whole fund to F. Gordon Dexter in trust for the purposes of the will of William M. King, after payment of the annuity to Sarah A. Croxton. Exceptions were filed to this award on the ground that the Auditing Judge erred in not surcharging the accountant with so much of the estate of Edward King, deceased, as would pay the debts of decedent, and in not holding that by the execution of the general power of appointment given to William M. King, by the will of Edward King, the estate formerly of the latter became liable to the debts of William M. King.

The Court subsequently dismissed the exceptions and confirmed the adjudication.

Swaby and the other creditors thereupon took this appeal, assigning for error the action of the Court in dismissing their exceptions.

John Samuel (*Geo. Sergeant* with him), for appellant.

Whilst technically the donee of a *general* power has no estate in the subject of the power, yet for all of the purposes for which property exists he (when he executes the power) is the real owner. The absolute power of disposition of property cannot be dissociated in fact, however it may be in law, from real ownership. Dominion constitutes practical—though it may not legal—ownership.

It is for this reason that courts of equity have said to the donee of the power, "Although the estate is not yours, yet you are permitted to treat it as yours; and when you treat it as yours, we will do the same, and in favor of your creditors will treat it as if you had in law what you have in fact, an absolute estate in it."

Johnson *v.* Cushing, 15 New Hampshire R., p. 307.
Tallmadge *v.* Sill, 21 Barbour, S. C. R. 53.
4 Kent Com. 333.
2 Sugden on Powers, chap. 8, sec. 3.

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R. C. McMurtrie, for appellee.

If the rule of Fisher *v.* Taylor (2 Rawle, 33), now generally known in the profession as that of Vaux *v.* Parke, is to continue, it is merely absurd to assert that the existence of the capacity to name the beneficiary of a fund makes the fund the property of the person holding the power. The English Courts have never done this. All that they have done is to say, if you do exercise the power you must first do whatever the law *compels* you to do with your own property, and if you do not we will treat you as having done this. And it is admitted this is at the expense of principle. (Holmes *v.* Coghill, 7 Ves. 507.) And their reason is, that as it is a fraud that a man shall enjoy property and not pay his creditors, so it is a fraud in him to make a gift even of the property of another without providing for his own creditors. Surely if Judge King could (as he is admitted to have been able to) provide that his nephew should enjoy the estate during his life without liability to creditors, it is inconsistent to say that he could not authorize him to dispose of the *corpus* without subjecting it to his creditors.

If the rule be as stated, the effect of all general powers has been misunderstood by the profession. No case can be found in which a creditor of the appointor has attempted to enforce the claim, and yet if it is good as to personalty it is equally so as to realty. Did any one ever hear of an inquiry being made, in passing title, as to the existence of debts by the donee of the power? Such a decision would be like an earthquake in this city, where hundreds of titles if not thousands have been passed on the doctrine that there is no such right.

In 1833 it was distinctly admitted as law that no such right existed in the creditor. (Morris *v.* Phaler, 1 W. 391.) Commonwealth *v.* Duffield (2 Jones, 277) decides that the property is not the estate of the donee for purposes of taxation. And the argument of GIBSON, C. J., rejects the doctrine sought to be introduced, as a *flagrant injustice*. Commonwealth *v.* Williams (1 Harris, 29) repeats this; and the ground of both is that it is not the estate of the donee, nor is it made so by appointing to another.

Samuel, in reply.

The contention of defendant in error is an attempt to extend the doctrine of "spendthrift trusts," the doctrine of Fisher *v.* Taylor, and Vaux *v.* Parke, beyond the reason for which the rule was established, and to overturn the law as well established in Pennsylvania as it is in England, that (with the single exception of "spendthrift trusts") title and the incidents of ownership are inseparable. The general policy of the law is the same in Pennsylvania as in England, that is, that the incidents of ownership must accompany title. An absolute estate cannot here be granted fettered with a restraint on alienation. (McWilliams *v.* Nisly, 2 S. & R. 507.) A condition repugnant to a grant cannot be sustained. On this ground, an estate cannot be given for the separate use of an unmarried woman not contemplating marriage.

Smith *v.* Starr, 3 Wh. 66.
Hamersley *v.* Smith, 4 Whart. 127, 128.

The exception to this rule is the "spendthrift trust," in which *for the life of the beneficiary only* an estate fettered with non-liability to debts may be created. This doctrine while established is exceptional, not favored, and not to be extended.

Overman's Appeal, 7 Norris, 281.
Keyser's Estate, 7 Smith, 236.

April 21, 1884. THE COURT. Under the well-settled rule of law in Pennsylvania we think this was clearly a spendthrift trust. The power of appointment in the donee of the power does not change the legal effect of the devise. The appointee takes under the will of the donor and not under the appointment of the donee. It follows that the estate devised in trust for the nephew of the donor was not liable for his debts during his life and could not become so after his death in the hands of those who acquired the same under the original trust.

Decree affirmed, and the appeal dismissed at the costs of the appellant.

PER CURIAM. A. B. W.

Jan. '84, 120. February 11, 1884.

Kennebec Ice & Coal Co. v. Wilmington & Northern R. R. Co.

Railroad companies—Ice companies—Fire—Negligence—Contributory negligence—Evidence.

In an action for damages for the loss by fire of the contents of a building, brought by several insurance companies in the name of the insured whom they have indemnified, evidence is admissible to show that the building, owned by a third party, was insured in one of the said companies, and that the policy of insurance contained a clause requiring the insured to keep a watchman employed, which requirement was not fulfilled.

Although ice companies have the right to use shavings in their business, yet if they use them in such a careless manner as to render it possible that they should be set on fire by the engine of a neighboring railroad company, they are guilty of contributory negligence; and if the shavings are so set on fire, and the property of the ice company, in consequence thereof, destroyed, no recovery can be had against the said railroad company.

Error to the Common Pleas of Chester County.

Case, by the Kennebec Ice and Coal Co. against the Wilmington and Northern R. R. Co.,

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to recover damages for the destruction by fire of a large quantity of ice belonging to the plaintiffs, which was alleged to have been caused by the negligence of the defendants. Plea, not guilty.

On the trial, before FUTHEY, P. J., the following facts appeared: On April 17, 1882, the plaintiffs had a large quantity of ice stored in certain ice houses which they had rented, situate upon the Brandywine Creek, a few miles above Coatesville. The main line of the defendants' road ran past these ice houses, but not to them. A siding was therefore constructed for the accommodation of both parties from the main line to the ice houses. On the above day, a shifting engine drew out cars from the siding. About twenty minutes after the engine left, fire was discovered burning upon the road bed of the siding and in the culvert over which it passed. Some grass and shavings and a tie were on fire. This was supposed to have been extinguished, but shortly after, it again appeared and communicated to some shavings surrounding the tie, and thence to the ice houses. These with their contents were destroyed. The property of the Kennebec Ice and Coal Co. was insured in a number of insurance companies, who paid the amount of the loss sustained in the fire, and then brought this suit for damages in the name of the said Ice and Coal Co. (See 13 WEEKLY NOTES, 162, 223.)

Defendants admitted that the fire was occasioned by their engine, but alleged contributory negligence on the part of the plaintiffs. To prove this they asked a witness, Jacob Pusey, on his cross-examination, as follows, viz:—

2. Were the ice houses and their contents insured? (Objected to.) Mr. Hayes: We offer to show that this is not the suit of the Kennebec Ice and Coal Co., but that it is the suit of sundry insurance companies, the names of which will be found in the records of the proceedings in the case; also that one of the policies of insurance required that a watchman should be kept at the buildings where the fire occurred, and that that requirement was not fulfilled.

THE COURT. I will admit evidence tending to show that the ice houses were insured, and that the policy of insurance contained a clause requiring the plaintiffs to keep a watchman employed. (First specification of error.)

2. The Susquehanna Mutual Ins. Co. originally insured the property, did it not? Objected to; objection overruled; exception. (Second specification of error.)

A. The Chester County Mutual insured it first. They had no insurance on the buildings of the $10,000 insurance on the buildings. I never applied to the Susquehanna Mutual to insure the contents.

It was also in evidence that for the storage of ice large quantities of shavings were used, and after the ice houses were empty it was the custom of the plaintiffs to remove the same and put them in heaps to dry. When the ice houses were refilled, all the shavings that were fit were again used, the balance being left to rot. When fresh shavings were put in, they were hoisted up in baskets and thus necessarily scattered about by the wind. When the ice was loaded from the ice houses into the car, it was dropped on an inclined plane, so that the shavings that were on the ice were, as a matter of course, scattered about by the motion. The evidence was contradictory as to whether this was done negligently or not. Concerning this question the Court charged, *inter alia*, as follows:—

"The plaintiffs having the right to use shavings in their business would not be responsible for any loss sustained by their proper use; but it is your duty to determine whether they were used in a negligent manner. I instruct you that it would be contributory negligence upon their part, if they allowed shavings to remain around the siding, or piled up on either side of it in such quantities as to render it possible for the engine used by the defendants, in running on the siding and removing the cars, to set them on fire, and cause the destruction of the property of the plaintiffs.

"It is contended on the part of the plaintiffs that the track was kept clear of shavings, although a few may have been scattered around in the vicinity. Charles E. Pennock, however, a witness for the defendants, described them as being scattered on the ground in close proximity to the buildings, and on both sides of the track, so that in his opinion there was imminent danger of a passing engine setting fire to them.

"You will carefully consider all the testimony bearing upon the condition and quantity of the shavings used by the plaintiffs in their business, and determine whether they were left in such close proximity to the siding as to be dangerous. If you find that they were, and that the fact of their having been left in that condition contributed to the origin of the fire, the plaintiffs are not entitled to recover in this action; because when contributory negligence is shown on the part of those claiming damages, there can be no recovery, even although there may have been negligence on the part of the defendants."

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Samuel M. Hyneman (*Emanuel Cohen* and *Wm. T. Barber* with him), for the plaintiffs in error.

Evidence as to insurance upon the ice houses was irrelevant to the issue. It was an offer to prove contributory negligence on the part of plaintiffs in that a third person, not a party to the record, failed to keep an agreement with an insurance company which likewise was not a party to the record, and in no manner interested in the suit. Evidence as to the insurance on the ice itself was inadmissible.

P. & R. R. R. Co. *v.* Hendrickson, 30 Smith, 182.

It is not contributory negligence in the owner to leave conbustible material on his land near a railway track.

P. & R. R R. Co. *v.* Hendrickson, *ut supra.*
Lehigh Valley R. R. Co. *v.* McKeen, 9 Norris, 122.
P. & R. R. R. Co. *v.* Schultz, 12 Norris, 341.

When the plaintiff in the *ordinary* exercise of *his own right* allows his property to be in an exposed position, and it becomes injured by the negligence of the defendant, he is entitled to reparation.

Kerwhaker *v.* Cincinnati R. R. Co., 3 Am. Law. Reg. O. S. 362.

John S. Gerhard and *Wm. M. Hays*, for the defendants in error.

Evidence as to insurance upon the ice houses was relevant. The insurance companies were the real plaintiffs in the suit, and the purpose of the offer was to show that one of them had deemed it necessary that a watchman should be kept there.

A land-owner's leaving of dry weeds and grass on his land, piling of shavings and stacking of hay near the railroad track, may be evidence of contributory negligence.

Pierce on Railroads, 434.

February 25, 1884. THE COURT. The admission of the offers covered by the first and second specifications of error furnishes no ground for reversal. The answers contain nothing to prejudice the plaintiff.

The main ground of defence was that of contributory negligence on the part of the plaintiff. It is very clear there was some evidence tending to prove this, and it was correctly submitted to the jury. The case was well and carefully tried. We see no sufficient cause for reversing the judgment.

Judgment affirmed.

PER CURIAM. C. K. Z.

Jan. '83, 405. January 14, 1884.

Creighton v. Boudinot.

Agent—Contract—Evidence—Quantum meruit without privity.

A. died intestate, seised of certain real estate, leaving four children and a widow. Partition was made of the estate among the four children, and a portion set aside as dower for the widow. B., one of the sons, assumed charge of the whole property, and entered into a contract with C. for curbing and grading streets, which were cut through it. B. subsequently left the city, leaving the estate in charge of his counsel, who, through an agent, D., entered into a further contract with C. to finish some grading and curbing of the widow's share, which had not as yet been done. On a suit brought by C. to recover for grading and curbing, the widow having died after suit brought, evidence to prove agency was offered, as to which it was—

Held, that agency cannot be established by the declarations of an agent.

Held further, that notices from the Highway Department to pave, and contracts and settlements with the agent of the whole estate regarding the separate portions of the children, were not evidence of authority in him to bind the defendant to a contract for work on the dower farm.

Held further, the fact that work was done upon the dower farm in pursuance of notice from the city, lays no foundation for a quantum meruit against a remainderman.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by James Creighton against Julia B. Keith and Ormes B. Keith, her husband, in right of the said Julia, Jennie J. Boudinot, and Bessie C. Boudinot, to recover for filling, grading, and curbing sidewalks on property hereafter described. Service was accepted as to Jennie J. Boudinot, *nihil habet* as to Julia B. Keith and Ormes B. Keith. On February 13, 1882, the Court allowed the name of Mrs. Bessie C. Boudinot, widow of Elias L. Boudinot, to be stricken from the record, so that Jennie J. Boudinot appeared on the trial as sole defendant.

On the trial, before ARNOLD, J., the following facts appeared: Elias E. Boudinot died intestate in 1863, leaving him surviving a widow, Jane M. Boudinot, and four children, Wm. B. L. Boudinot, Jennie J. Boudinot, Julia B. Keith, wife of Ormes B. Keith, and Elias L. Boudinot, being seised of a tract of land known as the "Rosehill Estate." By proceedings in partition it was divided among the four children, and in 1867 a portion was set aside to the widow as her dower. The present controversy was concerning the payment for curbing and grading its sidewalks. The plaintiff testified that he contracted with Elias L. Boudinot in 1871 or 1872 to do the work of grading the sidewalks of the Rosehill estate, and that the work was done by

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him in 1874 and 1875. When Mr. Boudinot left Philadelphia in 1875, in consequence of ill-health, he placed the estate in Mr. W. W. Wiltbank's charge as counsel, and afterwards James J. Cooper was employed as agent to collect rents, etc.

Prior to 1875 Mr. Boudinot had made several payments to the plaintiff for work he had done under his contract; and afterwards, in 1878, he was paid for work done upon the separate portions respectively of Miss Boudinot and her sister, Mrs. Keith; and then he was paid for all of the work done upon those portions of the estate which belonged to each of Judge Boudinot's children in possession.

In the fall of 1878 a written contract, drawn by Mr. Wiltbank, was made by James J. Cooper "as the agent of the Rosehill estate," with the plaintiff to continue his work upon the dower farm. Elias L. Boudinot died in 1876, Julia B. Keith in 1880, and Jane M. Boudinot in 1881.

The plaintiff offered in evidence the printed notices from the Department of Highways, to pave and grade streets upon the Rosehill estate, given to plaintiff by Elias L. Boudinot, the alleged agent, and being (1) direction to grade and fill sidewalk on property in possession of Julia B. Keith; and (2) direction as to property in possession of Jennie J. Boudinot, and showing that the city would have charged $1.25 a yard if it had done the work.

Defendant objected, because they were irrelevant and not connected with the property for the grading of which this suit was brought. Objection sustained. Exception (third assignment of error).

The plaintiff offered in evidence the receipts, accounts, memoranda in the handwriting of Mr. Wiltbank, the counsel for the Rosehill estate, and signed by Mr. Cooper, as agent, in settlement with plaintiff in 1878, as to work done under plaintiff's contract with Elias L. Boudinot, as agent upon Mrs. Keith's and Jennie J. Boudinot's separate portions of the Rosehill estate in possession.

Objected to, because the papers related to the separate estates and not to the dower farm. Objection sustained. Exception. (Fourth and fifth assignments of error.)

The plaintiff offered to show by a witness, Jacob M. Peters, a contractor—

(1) That he had graded, paved and curbed the cartways of all the streets opened at Elias L. Boudinot's direction, upon the Rosehill estate. That ever since he has known the property, Elias L. Boudinot, and no other person during Elias L. Boudinot's lifetime, took charge of the estate.

(2) That Elias L. Boudinot said many times that he was agent for the Rosehill estate.

(3) That witness was in 1872 paid by Elias L. Boudinot, on account of Miss Boudinot, for work done upon Tusculum Street.

Objection. Objection sustained. Exception. (Twelfth assignment of error.)

The plaintiff offered to show by John W. Brock, a witness, that he is the nephew by marriage, of Elias L. Boudinot, and to show many conversations with Elias L. Boudinot, and many of his acts, tending to show his agency as alleged.

Objection. Objection sustained. Exception. (Thirteenth assignment of error.)

Plaintiff proposed to connect all these offers of rejected evidence together, as showing the length of time that Mr. Boudinot was acting as agent as alleged; and as facts from which the fact of agency can be implied.

Objection. Objection sustained. Exception. (Fourteenth assignment of error.)

Mr. Wiltbank and James M. Cooper testified that the latter acted as the agent of Jane M. Boudinot, the widow, when he made the contract in 1878.

The defendant then submitted a motion for a nonsuit, which was granted. Subsequently a motion taken for a rule to show cause why the nonsuit should not be struck off was dismissed, in which the Court said after reciting the offers as above: "All these offers, it will be noted, begin and end in Mr. Boudinot, and in no manner whatever affect Jennie, or subject her to the consequence of his acts, which, so far as the testimony shows, may have been the acts of a self-appointed agent. The plaintiff did not offer to prove knowledge by Jennie of these various acts, or any conduct on her part which would ratify them or estop her from repudiating them, and the testimony was rejected. Other witnesses were called to prove similar acts and declarations of Mr. Boudinot, and their belief that he was the agent of all the parties; but there being no offer to follow up the proof, the testimony was rejected and the exceptions made manifold. Mr. Cooper, the person who signed the contract in 1878 as the agent of the estate, was called and testified that he was not the agent of Jennie J. Boudinot, but that he acted as the agent of Mrs. Jane M. Boudinot, the mother of Jennie, and life-tenant of the property. The plaintiff, having obtained fourteen exceptions, then proposed to connect all his offers together as facts from which the agency of Mr. Boudinot might be implied; and, having no other testimony to offer, or any other form in which to renew the rejected offers, he closed his case, whereupon he was, on motion, nonsuited. A party cannot weave together a mass of incompetent offers and make a strand strong enough for a jury to hang a verdict upon.

"That the fact of agency cannot be inferred or implied, unless the parties are brought together

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closer than they were by the offers in this case, is too plain for argument. It was not shown or pretended that Jennie J. Boudinot had any knowledge or notice of the acts of the plaintiff and Elias L. Boudinot, or that she even knew that the work was being done. To subject her to liability in such a case as this, would subject her to liability for the action of any unauthorized person who should assume to intermeddle with her property during her absence. That the declaration of Elias as to his powers as agent are not evidence, was decided in Owens *v.* Evans, (40 Leg. Intel. 26,) and the cases therein referred to. Even when such declarations are made under oath in a judicial proceeding they are not competent testimony against any person not a party to the suit. If the claim of the plaintiff is meritorious, and it would be a hardship for him should it go unpaid, we must not overlook the fact that it would be a greater hardship on the defendant, to subject her to liability for the whole of a claim against a property of which she owns only one-fourth, without her consent or knowledge."

The plaintiff thereupon took this writ of error, assigning for error, *inter alia*, the refusal of the Court to grant him a rule to strike off the nonsuit and the rejection of his offers as above.

W. W. Carr, for plaintiff in error.

Under the law, and in any event, whether they expressly contracted for the work or not, the parties interested in the Rosehill estate were liable for work of the character sued for, the life-tenant being liable only for the interest during her life upon the cost or assessment, and the remaindermen liable for the principal. Because, as it will be observed, the plaintiff's claim is not one of the ordinary taxes which a life-tenant is compelled to pay, like—

Schurr's Appeal, 37 Leg. Intel. 194.
Jewell's Est., 1 WEEKLY NOTES, 404.

This is a case of the extraordinary assessments or taxes levied for municipal improvements, and permanently beneficial to the estate, the rule being that the expense shall be apportioned, and the remaindermen pay, according to their interests, the life-tenant being only liable for the interest on the amount of the tax or assessment during her life.

Seibert's Est., 25 Pitts. L. J. 157.

sible for a plaintiff to "weave together a mass of incompetent offers, and make a strand strong enough for a jury to hang a verdict upon," and because the direct evidence was that the agents acted, not for the defendant, but for Mrs. Boudinot, and the irresistible inference was that the plaintiff knew it, and he failed to deny that he knew it.

He knew it because:—

1. The dower was assigned in 1867, and he had been agent for and familiar with the estate for years.

2. For all the remainder of the tract plaintiff has been paid; his settlements were for work upon the separate portions of the estate, and he was paid by the respective owners of those portions.

3. The Highway Department notices were received and retained by the plaintiff. They are all directed to the individual owners of the property to be paved.

4. In 1878 the plaintiff made with Mr. Wiltbank and Mr. Cooper, as agents, a contract for part of the work in suit. The plaintiff in error, throughout his argument, calls this a "continuing" contract to the one made in 1874 with Mr. Boudinot as agent.

Mr. Wiltbank testified [contract in suit shown witness]: "That contract is in my handwriting. Mr. Cooper made it as the agent for Jane M. Boudinot."

The contract was personal with the life-tenant. There was no privity with the defendant.

The fact that the city ordered the improvement creates not even an equity of which the plaintiff can avail himself, for (1) the personal contract may or may not have been advantageous; (2) the life-tenant may have agreed with the remaindermen to bear the burden of those improvements; (3) even if there were no such agreement, it is doubtful if the life-tenant could exact contribution from the remaindermen.

1 Washburn on Real Property, 123 (*95).
Hitner *v.* Ege, 11 H. 305.

January 28, 1884. THE COURT. The learned Judge committed no error in holding the evidence insufficient to submit to the jury. It did not show any contract, either express or implied, to bind the defendant to pay for the work. The

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Jan. '84, 42. April 14, 1884.

In re Private Road in Nescopeck Township.

Road law—Appeals—Act of June 13, 1874.

Under the first section of the Road Law of June 13, 1874 (P. L. 283), an appeal from the assessment of damages for private property taken for public use must be taken within thirty days from the time that the reviewers file their report, and not from the time that their report is confirmed. The fact that exceptions have been filed to the report does not extend the time within which an appeal may be taken.

Certiorari to the Quarter Sessions of Luzerne County.

The facts of the case were as follows:—

In June, 1882, Washington Houck filed a petition for a re-review of a private road over land of Andrew Keen, in Nescopeck Township, Luzerne County. Re-reviewers were appointed, who reported in favor of the road, and assessed damages to Keen at $150. Their report was filed December 6, 1882, and upon the same day Keen filed exceptions, *inter alia*, to the amount of damages assessed. Depositions were taken in support of the exceptions, which, however, were overruled, and the report confirmed March 26, 1883.

On April 5, 1883, Keen entered an appeal, in due form, under the first section of the Act of June 13, 1874 (P. L. 283; Purd. Dig. 1855, pl. 2), which provides as follows:—

"In all cases of damages assessed against any municipal or other corporation, or individual or individuals, invested with the privilege of taking private property for public use, for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, whether such assessment shall have been made by viewers or otherwise than upon a trial in Court, and an appeal is not provided for or regulated by existing laws, an appeal may be taken by either party to the Court of Common Pleas of the proper county, within thirty days from the ascertainment of the damages or the filing a report thereof in Court, pursuant to any general or special Act, and not afterwards."

On April 16, 1883, a rule was granted on application of Houck, to show cause why an order to open the road should not issue upon payment into Court of the damages assessed, which it was alleged had been tendered and refused by Keen.

This rule the Court, WOODWARD, P. J., delivering the opinion, made absolute, notwithstanding the pending appeal, assigning as a reason, *inter alia*, that the appeal was not entered within thirty days after the filing of the report, and therefore not in time. Thereupon the said Keen took this writ, assigning for error, *inter alia*, the decision of the Court above stated.

H. W. Palmer (*H. A. Fuller* and *G. B. Kulp* with him), for the plaintiff in error.

The appeal was taken in time. The language of the Act is "within thirty days from the ascertainment of damages or the filing a report thereof in Court," and the reasonable construction of this language is that when no exceptions are filed, the limitation runs from the filing of the report, *but when exceptions are filed*, the limitation runs from the date of their disposition by the Court, for then only can the damages be said to be *ascertained*. This construction is made necessary by the use of the word "ascertainment," instead of the word "assessment" used elsewhere in the section.

The Act is remedial; therefore any doubt should be resolved in favor of the appellant so as to secure for him a trial by jury.

E. G. Butler, for the defendant in error.

The plaintiff in error might have appealed at the same time that he filed his exceptions, the exceptions going to the misconduct or other proceedings of the viewers, the appeal to the quantum of damages, as is the case in the general railroad law.

Pusey's Appeal, 2 Norris, 70.

The damages were ascertained when the viewers filed their report, for the Court, whatever it might do with the exceptions that were filed, had no power to adjust the damages, either by increasing or decreasing the assessment.

May 5, 1884. THE COURT. The Court committed no error in holding the appeal was not taken in the time authorized by the statute. It provides the appeal may be taken "within thirty days from the ascertainment of the damages or the filing a report thereof in Court, pursuant to any general or special Act, and not afterwards." The damages were ascertained by the viewers. The report thereof was filed in Court on the 6th of December, 1882. The appeal was not taken until the 5th April, 1883. The fact that exceptions had been filed did not extend the time within which an appeal might be taken. It might have been taken at the same time the exceptions were filed. The Act does not designate the time of the confirmation of the report as having any bearing on the time of appeal. (Gwinner *v.* Lehigh R. R. Co., 5 P. F. S. 126.)

Judgment affirmed.

PER CURIAM. C. K. Z.

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Common Pleas—Equity.

C. P. No. 1. June 11, 1884.

Baker et al. v. Pepper et al. and the American Academy of Music.

Corporations—Powers of directors—Cumulative voting—Right of stockholders to exercise—Acceptance of the provisions of the Constitution of 1874—What constitutes—Ratification by stockholders of the action of the board of directors.

Hearing on bill and answer.

This was a suit in equity brought by certain stockholders against the Board of Directors of the American Academy of Music, to prevent them from adopting the cumulative system of voting at an election about to be held for directors.

The bill set forth, that the directors elected in 1883, at a meeting of the board held on May 20, 1884, and called without notice to or knowledge of the stockholders, accepted the provisions of the Constitution of 1874, and transmitted a copy of the resolution of acceptance to the office of the Auditor General of Pennsylvania, and claimed thereby to have obtained the right for the company to vote on the cumulative system, which right will be exercised by the stockholders holding a minority of the stock, at the annual election for directors to be held on June 2, 1884. The bill charged that such action by the directors was illegal and *ultra vires*.

The prayers were for (1) an injunction to restrain the defendants, or any judge of election they may appoint, from receiving or counting any votes at the coming election that may be cast on the cumulative plan. (2) The appointment of a Master to conduct the election and retain the ballots cast upon the cumulative or the old plan, in different boxes, and report the same to Court. (3) General relief.

The answer—filed after an election at which the Court had directed that the stockholders should vote according to such plan as they desired—averred that the meeting had been held as directed, and that as to seven of the directors voted for there was no contest, but with regard to the other five, there was a question between those who had the greatest number of votes according to the old plan, and those who had the highest number by reason of the cumulative plan.

The answer further averred, that at a meeting of the board, duly convened on June 4, 1884, after the election, the seven directors who confessedly were elected, and who constituted a majority of the board, had rescinded and set aside as illegal the resolution of the former board, passed May 20, 1884.

Geo. Biddle and *MacVeagh*, for complainants.

The action of the directors in accepting the provisions of the Constitution of 1874 was clearly illegal and inoperative to affect the stockholders. By the charter every stockholder has a right to one vote for each director for every share of stock held by him.

Hays *v.* Commonwealth, 1 Norris, 518.

The acceptance of a charter must be by the corporation in its associate capacity.

Commonwealth *v.* Jarrett, 7 S. & R. 460.
Shortz *v.* Unangst, 3 W. & S. 45.
Commonwealth *v.* Cullen, 1 Harris, 133.

Though all corporate powers may be vested in the board of directors, an increase of capital stock by them would be *ultra vires* and void.

R. R. Co. *v.* Allerton, 18 Wallace, 233.
Eidman *v.* Bowman, 58 Ill. 444.

By unanimous consent of its stockholders a corporation may accept additional powers conferred by a general Act of later date than its charter. But in this case a majority of the stockholders are actually opposed to the provisions of the Constitution of 1874.

Vt. and Canada R. R. *v.* Vt. Central R., 34 Vt. 2.

The title as well as the general tenor of the Act of 1878 shows that it was not intended to apply to such corporations as the Academy of Music, which is a stock company for the profit of its members, and has none of the attributes of a charitable institution.

The Academy has never been benefited by any general or special legislation, and is outside the operation of the Act.

T. Hart, Jr., and *J. G. Johnson*, for respondents.

The Board of Directors unquestionably had power to pass the resolution of acceptance of May 20, 1884, if not under the charter, under the Act of May 22, 1878.

If it be said that the Act is unconstitutional, it may be answered that action by the stockholders has been had in two instances, which has placed the discussion of this question beyond need.

First, by the election of a board in 1878 and subsequent years, without any limitation upon the powers of the directors. Second, by express ratification, at the annual meeting, June 2, 1884, of the action of the Board of Directors.

Acceptance of the new Constitution need not be by any express act.

Duncan *v.* Penna. R. R. Co., 7 WEEKLY NOTES, 556.

The charter of this corporation provides for a stock vote in one case only—that is, in elections of directors.

Act of March 24, 1852, sec. 5, P. L. 176.

The law is, that without an express statute upon the subject, stockholders vote individually, and not according to the number of shares held by each one.

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Morawetz on Private Corporations, sec. 360.
Field on Corporations, sec. 226, citing St. Mary's Church, 7 S. & R. 517.
Taylor *v.* Griswold, 14 N. J. Law, 227 (see page 237).

If it is conceded that a majority in number of the stockholders could bind the corporation they have certainly and unmistakably done so.

Lime Co. *v.* Green, 7 L. R. (C. P.), 43.
Foss *v.* Harbottle, 2 Hare, 461.
Morawetz on Corporations, sec. 390.

The presumption is in favor of the constitutionality of an Act of Assembly.

Craig *v.* The Church, 7 Norris, 46.
Moore *v.* Houston, 3 S. & R. 169.
Sharpless *v.* Phila., 9 Harris, 147.
Speer *v.* Blairsville, 14 Wright, 150.
R. R. Co. *v.* Riblet, 16 P. F. Smith, 164.
Commonwealth *v.* Wolfe, 11 WEEKLY NOTES, 241

June 21, 1884. THE COURT. The question raised in this case is whether the provisions of the Constitution of 1874 have been legally accepted by the American Academy of Music.

It appears that at a meeting of the Board of Directors, held on the 20th of May, 1884, they accepted by resolution the provisions of the Constitution of 1874, and that a copy thereof was transmitted to the Auditor General of the Commonwealth.

This, it is alleged, was done under the provisions of the following Act of Assembly:—

"An Act to require all private corporations applying to the State for aid, to file in the office of the Auditor-General their acceptance of the provisions of the Constitution.

"Section 1. Be it enacted, that no general or special law shall be passed conferring a benefit upon any corporation, unless such corporation shall have previously filed in the office of the Auditor-General the acceptance of the provisions of the Constitution.

"Section 2. That such acceptance may be made by resolution adopted at a regular or called meeting of the directors or trustees or other proper officers of any such corporation, which shall be certified," etc. (P. L. 1878, p. 84.)

If this were all, two questions would arise, first, whether this Act applied to corporations having stockholders, and, second, if it did, had the Legislature power to authorize the directors, without submitting the question to the stockholders, to make such action valid. Both these propositions are denied by the complainants.

resolution, certified by the President and Secretary of the Academy, was forwarded for registration to the Auditor-General and Secretary of the Commonwealth of Pennsylvania, and certificates of such registration had been received."

A resolution was then offered by one of the stockholders "that the reports of the Board of Directors and Treasurer be and they are hereby accepted and approved, and that they be printed for the use of the stockholders." It was moved to amend this resolution by striking the words "be and they are hereby accepted and approved" out of said resolution, which was put and lost, and the original resolution was adopted by a vote of 47 stockholders in favor to 36 opposed.

If this was lawfully and properly done it would of course render unnecessary a discussion of the applicability and constitutionality of the Act of 1878.

The defect of this proceeding, as contended for by the complainants, is, that the corporation was bound by the Act of 1876 (P. L. 33), and that, in accordance with its provisions, the acceptance must be "duly authorized by a meeting of the stockholders called for that purpose," and that therefore the meeting was not competent to act upon the question. And also that the call for a stock vote had been refused on the adoption of the resolution of approval and disapproval.

This Act of 1876, which is amendatory of the general corporation Act of 29th April, 1874, was intended to point out the way by which an existing corporation could avail itself of the benefit of that Act, and had no application to corporations having no such wish. And we fail to find any Act of Assembly that even purports to direct a specific mode which all corporations must pursue who desire to accept the provisions of the Constitution. We think, therefore, that any procedure which would act as an acceptance of a proposed amendment to the Constitution of the corporation would be a perfectly valid acceptance of the provisions of the Constitution of 1874.

The 5th section of the charter of the Academy provides (Act March 24, 1852): "That an annual meeting of the stockholders shall be held on the first Monday of June for the purpose of choosing directors, and for the transaction of such other business as may come before them, of

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the affairs and proceedings of the corporation for such year, together with a full account of all moneys received and expended for the same, and they shall also produce for the inspection of the meeting, or such committee as it may name, all of the books and accounts concerning the corporation. Special meetings of the stockholders may be called by order of the directors or by stockholders holding one-fourth of the capital stock, on like notice to that required for the annual meeting, specifying, moreover, the object of the meeting."

It will thus be seen that "at each annual meeting of the stockholders, the directors of the preceding year shall submit to the meeting a full and fair statement of the affairs and proceedings of the said corporation for such year." So that each stockholder must have known that the proceedings of their Board of Directors in accepting the provisions of the Constitution of 1874, must necessarily come before them for their approval in the ordinary course of business in that meeting, and they must also have known that at the annual meeting it is competent for them, in addition to choosing their directors, to transact "such other business as may come before them." In which these annual meetings are distinguished from the special meetings, where "the object of the meeting must be specified."

Had, then, this been an amendment to their charter which the directors had procured, it is probably the precise way in which it would have been presented for the acceptance of the stockholders.

The law which regulates stockholders' meetings in the absence of legislation to the contrary, is stated by Judge BELL, in Commonwealth *v.* Cullen (13 Pa. State Rep. 133), as follows: "To make a vote of acceptance valid as the act of a corporation, it should be passed at a meeting duly convened, after notice to all the members. In such cases congregate deliberation is deemed essential, and where the opportunity for this is offered, the decision of the majority is binding, if no other mode be prescribed by the charter. The private procurement of a written assent, signed by a majority of the members, will not supply the want of a meeting. Such an expedient deprives those interested of the benefit of mutual discussion and subjects them to the meaning, let it be supposed that the charter expressly authorizes the company to determine whether the members of it shall be permitted to vote by proxy or not. At the very first meeting of the company the question is proposed, How shall members vote on this question, in person or by proxy? Certainly not by proxy, for that would be to admit proxies before there is any law to authorize their admission. This primary vote must then be given and determined by the majority of the corporation present and voting in person." These principles are supported by a whole flood of authorities, which it would be superfluous to quote.

The vote therefore at the stockholders' meeting was properly taken "if no other mode was prescribed by the charter." The corporation is composed of 295 individuals, all of whom were present by person or proxy, and the report of the directors was approved by a vote of 47 to 26. And, in addition thereto, the majority of stockholders then present availed themselves of the right to vote cumulatively, thus bringing themselves under the provisions of the Constitution not only by their votes, but by their acts. If a majority of the members of the corporation present and voting in person can bind the corporation, they certainly did so on this occasion, both by their votes and acts.

The charter of the corporation appears to contain a provision for a stock vote in one instance only—that is, in elections for directors—and we think, therefore, it was properly refused at the annual meeting on the occasions on which it was called for.

We consider that the acceptance of the provisions of the present Constitution was properly ratified by the stockholders present at the annual meeting, and that the cumulative mode of voting provided for therein thus became as legal as the mode previously in force.

Entertaining these views, we find that George S. Pepper, James L. Claghorn, Pierce Archer, L. C. Cleeman, Henry Whelen, Jr., Alfred G. Baker, George A. Heyl, Francis P. Steel, Henry Budd, John Wright, Charles M. Swain, Peter A. Keller, who the tellers have reported to us received the majority of votes cast, are duly elected Directors of the Academy of Music for the ensuing year.

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Common Pleas—Law.

C. P. No. 2. June 7, 1884.

Borland v. Elton.

Subrogation—Property primarily liable for mortgage debt—Security—Principal.

Where a loan is made on bond and mortgage, and judgment is entered on the bond, the mortgaged property, being primarily liable, must, if the mortgagor so elect, be exhausted before the personal property of the mortgagor can be taken in execution.

E. mortgaged land to B., the title being in E., but the possession in S. A dispute arising as the real ownership, E. brought ejectment against S. While the ejectment was pending, B. entered judgment against E. on the bond, and issued attachments on E.'s personal property. Thereupon M., in behalf of E., paid the amount of the judgment to B.'s attorney, and took from him an order to mark the judgment to M.'s use, and a promise to have the mortgage also assigned to him. But the client refused to ratify this, because S. was a friend of hers, and such an assignment might prejudice him in the ejectment; and she asked to have the order, marking to use set aside, or the judgment marked satisfied:

Held, that the assignment should be sustained, because as the land was primarily liable, and must be used to satisfy the judgment, before the personal property of E. could be taken, therefore E. (or M. in his interest) should be subrogated to the rights of B. in the judgment.

Sur rule to show cause why the judgment should not be marked satisfied of record, or the order to mark to the use should not be rescinded and stricken from the record on repayment of the money taken therefor, and the order to stay execution in the hands of the sheriff be cancelled and revoked.

The facts were as follows: Catharine Borland advanced money to Anthony Elton, and took as security a bond and mortgage. Ellis Stokes was in possession of the land, and the mortgage was given with his consent. Afterwards, however, a dispute arising between Elton and Stokes, as to the beneficial ownership of the land, Stokes claiming that Elton was merely a trustee for him, Elton brought ejectment against Stokes.

For non-payment of interest and taxes judgment was entered on the bond, and the mortgagee ordered her counsel to collect the judgment. He accordingly issued attachments on Elton's bank account and other property. Elton then got Charles A. Meurer to pay the amount of the judgment, on condition that the judgment and also the mortgage should be assigned to him. The mortgagee's counsel accepted this offer, and entered an order, marking of record the judgment to the use of Meurer. But when the mortgagee heard of it, she refused to ratify this assignment, because it would prejudice Stokes in the ejectment suit then pending between him and Elton. She demanded that the matter be put back as it was before. Meurer would not assent, and declined to receive back the money he had paid for the assignment. The mortgagee's counsel then took this rule.

S. Davis Page, for the rule.

The order to mark the judgment to the use of Meurer was obtained without the authority of the plaintiff. It is settled that an attorney has no power to sell his client's judgment, and such a selling is void, unless ratified by the client.

Campbell's Appeal, 5 Casey, 401.
Kirk's Appeal, 6 Norris, 243.

The money for the purchase of this judgment though paid by Meurer, came in reality from Elton. The plaintiff is therefore entitled to have the judgment marked satisfied, and to receive the money paid by Elton in the name of Meurer.

Pearce *v.* Yost, 1 WEEKLY NOTES, 472.

There is no right to subrogation here.

Hoover *v.* Epler, 2 Smith, 522.
Mosier's Appeal, 6 Smith, 76.
Wallace's Appeal, 9 Smith, 401.
Webster's Appeal, 5 WEEKLY NOTES, 486.
Wagner *v.* Elliott, 10 Ibid. 8.

John G. Johnson, contra.

THE COURT. We need not consider the question of authority of counsel. This case must be considered as if defendant, Elton, were asking the Court now to interfere and subrogate him (or Meurer in his interest) to plaintiff's claim against the property.

Even if Elton is, as Stokes claims, a trustee for Stokes, nevertheless the property is primarily liable for this debt, and Elton's personal property should not be taken on this execution on his bond until the real estate primarily liable has been exhausted. Therefore, it is a case of a surety being called upon to pay, while his principal has property within reach of the creditor. Under such circumstances, if the surety pays the Court will subrogate him to the creditor's rights.

Rule discharged. S. G. F.

C. P. No. 4. July 7, 1884.

In re Petition of Charles J. Hofmann.

Mortgage — Payment into Court of amount claimed with interest, etc., and decree for satisfaction, will not be allowed where there is a dispute as to whether the mortgage is due—Whether a mortgage payable in two years can be paid against the protest of the mortgagee, before the expiration of that time, quære—To what period interest on the disputed amount should be calculated and deposited, discussed.

Hearing on petition and answer.

The petitioner averred that on December 10, 1883, he executed a mortgage for $1100 unto John H. Scott; that the premises mortgaged

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were conveyed to the petitioner by Harriet M. Scott and others, of whom said John H. Scott was one, by deed bearing even date with the mortgage, and purported to be clear of incumbrances; that since the execution and delivery of said deed and mortgage, the petitioner had discovered several municipal liens against the premises, which he had been compelled to pay; that the mortgage is payable at any time within two years from its date;* and that he is desirous of paying off the same, but that the said John H. Scott refuses to accept the amount actually due after allowing an off-set of the amount of said liens and costs, and insists upon payment in full with interest to date. He therefore prayed for leave to pay into Court the amount claimed to be due, with interest to the time of payment, and upon such payment being made, an order for the satisfaction of the mortgage on the record thereof.

A rule to show cause was granted, and upon the return thereof, the respondent filed an answer in which he averred that the mortgage was given for part of the purchase-money of the property; that the time of payment of the principal thereof, was, at the special request of the petitioner, made to expire at the end of two years from December 10, 1883, as is so intended to be expressed in the mortgage, and it was agreed to by the respondent on account of the liens referred to in the petition, which would take a considerable time to adjust, settle, and remove.

John A. Bickel, for the petitioner.

This application is made under the Act of April 3, 1851 (Purd. Dig. p. 481, pl. 118). Our offer is to pay into Court the principal and interest to the day of payment, as was done in Pennock *v.* Stewart (14 WEEKLY NOTES, 113), also in Wapples's Appeal (24 P. F. Smith, 100).

The petitioner has the right to pay off this mortgage. A mortgage payable in two years may be paid off at any time within the two years.

Horstman *v.* Gerker, 13 Wr. 282.

A purchaser who has given a purchase-money mortgage, may deduct therefrom incumbrances known to him at the time he gave the mortgage.

Wolbert *v.* Lucas, 10 Barr, 73.

Henry J. Scott, for the respondent.

The Court is without jurisdiction, because the mortgage sought to be paid into Court is not due, and there is no dispute as to the amount thereof. We are entitled to our investment and the interest, until it becomes due. Payable in two years means at the expiration of that time.

The petitioner cannot set off the amount of the claims stated in his petition to be liens upon been paid by him; they are not the proper subject of set-off.

The municipal claims against this property are disputed because they are assessments against rural property for general improvements. The petitioner knew of them when he purchased, and the mortgage was drawn for two years so as to give time to have a trial on the claims. The petitioner has not paid them. He has only obtained leave to pay them into Court. If the money is paid into Court, and an Auditor is appointed to distribute it, we will be deprived of a trial by jury.

July 26, 1884. THE COURT. The Act of April 3, 1851 (sec. 14, P. L. 871), applies to cases in which there is a dispute as to the amount due (In re Petition of Samuel M. Stewart, 14 WEEKLY NOTES, 113), or as to the person to whom payment is to be made (Wapples's Appeal, 74 Pa. S. R. 100). If there is a dispute whether the debt is due, the power of the Court to proceed under that Act is at an end. (Kohler's Petition, 9 WEEKLY NOTES, 527.) A debtor cannot compel his creditor to receive the amount of the debt, before the day specified in the contract, either with or without interest to that date. (Tillou *v.* Britton, 4 Halstead, 121; Kingman *v.* Pierce, 17 Mass. 247; Abbe *v.* Goodwin, 7 Conn. 377; Brown *v.* Cole, 14 L. J. Chan. 167.)

The respondent in this case alleges that upon the request of the petitioner, it was expressly agreed at the time he executed the mortgage, that it should not be payable until the expiration of two years from its date, so as to give time to remove the municipal claims against the mortgaged property, sought to be set-off against the mortgage. It seems reasonable that a mortgagee should be allowed to interpose an agreement of that kind, especially since a mortgagor has been allowed to prove a contemporaneous parol agreement that a mortgage drawn payable in one year, should not be enforced for three years, as was done in Lippincott *v.* Whitman (83 Pa. S. R. 244). Whether such an agreement as the respondent alleges was made, cannot be tried in a summary proceeding like this, which, at the outset, shifts the security from the land to a substituted fund, and which, if it should turn out that the respondent is right, deprives him of his investment and the interest thereon until the principal should become due. The mode of determining whether a debt may be paid off, is by a bill in equity to redeem, as was done in Brown *v.* Cole (*supra*).

The agreement alleged in the answer renders

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tion that the meaning of words is to be interpreted according as reason and good sense may require, with reference to the context in which they occur. Thus, the word "upon" may mean at a certain time, or before or after it (The Queen *v.* Humphrey, 10 Add. & Ellis, 370); and the phrase "at least" may be construed to mean more than, if necessary. (Roberts *v.* Wilcock, 8 W. & S. 464.) It has always been the opinion of the profession that while a mortgage payable *within* a certain time, may, at the option of the mortgagor, be paid off at any time, yet that a debt payable *in* a certain time cannot be extinguished, without the consent of the creditor, before the expiration of the time specified. In the case of Horstman *v.* Gerker (49 Pa. S. R. 282), the question arose incidentally, and it was decided that a mortgage payable in five years, which was held as collateral security for promissory notes, which fell due and were paid at an earlier date, was thereupon extinguished. The mortgage in that case was assigned to a third party who neglected to require a certificate of no off-set, and the notes were paid by the mortgagor before he was informed of the assignment. Under those circumstances it was decided that that mortgage might be discharged at any time within the five years. The case is authority only for the statement that when a debt secured by a mortgage has been paid, before the date specified in the mortgage, the debtor and creditor concurring, it will not be kept alive in law or equity, for the benefit of a third party who has not given notice of his rights.

A rule to fix the amount which should be paid into Court to abide the settlement of the dispute, and obtain satisfaction of the mortgage in advance of a trial, has not been definitely laid down. The Act of 1851 fixes it at the amount of money claimed by the mortgagee. As he can claim the principal, with interest and costs, the question arises to what period ought the interest to be calculated. It would be unjust to deprive the mortgagee of his interest while he is waging a just battle for the disputed principal. He is unwillingly drawn into Court, and he ought not to be punished, by depriving him of his interest, for refusing to take less than he is entitled to claim. On the petition of the Bedford Street Mission (1 WEEKLY NOTES, 100), the former Court of Common Pleas of this county required a deposit of the whole of the disputed principal

sion, poundage, costs, and interest to the date when it was paid in. The main dispute in that case, was as to the right to pay the money into Court and obtain an order of satisfaction, inasmuch as an action of scire facias on the mortgage was pending when the petition was filed. The mortgagee seems to have had a just cause, for he was intrenched behind a certificate of no defence; and if the attention of the Court had been called to this matter, perhaps it would have required the deposit of enough to secure the future interest on the difference between the amount claimed and that admitted to be due. This view of the question does not appear to have been presented and considered. The Supreme Court says that the mortgagee may, by leave of Court, take out so much of the money as is not in dispute, and the residue, if not invested by order of Court, or taken out by one of the parties, on giving approved security for its payment when required, remains in Court to abide its final order in the premises. Such investment by the Court should not be in the name and for the benefit of a third party, even though it is beneficially entitled to the interest (Wapples's Appeal, *supra*). But suppose the mortgagee does not or can not give security and thus get his money, ought he to be deprived of his interest, while the litigation is pending, because he insists upon having the full amount of principal due to him? Speaking for myself, I think that at least three years' advance interest on the amount in dispute should be deposited. That would allow time for the trial of an issue, a writ of error, and a new trial, if awarded. As the difference between the amount claimed and that admitted to be due, is generally small, in comparison with the whole amount secured by the mortgage, the hardship on the mortgagor of requiring him to deposit enough to secure future interest on that difference, would be much less than the injustice inflicted upon the mortgagee, in depriving him of his interest for resolutely insisting upon payment of the whole amount of principal to which he is justly entitled.

The statement in Stewart's Case (*supra*), that, as a general rule, proceedings on a pending sci. fa. sur mortgage should not be stayed until the amount claimed is actually paid into Court, implies that the proceedings will be stayed when the money is paid. In that event the right to the fund would have to be determined in an

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C. P. No. 4. June 3, 1884.

Garretson v. Garretson.

Divorce—Alimony pendente lite not granted where wife has separate estate.

Rule to vacate order for alimony.

The depositions showed that the wife was possessed of a separate estate.

John A. Clark, for the rule, cited—

Toole *v.* Toole, 1 WEEKLY NOTES, 96.

Josiah R. Adams, contra.

[THAYER, P. J. Where the wife has a separate estate, alimony *pendente lite* will not be granted.]

June 11, 1884. Rule absolute. G. R. V. D.

Orphans' Court.

April 7, 1884.

Rachel Parker's Estate.

Will—Calendar month, computation of—Charitable bequests—Act of April 26, 1855.

Sur audit of the account of the executors.

Decedent died March 28, 1883, having made her will dated February 27, 1883, and duly proved April 5, 1883, by which, *inter alia*, she bequeathed to the "Bethel Church in Sixth Street," and to the "Home for Aged Colored People," each one hundred dollars, and the residue of her estate to her sister, and other collateral relations.

The only question raised, was whether the charitable bequests were valid under the Act of April 26, 1855 (Purd. Dig. 1477, pl. 22).

The Auditing Judge (HANNA, P. J.), in his adjudication, found as follows: The will was executed on February 27, 1883, and testatrix died March 28, 1883, and the Act says all such bequests shall be void unless the will be made or executed at least one calendar month before the decease of the testator. So that it is important to ascertain whether the present will was executed one calendar month before the decease of testatrix. If the Act had said simply *one month*, then it would have meant a calendar month. (Moore *v.* Houston, 3 Sergt. & R. 169.) But to prevent misunderstanding, the Legislature said it shall be a "calendar" month, that is, a month according to the calendar or almanac, which is not uniform as a lunar month but varies; as, for instance, February has 28 days, except in leap year, when it has 29, and April, June, September, and November each have 30 days, while the remaining months have 31 days. (See 2 Bouvier's Law Dict. title "month.") The calendar year is therefore composed of twelve months, varying in length, according to the common or Gregorian calendar. (Webster's Dict., "month.") Applying this test to the will, and computing from the date of the death of testatrix, one month prior to that date according to the calendar or almanac will bring us to February 28th, thus completing a calendar month. And as testatrix executed her will on the day previous, viz., February 27th, it follows it was executed prior to her death fully the time prescribed by the Act, and without counting the day of her death. In computing the time within which an act is to be performed, the day from which the computation is made is to be excluded. (Boyer *v.* N. C. R. W. Co., 1 Pearson, 113; McCready *v.* McGovern, 1 Kulp, 474; and see Act of June 20, 1883, P. L. 136.) When a calendar month's notice of action is required, the day on which it is served is included and reckoned one of the days; and therefore if a notice be served on the 28th of April it expires the 27th of May, and the action may be commenced on 28th of May. (2 Blackst. Comm. 141, note 3.)

And a lease made on January 1st to hold from year to year, rent payable quarterly, the first quarter's rent is due March 31st, and the lease expires December 31st. (Donaldson *v.* Smith, 1 Ash. 197.)

Being of opinion, therefore, that the requirements of the Act of 1855 have been met, and the religious and charitable bequests are valid, they are accordingly awarded payment.

D. R. Nuttall, for executors.

J. Sergeant Price, for legatees.

April 26, 1884. No exceptions having been filed, the adjudication was confirmed sec. reg.

June 16, 1884.

Fish's Estate.

Distribution—Practice—Rights of creditors not affected by agreement between administrator and purchaser of real estate made after the sale.

Sur exceptions to adjudication.

At the audit of the account of the administrator of the will of Jacob S. Fish, deceased, the following facts appeared: During his lifetime decedent had given his bond for $2000 secured by a mortgage on premises No. 679 North Tenth

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Street. This bond and mortgage were afterwards assigned to Thomas W. Vaux. The bond was entered up and the judgment thereon thus became a lien on all real estate of decedent in the county, among which was property on Citron and on Melon streets, which were also incumbered by building association and other mortgages.

After his death it was found that his personal estate was insufficient to pay his debts, and, therefore, his real estate was called upon, and the Orphans' Court ordered the sale of the real estate for payment of debts. Previously to making sale of the real estate, the administrator, upon an application to the Court, appropriated the sum of $1150 towards the liquidation of the building association mortgages. The sale took place on the 13th of November, 1883, when the Tenth Street property was sold to Clotilda E. White for $675, subject to the $2000 mortgage. The deed for this property was made and delivered December 28th, 1883. At this time the interest due and unpaid on the mortgage was $690. In the settlement for the purchase, the house rent was calculated and added to the purchase-money, and the evidence before the Auditing Judge was that it was agreed that all interest unpaid at that time should be paid by the estate. Upon this agreement and basis the settlement was made, and the consideration was paid. The statement of settlement, signed by the administrator, was also produced and proven at the audit in support of the above facts.

The aforesaid Thomas W. Vaux claimed the arrears of interest on the mortgage of the Tenth Street property, as the administrator had agreed the estate should pay the same.

The Auditing Judge held that the arrears of interest were a mere incident to the original mortgage debt, and therefore disallowed the claim of Vaux, saying :—

"The purchaser is, therefore, liable for the arrears of interest and not the estate. As to the claim upon the bond accompanying the mortgage, it need only be said that the judgment upon it is only to secure any balance not collected by a suit and consequent sale upon the mortgage. The bond is the principal debt and the mortgage is a collateral security. The holder is bound to exhaust the latter, the mortgage, and then upon the bond collect the balance remaining unpaid in the suit on the mortgage.

"He cannot be paid out of assets as to which other creditors having but a single remedy can alone look for payment, while he has another security of no advantage to them. It would be unjust to the other creditors, and we will not permit any such result. The judgment held by the mortgage creditor should accordingly be postponed to claims of the other specialty creditors. (See Gould's Estate, 6 WEEKLY NOTES, 562, and cases there cited.) The claim of Thomas W. Vaux is accordingly disallowed."

To this finding exceptions were filed by Vaux.

H. K. Fox (with whom was *E. C. Mitchell*), for exceptant.

By the entering of the bond Vaux became a judgment creditor of the estate of Jacob S. Fish, deceased, and should participate with other creditors in their awards according to priority.

Mason's Appeal, 8 N. 402.
Ramsey's Appeal, 4 W. 71.

We cannot be postponed under the law, for we have a right and the duty is upon us to make our claim upon the personalty for the payment of the debt.

Hammett's Appeal, 3 WEEKLY NOTES, 416.
Brough's Estate, 21 P. F. S. 460.

The accumulation of remedies does not diminish our rights, and this right is not impaired by any lien we may have on the land.

Morris *v.* Olwine, 10 Harris, 442.
Kittera's Estate, 5 Harris, 416.
Shunk's Appeal, 2 Barr, 309.

The position taken in this case that a mortgage creditor whose lien was not disturbed by the sale should be postponed to other specialty creditors, is not sustained by Gould's Estate (cited by the Auditing Judge), for this Court, in Jones's Estate (12 WEEKLY NOTES, 388), explained that in Gould's Estate there was merely a suspension of distribution for four months until the mortgage creditor should proceed against the mortgaged premises, which is all we ask for here. Further, the interest accruing day by day is one of the burdens of the land, and it is reasonable that the estate which profited by the income should bear the burdens incident to the ownership.

Eddy's Estate, 13 Philada 262.

If the Act of 1867 preserves the lien of a mortgage when prior to all other liens except other mortgages, etc., it would seem to be error to distribute any of this fund to the Tradesmen's and State Mutual Building Associations, whose mortgages answered the requirements of the Act, unless, indeed, Vaux's mortgage is accorded the same privileged position.

S. Gavitt, Jr., *W. C. Hannis*, and *N. D. Miller*, contra.

June 28, 1884. THE COURT. It is clear that the rights of creditors cannot be affected by any agreement between the administrator and a purchaser of the real estate made after the sale; nor can it be questioned that the sale of the Tenth Street property did not discharge the lien of the mortgage, either as to interest or principal. If the purchaser was misled in any way, his only remedy was by an application to have the sale set aside. (Penn Building Association's Appeal, 32 Smith, 330.)

But, though the lien of the mortgage was not

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discharged as to this property, the mortgagee, by whom judgment had been entered upon the bond in the lifetime of the decedent, had his rights, so far as other properties were concerned, both as general creditor, and under the lien of his judgment; and that he had two funds to which he might resort while other creditors had but one, could not justify his exclusion altogether from the common fund. (Jones's Estate, 12 WEEKLY NOTES, 388.) Ordinarily in such a case, distribution might be suspended until after proceedings could be had on the mortgage, as in Gould's Estate (6 WEEKLY NOTES, 562); or, payment might be awarded to the mortgagee, as general creditor, or by virtue of his judgment lien, out of the proceeds of the properties not covered by his mortgage, the lien of the mortgage being preserved for the benefit of other creditors, who, to the extent that they had been deprived of the common fund by reason of its having been so taken, would be entitled to subrogation upon the mortgage. Of course the purchaser of the mortgaged property, who had paid only for the decedent's interest in the property in excess of the mortgage, could not claim that payments so made to the mortgagee should be applied in extinguishment or reduction of the mortgage subject to which he had bought.

In the present case, however, it appears that by an arrangement made previous to the sale and afterwards confirmed by the Court, the two other properties were sold clear of incumbrance other than first mortgages, and that the proceeds, after payment of taxes, etc., etc., were insufficient to pay the specific liens discharged by the sale thus made. The fund now before the Court represents, therefore, only the proceeds of the property sold subject to the mortgage of the exceptant, and, after payment of taxes, amount due upon a judgment, etc., etc., there remains but $35.14 for distribution among general creditors. This amount is so small that it is not worth while to consider what right the exceptant may have, as general creditor, to claim a dividend. The inconvenience which would result to him from having the accountant subrogated as mortgagee to the extent of the dividend would largely exceed any benefit from the payment.

We will therefore dismiss the exceptions, giving leave, however, to the exceptant, if he should desire to avail himself of it, to apply within ten days from the date of filing this opinion for an order suspending distribution until after a sale under the mortgage.

Opinion by PENROSE, J. W. D. N.

June 16, 1884.

Kieszling's Estate.

Substituted legatee—Parties to the record—Advertisement—Practice.

Sur petition for further order of Court, and answer.

The petition of the executor of Wolfang Kieszling set forth that testator died leaving a will dividing his estate between his sister and his son, provided that the latter should "come forward and make himself known within three years from the date of my death" (March 9, 1881). Christopher Kieszling, the son, had not been heard of for some time prior to his father's death, and, after the adjudication of the executor's account, by order of Court, the share of Christopher Kieszling was deposited in bank and a system of advertising instituted, which resulted in the reception of a letter on January 3d, 1884, from one who knew that Christopher Kieszling had left for the West, in July, 1877. Further search elicited a letter signed Christopher Kieszling, dated June 2, 1884. The petition asked for further order in the premises, inasmuch as the letter first received prevented the presumption of his death until July, 1884.

The answer, admitting the facts, maintained that as Kieszling had not complied with the provision of his father's will he must forfeit his share of the estate to decedent's sister.

W. H. Staake, for petitioner.

S. S. Remak, for the substituted legatee.

June 28, 1884. THE COURT. The petition undoubtedly discloses a *prima facie* case in favor of the substituted legatee, by alleging a full compliance with the testator's request, and with the corresponding order of Court, to advertise for the missing son, and the failure of the latter to make himself known within the time limited by the will. Where, however, the subsequent knowledge of his whereabouts is so distinctly admitted, no adverse judgment would bind him, and certainly none would conform to equitable principles which did not first require that he should be made a party to the record. Whether any evidence which he may submit, either of efforts to comply with the directions of the testator, or of disability which precluded all effort, can avail him, would be prematurely discussed unless this prerequisite shall be complied with. We therefore direct that a copy of the petition, with notice that he will be required to answer within twenty days from its receipt, be served upon the son, and that a return thereof be made to the Court.

Opinion by ASHMAN, J. W. D. N.

[*Cf.* Fairfax's Appeal, 13 WEEKLY NOTES, 274.]

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in an action brought by the defendant against the garnishee. (C. P.) Ireland *v.* Stockham, 126.

Although an affidavit of defence filed before return day admits a portion of the plaintiff's claim, judgment therefor cannot be entered until after the return day. Boyle *v.* Horner, 9.

When a copy is filed during the second week after return day, rule of Court III. requires that notice be given to the defendant at least forty-eight hours before the third Saturday. (C. P.) Bergdoll *v.* Toth, 211.

No writ of error lies to the refusal to grant judgment for want of a sufficient affidavit of defence, unless the plaintiff excepts to such refusal. Watson *v.* Supplee, 452.

Sufficiency of copy. A contract to buy shares of stock is not within the Act. (C. P.) Coleman *v.* Clark, 76.

A bank ledger is not a book of original entries within the Act of Assembly for the purpose of charging a depositor for an overdraft. (C. P.) Bank *v.* Baker, 89.

It is not necessary that the book of original entry should show the name of the seller. (C. P.) Lantz *v.* Fowler, 359.

Book entries charging goods in the manner customary in the trade, by their trade names, are sufficient. (C. P.) Atkinson *v.* Harper, 359.

Indorsements of credit upon a promissory note are not sufficient to overcome a defence of the Statute of Limitations upon a rule for judgment for want of a sufficient affidavit of defence. (C. P.) Schaecterlein *v.* Knabe, 404.

In an action against a corporation upon a guaranty of bonds, the corporate power to make the guaranty may be stated in an averment accompanying the copy filed. (C. P.) Pennypacker *v.* Camden and Atlantic R. R. Co., 158.

No material defect in the copy filed can be supplied by amendment. Hence, if an indorsement necessary to vest title to promissory note in the plaintiff has been omitted, a judgment cannot be taken for want of an affidavit of defence. (C. P.) Zug *v.* Robbins, 292.

Sufficiency of affidavit. An affidavit by the maker of an accommodation note averring want of consideration as a defence against it in the hands of one to whom it has been pledged as collateral security for an antecedent debt is insufficient. (C. P.) Bank of Republic *v.* Carpenter, 92.

What is a sufficient denial of the purchase of goods. (C.P.) Caldwell *v.* Prendergest, 125.

What a sufficient averment of fraudulent negotiation of promissory note, to put the holder to proof of holding for value. (C. P.) Nichols *v.* Brown, 328.

In an action for rent, an affidavit averring untenantable condition of premises is insufficient. (C. P.) Schleppi *v.* Gindele, 31.

What a sufficient affidavit in an action by holder against indorser of promissory note. (C. P.) Gross *v.* Cloud. 225.

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AMENDMENT—*Continued.*

Upon the trial of an issue against two defendants where the plea is the Statute of Limitations, the plaintiff is entitled to amend the pleadings so as to render competent an offer to show a payment within six years by one. Herman *v.* Rinker, 541.

No material amendment can be made in a copy filed for the purpose of obtaining judgment for want of an affidavit of defence. (C. P.) Zug *v.* Robbins, 292.

Where plaintiffs declare against a firm for a debt which has been discharged by proceedings in bankruptcy, and on the trial prove a sufficient promise by one partner subsequent to the discharge to pay the debt, the narr. may be so amended after verdict as to declare against that partner only. Bolton *v.* King, 361.

A plaintiff in foreign attachment brought for breach of contract may amend his declaration by filing special counts. (C. P.) Sims *v.* Stribler, 29.

An indictment against the treasurer of an association for embezzlement, may be amended by adding descriptive words in the title of the association. (Q. S.) Commonwealth *v.* Volz, 289.

A bill in equity may be amended by the joinder of new plaintiffs intervening for their own protection against a nuisance maintained by the defendants. (C. P.) Harrison *v.* St. Mark's Church, 387.

An amendment of the title of the garnishees in an attachment execution will not be permitted if intervening rights may be thereby affected. (O. C.) Bunting's Estate, 487.

ANNUITY. In setting apart a sum to meet annuities, the Court will make the fund sufficiently large to meet all contingencies arising from falling of prices and possible losses attendant upon change of investments. (O. C.) Mullen's Estate, 144.

ANSWER. Effect of, in equity. See EQUITY. George Socher's Appeal, 381.

APPEALS. See ERRORS AND APPEALS.

Appeal from Justice of Peace. See JUSTICE OF PEACE.

Appeal in road case, when to be filed. *In re* Road in Nescopeck, 559.

APPORTIONMENT. The interest upon the loans of a public and also of a private corporation will be apportioned up to the date of the death of a life tenant; *aliter* as to government loans. (O. C.) Truefitt's Estate, 242.

Apportionment of dower. See HUSBAND AND WIFE Jones's Appeal, 313.

APPROPRIATION OF PAYMENTS. See EXECUTION. Wagner's Appeal, 104.

ARBITRATION. Where a contract contains a submission to a designated person as a common arbiter of all and every question of difference between them, growing out of the contract, the non-performance of the contract by one of the parties constitutes a cause within the jurisdiction of the arbiter. Connor *v.* Simpson, 315.

Such a submission is a binding one on the parties, and it includes questions of law as well as of fact; the arbiter, though not learned in the law, may pass upon the construction of the contract, and where a question arises as to whether a provision is to be treated as for a penalty or for liquidated damages, he must decide that question. Ib.

When the arbiter does not so decide, but awards one sum upon one construction of such clause, and another sum upon the other construction, the award is bad, as uncertain and indefinite and as driving the parties to a different tribunal for the settlement of

ARBITRATION—*Continued.*

differences which they had contracted should be finally determined in one of their own choosing. Ib.

Under what circumstances a submission of a cause by agreement of the parties to referees mutually chosen, whose decision of law and fact shall be final, is an irrevocable contract, with which the Court will not interfere. (C. P.) White *v.* Davis, 59.

When the Common Pleas sustains exceptions filed to the report of a referee under the Act of June 16, 1836, but enters no judgment, files no opinion, and makes no order referring the cause back to the referee, a subsequent entry of judgment by the prothonotary, as of the day the exceptions were sustained, is unauthorized, and the cause must be considered as still pending. McGlue *v.* Philadelphia, 399.

This defect cannot be waived by agreement of counsel. Ib.

ASSAULT. See TRESPASS ON CASE. W—— *v.* D——. 239

ASSESSMENTS. See TAXES AND TAXATION.

ASSIGNMENT, partial, of claim against municipal corporation invalid. See MUNICIPAL CORPORATIONS. Schroeder's Appeal, 537.

ASSIGNMENT FOR BENEFIT OF CREDITORS. While no particular form of words is necessary to constitute an assignment for the benefit of creditors under the Act of 1836, the transaction must be in substance a transfer of property of the assignor in trust for the benefit of his creditors. Johnson's Appeal, 441.

A mortgage executed by the assignor to a trustee for creditors in consideration of an extension of time for the payment of the assignor's debts, being a mere security cannot be treated as an assignment for the benefit of creditors under the Act. Ib.

The Court of the domicile of the trustee has jurisdiction over his account, not of the locus of the land. Ib.

An assignment for the benefit of creditors being a voluntary conveyance, is sufficient of itself to pass title to an insolvent's personal estate wheresoever situate, and the deed without recording is effective as against the grantor. Martha Smith's Executors' Appeal, 285.

The Act of May 3, 1855, makes such deed good as to all but "*bona fide* purchasers," mortgagees or creditors having a lien thereon before the recording, in the same county, and not having had previous notice thereof. Ib.

But those who have actual notice of the assignment are not within the saving clause, and can take no title by deed from the insolvent. Ib.

An assignment was dated, executed, delivered, and accepted in New York, but the assignor and assignee were residents of Pennsylvania, and had their principal place of business here. The assignment was recorded in New York, and an inventory filed there, but neither of these was done in Pennsylvania, *held*, that the summary dismissal of the assignee upon the petition of certain of the creditors was in accordance with the Act of Assembly. Weiskettle's Appeal, 55.

An auditor appointed to distribute the balance in hands of an assignee for the benefit of creditors, can only distribute to those claiming under the assignment. Those who claim adversely cannot be heard. Schroeder's Appeal, 537.

Right of assignees for benefit of creditors of a corporation to enforce payment of unpaid subscription to stock. See CORPORATION. Yeager *v.* Trust Co., 296.

ASSIGNMENT OF LIFE INSURANCE POLICY. See INSURANCE. Blattenberger *v.* Holman, 283.

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ASSIGNMENT OF MORTGAGE, rights of assignee of part of mortgage. See MORTGAGE. Patrick's Appeal, 332.

ASSUMPSIT. Money paid by the plaintiff to the defendant under a *bona fide* forgetfulness of facts which disentitle the defendant to receive it, may be recovered back. It is no bar to recovery that the plaintiff paying money under a mistake of fact had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate the facts. Meredith *v.* Haines, 364.

Assumpsit, when not maintainable for work done upon expectation of the consummation of an agreement. MacMackin *v.* Timmins, 318.

Under what circumstances the doing of work upon the defendant's property will not lay the foundation for a *quantum meruit*. Creighton *v.* Boudinot, 556.

ATTACHMENT EXECUTION. See EXECUTION.

ATTACHMENT FOREIGN. See FOREIGN ATTACHMENT.

ATTACHMENT FOR CONTEMPT, when not granted against County Commissioners in mandamus proceedings. (C. P.) Senior *v.* Douglass, 454–5.

ATTACHMENT UNDER THE ACT OF 1869. In order to sustain an attachment there must be a fraudulent concealment of property; simply hindering creditor by confessing a judgment to a preferred creditor is not enough. (C. P.) Stokes *v.* Schlecht, 328.

ATTORNEY AND CLIENT. A contract between an attorney-at-law and a client for a contingent fee is a valid and binding contract in this State. Perry *v.* Dicken, 245.

The validity of such a contract is not interfered with by reason of the fact that the attorney is also a material witness in the case, where it does not appear that the fee was at all intended as a reward for the attorney's services as a witness. Ib.

Semble, that an attorney is a competent witness on behalf of his client. The propriety of his taking the witness stand commented on. Ib.

Counsel have no power to agree to a verdict in an issue *devisavit vel non*. (C. P.) Hambleton *v.* Mendenhall, 172.

The claim of an attorney for professional services rendered in an action pending at the death of the client, becomes due at such time, and, consequently, the Statute of Limitations commences to run from that date. Campbell *v.* Maple's Administrator, 329.

ATTORNEYS-AT-LAW. Where an attorney-at-law of another State applies for admission as an attorney of this Court, it is not sufficient to produce his certificate of admission in the Courts of a foreign State. Recent certificates, or other satisfactory evidence of the good standing of the applicant as an attorney of the Courts of his domicile, will be required. A certificate of admission to the Supreme Court of the United States, of recent date, will not supply the place of such evidence of good standing. *In re* Application for Admission to the Bar, 88.

A married woman is not entitled to admission to the Bar. (C. P.) *In re* Mrs. Kilgore, 30, 255; *contra*, 466.

The rules of Court do not prevent attorneys-at-law from entering bail upon appeals from justices of the peace. (C. P.) Gardy *v.* Moffit, 438.

AUDITOR, appointed to distribute assigned estate; scope of duties. See ASSIGNMENT FOR BENEFIT OF CREDITORS. Schroeder's Appeal, 537.

AWARD, when bad. See ARBITRATION. Connor *v.* Simpson, 315.

BAILMENT, duty of bailee to insure. (C. P.) Heaton *v.* Knowles, 74.

As between two pledges of the same negotiable securities, the possession of the holder, if without notice of the prior bailment is paramount. Gibson *v.* Lenhart, 149.

BANKRUPTCY. A sale of a bankrupt's lands by his assignee under order of the Court does not divest the dower of the wife. Porter *v.* Lazear, 261.

A claim for damages for cutting timber under the Act of March 29, 1824, which has been put into a judgment obtained for want of an appearance is provable against the estate of a bankrupt. Spring Run Coal Co. *v.* Tosier, 353.

The effect of a discharge in bankruptcy is absolutely to extinguish a debt and not merely to bar the remedy for its recovery. Hence, the mere acknowledgment of a debt after a discharge in bankruptcy therefrom, however clear, distinct, and unambiguous it may be in its terms, is not sufficient to restore the debt so that suit can be maintained thereon. Bolton *v.* King, 361.

A statement in the following words, "We owe her the money, will pay it some day, can't say when," is a sufficient promise upon which to bring suit for a debt discharged by proceedings in bankruptcy. Ib.

Where plaintiffs declare against a firm for a debt which has been discharged by proceedings in bankruptcy, and on the trial prove a sufficient promise by one partner subsequent to the discharge to pay the debt, the *narr.* may be so amended after verdict as to declare against that partner only. Ib.

BANKS AND BANKING. The Act of March 14, 1871, incorporating the Merchants' Bank of Easton, confers upon such corporation no right of lien upon its stock for the amount of debts due to it by its stockholders. Merchants' Bank *v.* Shouse, 133.

The provisions of the Act of April 16, 1850, conferring such rights upon banks of issue do not extend to mere savings banks. Ib.

When a collecting bank sends negotiable paper to the bank on which it is drawn, it is guilty of such negligence as to make itself liable to its customer. (C. P.) Goodman *v.* Merchants' Bank, 531.

The administrator of a deceased stockholder is entitled to receive from a bank upon its winding up the amount of the dividend payable upon the shares of such stockholder without any deduction for moneys due by the stockholder to the bank. Slaymaker *v.* Farmers' Bank, 349.

Under what circumstances a bank paying a check under a mistake as to the account of the drawer may recover the amount from the party to whom payment was made. Meredith *v.* Haines, 364.

BASE FEE. See DEED. Church *v.* Columbia Co., 229.

BENEFICIAL SOCIETY. Under what circumstances a member of a beneficial society may not be expelled. (C. P.) Sweeney *v.* Hugh McLaughlin Beneficial Society, 466, 486.

BILLS AND NOTES. An affidavit of defence by the maker of an accommodation note averring want of consideration as a defence against it in the hands of one to whom it has been pledged as collateral security for an antecedent debt is insufficient. (C. P.) Bank of the Republic *v.* Carpenter, 92.

Items of credit indorsed are not part of a promissory note, and need not to be denied in an affidavit of defence setting up the Statute of Limitations. (C. P.) Schaecterlein *v.* Knabe, 404.

When an affidavit of defence sets up the fraudulent negotiation of a note, the onus of showing that he is a holder for value is thrown on the plaintiff. (C. P.) Nichols *v.* Brown, 328.

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BILLS AND NOTES—*Continued.*

What is a sufficient averment of want of consideration. (C. P.) Gross *v.* Cloud, 225.

BILLS OF PARTICULARS. See PRACTICE.

BONDS. Railroad coupon bonds are negotiable instruments which pass by delivery, and every transfer thereof to a new holder for value and without notice, gives him a good title as against the former holder. A *bona fide* purchaser is unaffected by want of title in his vendor, and the last taker is presumed to be a *bona fide* holder for value, and may maintain his possession against everybody until the presumption is successfully rebutted by those who assail his possession. Gibson *v.* Lenhart, 149.

Municipal coupon bonds payable to bearer are at least quasi-negotiable in these particulars—they pass by delivery; the holder may sue in his own name; the transferree for value holds the title as an original obligee; he cannot be affected by equities between the previous holders and the municipality of which he had no notice; neither can he be affected by the default of the officers issuing them, unless such default directly affects their power to make and put them upon the market. Kerr *v.* Corry, 277.

A coupon is incidental to and forms part of the bond, and therefore suit upon it is not barred until twenty years after maturity. (C. P.) Helmbold *v.* D. H. and W. R. R. Co., 128.

In a suit on coupons payable at a particular time and place, it is no defence to allege want of demand, without showing that a fund was provided to meet them. Ib.

The special remedy given in a mortgage created as a security for a bonded indebtedness is not exclusive, but an action of debt on the bond co-exists with it. Ib.

An action will lie for interest due on a bond, although the principal is not yet due, and notwithstanding the fact that the mortgage securing the bond provides a special remedy for the collection of principal and interest by writ of scire facias. Montgomery County Agri. Society *v.* Francis, 179.

One of two tenants in common to whom jointly the bond of a purchaser at a treasurer's sale of unseated land is given, cannot release the whole bond. He can only release such portion as represents his undivided interest. Petriken *v.* Myton, 71.

The presumption of the payment of a bond arising from lapse of time may be rebutted by evidence of the debtor's inability to pay. (O. C.) Griffith's Estate, 486.

Action on official bond of sheriff for a false return, when not maintainable. King *v.* Commonwealth, 219.

BOROUGHS. The Act of April 1, 1834, providing for the incorporation of boroughs remains in force so far as it is not repugnant to and is not altered or supplied by later enactments. The Court of Quarter Sessions may declare needful alterations in the borough limits whenever expedient. McFate's Appeal, 543.

BRIDGES. Liability of county for defect in. See NEGLIGENCE. Rigony *v.* Schuylkill County, 120.

BROKER, lien of, on papers for services rendered. (C. P.) Arthur *v.* Sylvester, 417.

BUILDING ASSOCIATION. A, a member of a building association borrowed money from it and gave a mortgage on property belonging to his wife, in which she joined. Her acknowledgment was taken by a justice of the peace, who was also vice-president of the association, and it was therefore held to be invalid and the land discharged. A. had also executed a bond in favor of the association on which the defendant

BUILDING ASSOCIATION—*Continued.*

was surety, and in a proceeding on this bond it was held, that the defendant could not testify that it was the custom of the association to secure its loans by real estate security, which was treated as primary security and was first resorted to, and that he would not have signed the bond had it not been for the verbal agreement that the land mortgaged should be first liable for the payment of the loan.

Held further, that since the officers of the association were authorized by its by-laws to take either a bond or a mortgage as security for loans, they might take both, and in that case the presumption would be that they were both relied on, and that the association would not be restricted to the pursuit of the one before the other. Juniata Loan Association *v.* Hetzel, 431.

A member of a building association who as surety has given a mortgage to secure payment of a loan made by the association to another of its members, is liable to the same extent as he would be if the loan had been made to himself as principal, and cannot plead usury to an action thereon. Johnston *v.* Elizabeth Loan Association, 247.

A building association need make no inquiries as to the purpose for which a loan made by it to one of its members is obtained, nor as to the use to which the money may be put. Ib.

In an action on a mortgage given to a building association incorporated under the Act of April 12, 1859, it is not competent for the defendant to show that less than the face value has been advanced to the mortgagee. The presumption is that the difference between the face value and the amount advanced is the premiums legalized by that Act. Ib.

A member of a building association who has borrowed money from it, cannot prove as a set-off to an action therefor that the association suspended business subsequently to the loan, and that he suffered pecuniary loss of profit on account of such suspension. Ib.

BURGLARY. See CRIMES. Swan *v.* Commonwealth, 67.

CAPIAS. Sufficiency of affidavit for. See PRACTICE. (C. P.) Craven *v.* Coates, 90. Kasper *v.* Newhouser, 128. Wedman *v.* Kendall, 157.

CASE, ACTION ON, when maintainable. See TRESPASS ON THE CASE.

CERTIORARI. See ERRORS AND APPEALS.

CHARITIES, exemption of from taxation. See TAXES AND TAXATION. Computation of calendar month in devises to. See WILL. (O. C.) Parker's Estate, 566.

CHURCH. Where the vestry of a Protestant Episcopal church in voting upon a question, stand six to five, the rector cannot claim to vote as a member of the vestry with the minority, and also to give a casting vote as presiding officer. Neilson's Appeal, 414.

The rector is a member of the vestry, and as such entitled to vote upon any question which may arise. Ib.

Exemption from liability to lien for municipal claims. See TAXES Erie *v.* Church, 232.

COLLATERAL INHERITANCE TAX. See DECEDENTS' ESTATES.

COLLISION. See SHIPS AND SHIPPING.

COMMISSIONS, waiver of right to charge. See DECEDENTS' ESTATES. (O. C.) McCawley's Estate, 260.

COMMON CARRIER. A person who drops his money in the street car is entitled to remain in the car a reasonable time to find it. (C. P.) Hall *v.* Second St. Pass. R. W. Co, 242.

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COMMON CARRIER—*Continued.*

Liability of sleeping car company for theft at night. See NEGLIGENCE. Pullman Palace Car Co. *v.* Gardner, 17.

COMMON PLEAS. The title of the Act of 1869 forbids its construction so as to give the Court of Common Pleas jurisdiction over the management of lunatics' estates by virtue of proceedings under its provisions. Such jurisdiction can only be acquired and exercised under and by virtue of proceedings in conformity with the Act of June 13, 1836, or similar statutes. Halderman's Appeal, 101.

In the supervision and control of trustees, especially assignees under deeds of voluntary assignment, Courts of Common Pleas are clothed with very large discretionary powers, and their orders and decrees in such cases should not be modified or reversed except for manifest abuse of such discretion. Weiskettle's Appeal. 55.

Jurisdiction of Common Pleas over assignee acting under assignment executed in foreign State. Ib.

C. P. of Dauphin County. The Common Pleas of Dauphin County has jurisdiction of proceedings in mandamus against the Sinking Fund Commissioners of the State. (C. P.) Commonwealth *v.* Sinking Fund Commissioners, 222.

The Common Pleas of Dauphin County has jurisdiction in all suits and proceedings in which the Commonwealth is the real plaintiff. (C. P.) Commonwealth *v.* Penna. Slatington & N. E. R. R. Co., 60.

The fact that a corporation defendant does not have a place of business, and does not exercise any franchise within the county makes no difference. Ib. See, also, Mahoney Life Asso. *v.* Commonwealth, 370.

See COURTS.

COMPETENCY OF WITNESSES. See EVIDENCE.

COMPROMISE. The offence of fraud in misappropriating money as broker is but a misdemeanor under the Cr minal Procedure Act; it can be settled, and an action had for the amount misappropriated. (C. P.) Williams *v.* Dreshler, 211.

Power of agent of insurance company to make compromise. See CORPORATION. Mercer County Ins. Co. *v.* Stranahan, 495.

CONDITIONAL FEE. See DEED. Church *v.* Old Columbia Ground Co., 229.

CONFIDENTIAL ADVISER. See WILL.

CONSEQUENTAL DAMAGES. See CONSTITUTIONAL LAW.

CONSIDERATION, for promise to pay debt discharged in bankruptcy. See BANKRUPTCY. Bolton *v.* King, 361.

For family settlement, see CONTRACT. Wilen's Appeal, 539.

CONSPIRACY, to imprison, action for, when not maintainable. See DAMAGES. Johnston *v.* Given, 326.

CONSTITUTION OF PENNSYLVANIA.

Art. III. § 13, 322.
III. § 21, 505.
XVI. § 4, 97.
XVI. § 8, 545.

CONSTITUTION OF UNITED STATES. Art. I. § 8, 23.

CONSTITUTIONAL LAW. A steamship company incorporated in Pennsylvania and engaged in the business of transporting freight and passengers between ports in the United States, and between such ports and foreign countries, is liable as to its receipts to the tax on gross receipts imposed by the Acts of Assembly of March 20, 1877, and June 7, 1879. Philadelphia and Southern Mail S. S. Co. *v.* Commonwealth, 23.

CONSTITUTIONAL LAW—*Continued.*

Those Acts are not, in respect to such tax, in contravention of Art. I. § 8, of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations, and among the several States. Ib.

Under Art. XVI. § 8, of the Constitution of Pennsylvania, all corporations exercising the power of eminent domain must make just compensation for property taken, injured, or destroyed; this section was intended to apply to private corporations chartered before the adoption of the Constitution equally with others. (C. P.) Patent *v.* R. R. Co., 545.

Where just compensation is not made, the proper remedy is by action on the case. Ib.

An action on the case is the proper remedy where the value of plaintiff's property is lessened by the shifting of the tracks, though none be actually taken. Ib.

The feme sole trader Act of 1855, allowing a married woman to convey real estate, is constitutional. It impairs no vested right of the husband. Moninger *v.* Ritner, 99.

In an election for directors or managers of a corporation formed since the adoption of the Constitution of 1874, the shareholders may cumulate their votes upon less than the whole number of candidates. Pierce *v.* Commonwealth, 97.

The provisions of Art. XVI. § 4, of the Constitution, relative to cumulative voting do not require legislative action to carry them into effect. Ib.

Cumulative voting is a constitutional right, and a stockholder in its exercise is not bound to make known his intentions in advance. Ib.

A railroad company is a private corporation, and is embraced within the provisions of Art. XVI. § 4, of the Constitution. Ib.

A railroad company was entitled to take advantage of the Act of April 4, 1868, § 2, limiting liability to $5000 in case of death caused by negligence, although it had not accepted the provisions of that Act. Lewis, Receiver, *v.* Hollahan, 505.

The compensation of the sheriff for boarding prisoners is an "emolument" within the meaning of the Constitution of Pennsylvania, Art. III. § 13, which cannot be increased or diminished during his term of office. Apple *v.* Crawford County, 322.

CONSTRUCTIVE NOTICE. See NOTICE. Rowe *v.* Ream, 293.

CONTESTED ELECTION. See ELECTION LAW.

CONTINGENT FEE, contract for, not void. See ATTORNEY AND CLIENT. Perry *v.* Dicken, 245.

CONTRACT. The contract of a lunatic is void, without reference to the adequacy of the consideration, or the knowledge of the other party of the lunacy. (C. P.) Bowman *v.* Van Baum, 185.

A conditional acceptance of an offer does not bind the parties, unless the condition is accepted by the offerer. (C. P.) Bruggeman *v.* Larzelere, 108.

If a husband's conduct is such that his wife is legally justified in leaving him, she has the right to remain absent, and her agreement to return is a sufficient consideration to support a post-nuptial contract entered into by her with him. Burkholder's Appeal, 234.

The settlement of a family dispute is a sufficient consideration to sustain a contract. Wilen's Appeal, 539.

A contract with an attorney-at-law for the payment of a contingent fee is not void. Perry *v.* Dicken, 245.

A contract for the payment of a sum of money in settlement of a claim arising out of a fraudulent em-

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CONTRACT—*Continued.*
bezzlement by a broker is not the compounding of a felony, and may be enforced. It is based upon a valid consideration. (C. P.) Williams *v.* Dreshler, 211.

Where an insolvent debtor in fraud of his creditors assigns his property to a third person, taking from him judgment notes for the value thereof, and subsequently assigns one of such judgment notes as collateral security to a creditor who has knowledge of the fraud, the maker of such note cannot set up the fraud as a defence in an action brought against him by the creditor thereon. Winton *v.* Freeman, 324.

The mutual fraud of the parties constituted sufficient consideration in that case for the note in suit. Ib.

An assignment of all one's estate to a charity in consideration of maintenance during life is valid without regard to the amount of the estate. (O. C.) Stevens's Estate, 488.

Where the subject of a sale consists of an entire lot of standing timber of a specified quality, and the price to be paid is not apportioned to any item or part thereof, the contract is entire. Alcott *v.* Hugus, 355.

Where a contract is entire and not divisible, but one action can be maintained thereon. Ib.

Where the consideration of an entire contract is a cash payment, and a promise to give negotiable notes, at three, six, nine, and twelve months, a refusal to give such notes, after cutting part of the timber, is a breach for which the vendor can recover damages for the whole sum for which the notes were to have been given. Ib.

A covenant entered into by a decedent in his lifetime, guaranteeing the payment of interest on a mortgage until the mortgaged premises are so improved as to constitute an adequate security for the mortgage debt survives him, and can be enforced against his executors and administrators so as to recover interest accruing after the death of the decedent. Hunt's Appeal, 377.

Under what circumstances a contract of suretyship for rent runs with the land, and may be sued on by an assignee of the reversion. (C. P.) Taylor *v.* Kennelly, 124.

Where no demand for payment of board is made by a sister to a brother for over twenty years, there is a presumption that none was expected or intended. (O. C.) Pickens's Estate, 407.

Where a claimant has rendered menial service to a decedent, and no demand has been made for a long period of time, the law presumes payment. (O. C.) Kelly's Estate, 423.

A contractor with a municipal department is entitled to recover, if he has not exceeded the appropriation, notwithstanding the department and City Controller have improperly allowed the appropriation to be diverted to an erroneous use. (C. P.) Gate *v.* Philadelphia, 274.

Contract for submission to arbitrators, when not maintainable. See ARBITRATION. Connor *v.* Simpson, 515.

Right of action to recover price of work done upon the expectation of the consummation of a contract. MacMackin *v.* Timmins, 318.

Parol evidence, when admissible to vary writing. See EVIDENCE.

What not sufficient evidence of contract to enable contractor who has paved the street upon defendant's land to maintain assumpsit on a *quantum meruit.* Creighton *v.* Buodinot, 556.

The construction of a written contract is for the Court. Hughes *v.* Coal Co., 463.

CONTRACT—*Continued.*
Ambiguous words in a policy of insurance will be held to have the meaning most favorable to the insured, the presumption being that he took the policy on this construction, and the company could have avoided the difficulty by being more specific. Burkhard *v.* Ins. Co., 33.

Construction of contract by railroad company for employment of minor apprentice. Pennsylvania R. R. Co. *v.* Bost, 84.

See ASSUMPSIT. FRAUDS, STATUTE OF. SALE.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONVERSION. A mere testamentary power of sale vested in executors to sell real estate will not work a conversion. Hunt's Appeal, 377.

CONVEYANCER, implied powers of. See PRINCIPAL AND AGENT. (C. P.) Philadelphia Trust Co. *v.* Roberts, 123. BROKER, Arthur *v.* Sylvester, 417.

CORPORATION. The word "independent" as part of the name of an order held descriptive merely, and not to constitute a sufficient distinction between it, and the name of an order, whose title is in other respects identical. (C. P.) *In re* Sons of Progress, 31.

One who deals with a corporation in its corporate capacity cannot impeach the charter in a collateral proceeding by alleging that conditions precedent to the existence of the corporation have not been complied with. Johnston *v.* Elizabeth Building Asso., 247.

The jurisdiction of the Common Pleas of Dauphin County, in proceedings to close the business of insurance companies under the Act of April 4, 1873, extends to insurance companies located in any county of the Commonwealth. Mahoney Life Association *v.* Commonwealth, 370.

See, also, (C. P.) Commonwealth *v.* Penna. S. and N. E. R. R. Co., 60.

Upon the repeal and forfeiture of a turnpike company, the public right of way does not revert to the owner of the fee. The road still remains for the public use though discharged of tolls. Pittsburgh, etc., R. R. Co. *v.* Commonwealth, 177.

Upon the insolvency of a corporation its uncalled and unpaid capital stock constitutes a trust fund for the benefit of all its creditors, and will be administered as such. Bunn's Appeal, 193.

Where a corporation incorporated under the provisions of the Act of April 29, 1874, becomes insolvent, a bill in equity will lie at the instance of judgment creditors of the corporation to collect such part of the unpaid and uncalled subscriptions to the capital stock as is necessary for the satisfaction of their debts. Ib.

The personal liability of stockholders for work or labor done or materials furnished, imposed by section 14 of the Act, is not the sole liability which such creditors may enforce for the satisfaction of their debts. They may also by appropriate process enforce for their benefit the liability existing on the part of the stockholders to the corporation to pay uncalled and unpaid subscriptions to capital stock. Ib.

The liability of a transferee of stock to pay up to the par value thereof, is not to be enforced for the benefit of creditors in the manner specified in section 15 of the Act. Ib.

The liabilities to be enforced in the mode pointed out in § 15 are only those special personal liabilities to pay particular debts created by the other sections of the Act. Ib.

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CORPORATION—*Continued.*

In case of the insolvency of a corporation unpaid and uncalled amounts due upon the capital stock cannot be attached by a judgment creditor of the corporation by means of an attachment execution; upon insolvency the uncalled and unpaid subscriptions constitute a trust fund, which will be administered for the benefit of all the creditors. Ib.

The proper method of enforcing the stockholders' liability is by bill in equity praying for an assessment and the appointment of a receiver. Ib.

Unpaid subscriptions to the capital stock of a corporation which has become insolvent, may be levied on under writs of attachment execution although no assessment has been made by the board of directors. (U. S. C. C.) *In re* Glen Iron Works, 514.

An agreement in the articles of association of a corporation that the subscription should be paid in the notes of the subscribers, which should not be liable at any time to an assessment of more than fifty per cent. of their face, does not relieve stockholders from liability to creditors for the full payment of their subscription. Ib.

Where a corporation has made an assignment for the benefit of its creditors, and the assignees have notified the stockholder to pay the unpaid subscription due on his stock, the action of the assignees is equivalent to a formal assessment by the officers of the bank, and the assignees may recover the amount of such unpaid subscription in an action of assumpsit brought by the corporation to their use. Yeager *v.* Scranton Trust Co., 296.

Corporations are not creatures of the common law as opposed to the statute law. There is no such thing as a common law corporation in this Commonwealth. Merchants' Bank *v.* Shouse, 133.

At common law corporations have no lien upon stock for the amount of debts due to them by their various stockholders. Ib.

A railroad company is a private corporation, and is embraced within the provisions of Art. XVI. § 4, of the Constitution. Pierce *v.* Commonwealth, 97.

In an election of directors or managers of a corporation formed since the adoption of the Constitution of 1874, the shareholders may cumulate their votes upon less than the whole number of candidates. Ib.

The provisions of Art. XVI. § 4, relative to cumulative voting do not require legislative action to carry them into effect. Ib.

Cumulative voting is a constitutional right and a stockholder in the exercise of it, is not bound to make known his intention in advance. Ib.

What a sufficient acceptance of the Constitution of 1874 as to enable the stockholders of a corporation organized before that time to cumulate their votes. (C. P.) Baker *v.* Pepper, 560.

The *de facto* officers of a corporation are entitled to represent it in any legal proceedings. (C. P.) Woodward *v.* Church, 240.

A charter of an insurance company construed to justify the enactment of a by-law delegating to agents other than its board of directors, power to compromise and settle disputed claims by and against it. Mercer Co. Ins. Co. *v.* Stranahan, 495.

The proceeds arising from a sale upon execution of property of an insolvent corporation not essential to the exercise of its franchises, goes to the execution creditor, and is not to be distributed among any of the other creditors. Fairmount Coal and Iron Co.'s Appeal, 214.

Whether any of the franchises of the corporation could be sold on execution and the proceeds of the sale applied on that execution to the exclusion of the other creditors, not decided. Ib.

Taxation of corporation. See TAXES AND TAXATION.

Limitation of damages in action against for negligence. See CONSTITUTIONAL LAW. Lewis, Receiver, *v.* Hollahan, 505.

See BANKS AND BANKING, BUILDING ASSOCIATIONS, CHURCH, MUNICIPAL CORPORATIONS, RAILROADS.

COSTS. Where the assignee of a chose in action brings suit in the name of his assignor, the equitable plaintiff alone is liable for the costs of the action. (C. P.) Coffey *v.* White, 108.

Security for costs may be required of a foreign plaintiff even after the case is at issue. (C. P.) Hickok *v.* Park Association, 12.

Rule of Orphans' Court, concerning security for costs, 536.

All exceptions to the amount of costs paid out of a fund realized from a sheriff's sale, must be taken before the auditor or in the Court below. The question cannot be raised for the first time on appeal to the Supreme Court. Patrick's Appeal, 332.

Where the fund produced by a sale of real estate is insufficient to pay prior liens, the plaintiff in the writ on which the land is sold shall receive out of the proceeds the costs incurred to effect the sale only, and not those incurred prior to his execution. Bryant's Appeal, 167.

Costs of injunction affidavits when not allowed. (C. P.) Spielman *v.* Oil Co., 358.

Under what circumstances, the costs of a proceeding to settle a partnership account will be put upon the surviving partner. (C. P.) Foulke *v.* Hitzeroth, 241.

Upon what circumstances an Examiner's bill of costs in the Orphans' Court should not be put on a successful litigant who did not apply for the appointment of the examiner. Yerkes's Appeal, 510.

Costs in Orphans' Court when chargeable on guardian. (O. C.) Smith's Estate, 93.

COUNTY. The Act of March 31, 1876, § 14, provides that the salaries of prothonotaries in counties which have more than 150,000 and less than 250,000 inhabitants shall be $6000 per annum, *held*, that in order to ascertain whether the prothonotary of a particular county was entitled to the benefit of the provisions of the Act, the population of the county at the time he entered upon the performance of his duties must be deemed the criterion. Munroe *v.* Luzerne County, 446.

Effect of division of county, *i.e.*, Luzerne and Lackawanna, discussed. Ib.

The fact that untaxed dogs are kept on the same farm where sheep were killed does not affect the claim of the owners of the sheep to remuneration from the county sheep fund, unless those owners had a control of the dogs on the farm. When the county commissioners refuse to draw their warrant on the sheep fund for damages duly certified by the township auditors. the proper remedy is by mandamus. The duty of the commissioners in such cases is merely ministerial. (C. P.) Wetherill *v.* Delaware County, 42.

Under the Act of May 8, 1876, providing that court stenographers shall be paid by the county or counties forming the judicial district by which they are appointed, the counties are liable, although they have not made an appropriation to pay the stenographer. (C. P.) Wilson *v.* Philadelphia, 74.

Liability of county for defective bridges. See NEGLIGENCE. Rigony *v.* Schuylkill County, 120.

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COUPONS. Action on. See BOND. (C. P.) Helmbold *v.* Danville, etc., R. R. Co., 128.

COURTS. Order of Supreme Court as to paper-books, 313.

Jurisdiction of Common Pleas over trust for an incorporated association. (C. P.) Brown *v.* Griffin, 358.

Liability of county for payment of charges of Court stenographer. See COUNTIES. (C. P.) Wilson *v.* Philadelphia, 74.

Jurisdiction of Common Pleas of Dauphin County in proceedings instituted by the Commonwealth. Mahony Life Asso. *v.* Commonwealth, 370. Commonwealth *v.* Sinking Fund Commissioners, 222. (C. P.) Commonwealth *v.* Pennsylvania, Slatington, etc., R. R. Co., 60.

Admissions to the bar. See ATTORNEYS-AT-LAW.

COVENANT. In an action of covenant by a lessor against a lessee for the cost of curbing and paving the leased premises, the lease providing that the lessee shall pay all taxes, water-rents, and assessments upon the premises, the fact that the parties to the lease had agreed that a third party should do the work, and that the question of the liability should be afterward determined, was not such an alteration of the covenant as to render necessary a change in the form of the action. Griffen *v.* Phœnix Pottery Co., 266.

A covenant entered into by a decedent in his lifetime guaranteeing the payment of interest on a mortgage until the mortgaged premises are so improved as to constitute an adequate security for the mortgage debt, survives him, and can be enforced against his executors and administrators, so as to recover interest accruing after the death of the decedent. Hunt's Appeal, 377.

The lien of such a covenant can only be continued against the real estate of the decedent by bringing suit thereon within five years of the decedent's death, or by filing a copy of the covenant within that period. Ib.

Covenants, what implied upon sale. See VENDOR AND VENDEE. Transue *v.* Sell, 397.

Merger of. See LANDLORD AND TENANT. (C. P.) Lea *v.* Love, 75.

CRIMES, CRIMINAL LAW, AND PROCEDURE. Evidence may be admitted in a criminal trial of any one of a system of crimes that are mutually dependent, to show that the defendant belonged to an organization banded together for the purpose of committing crime, but some connection must be shown to exist between the offences. Swan *v.* Commonwealth, 67.

Where two persons are indicted for robbing a store, and one of the defendants has been found guilty of robbing another store about the same time, it is error to admit evidence relating to articles taken from such other house, unless some connection is shown to exist between the two offences. The collateral offence must form a link in the chain of circumstances relied on to convict. Ib.

An indictment charging that A., "with force and arms, etc., unlawfully, wilfully, and maliciously did break and destroy a certain chair, then and there the property of B.," does not set forth an offence indictable at common law. (Q. S.) Commonwealth *v.* Casperson, 106.

The treasurer of a building association, although a member thereof, may be indicted for embezzlement of funds. (Q. S.) Commonwealth *v.* Volz, 289.

The misappropriation of money by a broker is a misdemeanor, and hence may be settled by the parties. (C. P.) Williams *v.* Dreshler, 211.

CRIMES, CRIMINAL LAW, AND PROCEDURE—*Continued.*

Procedure. The commitment of a magistrate is final, and he has no power to review it or alter the sentence. In the event of an improper commitment under the Act of March 13, 1862, providing for the summary commitment of professional thieves, the defendant is fully protected by the Habeas Corpus Act. (Q. S.) Commonwealth *ex rel.* McCoy *v.* Superintendent of County Prison, 171.

Upon an indictment for fornication and bastardy, where facts are stated from which birth is a necessary inference, the indictment need not state the fact of birth expressly, nor that the child was born within the county, nor that it was born alive. (Q. S.) Commonwealth *v.* Menefee, 170

A distiller of whiskey having a license under the law is at liberty to sell the whiskey manufactured by him at any place within the same county where his distillery is established. Because he sells such liquor in a different township of the same county from that in which his manufactory is located, he is not liable to be indicted for selling liquor without a license. Britton *v.* Commonwealth, 368.

An amendment of an indictment by the insertion of descriptive words in the title of an association. (Q. S.) Commonwealth *v.* Volz, 289.

The pendency of an indictment is no ground for a plea in abatement to a second indictment charging the same offence. Smith *v.* Commonwealth, 40.

A plea averring the pendency of another indictment for the same offence is a nullity. Ib.

On one indictment charging a felony triable exclusively in the Oyer and Terminer, there cannot be a conviction for a misdemeanor. (Q. S.) Commonwealth *v.* Harper, 10.

The Supreme Court will not appoint a commission under the Act of May 14, 1874, to report on the mental condition of a prisoner sentenced to be executed on the day after the application is made. *Ex parte* McGinnis, 221.

The Act of May 14, 1874, providing for the appointment of a commission to inquire into and report upon the mental condition of persons convicted of crime, or charged with crime and acquitted on the ground of insanity, does not apply to a prisoner convicted of murder in the first degree. (O. and T.) *Ex parte* Briggs, 341.

A prisoner convicted of murder, and under sentence of death, is remitted by authority of law to the control of the executive, either for execution of sentence, commutation of it, or pardon in the manner prescribed by law. Ib. See LIBEL.

CROSS-EXAMINATION, scope of. See PRACTICE.

CUMULATIVE VOTING. See CORPORATION. Pierce *v.* Commonwealth, 97.

CURTESY. See HUSBAND AND WIFE.

CUSTOM. See EVIDENCE.

DAMAGES. When not recoverable by an alleged lunatic against the persons who procured her confinement. (C. P.) Johnston *v.* Given, 326.

A judgment for treble damages under the Act of March 29, 1824, for cutting timber is a provable debt in bankruptcy although the damages have not been assessed prior to the adjudication. Spring Run Coal Co. *v.* Tosier, 353.

Where judgment has been entered against a defendant by default for want of a plea, the damages may be assessed by the regular jury in the Common Pleas upon a writ of inquiry being obtained under the

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DAMAGES—*Continued.*
Act of May 22, 1722. (C. P.) McHenry *v.* Union Pass. Railway Co., 404.

Where the consideration of an entire contract is a cash payment, and a promise to give negotiable notes at three, six, nine, and twelve months, a refusal to give such notes after cutting part of the timber is a breach for which the vendor can sue and recover damages for the whole sum for which the notes were to have been given. Alcott *v.* Hugus, 355.

In an action by a property owner against a mining company for polluting the waters of a natural stream flowing through the plaintiff's land, and used by her for domestic purposes, it is error for the Court to leave the measure of damages entirely to the discretion of the jury without reference to the evidence. The jury should be instructed that the plaintiff is entitled to such damages as they find from the evidence will compensate the loss sustained. Sanderson *v.* Coal Co., 81.

In such case the fact that the mining company has increased the flow of water in the stream is immaterial, and cannot be set up by way of set-off or recoupment. Ib.

In the above case, the plaintiff was held entitled to recover damages not only for pollution of the water, but also for injuries done to a dam and other artificial constructions erected by her on the premises to enable her to make a convenient use of the pure water. Ib.

Evidence in this case that the mining was necessarily below water level, and involved the pumping up from the mines of water according to the ordinary, reasonable, and proper mode of working such mines, was held inadmissible to mitigate the damages. Ib.

Evidence is admissible in an action of libel to prove the careless, reckless, or wanton conduct of an employé of the defendant, in writing an article, in execution of authority given him by his principal, for the purpose of increasing the damages. Bruce *v.* Reed, 161.

The right to recover punitive damages is not lost, because the defendant had no personal knowledge of the article before it was published, and after its publication did what was reasonable to make amends. Such facts are for the jury to consider in mitigation of damages; in connection with all the other evidence submitted to the jury tending to enhance the damages. Ib.

Limitation of amount in action against corporation for negligence. See CONSTITUTIONAL LAW. Lewis, Receiver, *v.* Hollahan, 505.

Damages against railroad for consequential injuries. See CONSTITUTIONAL LAW. Patent *v.* R. R. Co., 545.

DEBTOR AND CREDITOR. Agreement to accept a smaller sum in satisfaction of a debt, when enforced. Time not of the essence of such a contract. (C. P.) Jacoby *v.* Bunting, 376.

A laborer claiming $200 wages out of the proceeds of an execution, under the Act of April 9, 1872, may appropriate payments for wages made to him within six months preceding the sale to wages due him prior to the six months. Wagner's Appeal, 104.

Under what circumstances, a volunteer distributee of personal property will not be permitted to use the name of a creditor to obtain payment of a debt of the decedent out of real estate. (O. C.) Moroney's Estate, 46.

A grant of an estate for life with a power of appointment by will does not render the estate liable for the debts of the donee of the power at the determination of the life estate. (O. C.) King's Estate, 77. Swaby's Appeal, 553.

DEBTOR AND CREDITOR—*Continued.*
The English rule that the creditors of a donee of a power to app int by will who has fully exercised the same have after his death a preference over his appointee is not followed in Pennsylvania. Ib.

The release by a parent of his right to the wages of a minor child, executed to such child after a general assignment for the benefit of creditors, is of no validity as against such creditors. Beaver *v.* Bare, 53.

The pledge of an intangible interest, to wit, the interest of a partner in a copartnership is an exception to the general rule that possession of the thing pledged must be taken by the pledgee in order to make the pledge valid against the creditors of the pledgor. Wallace's Appeal, 164.

Where a loan is made on bond and mortgage, and judgment is entered on the bond, the mortgaged premises being primarily liable must, if the mortgagee so elect, be exhausted before the personal property of the mortgagor can be taken in execution. (C. P.) Borland *v.* Elton, 563.

Debtor and creditor do not occupy a relation of confidence which makes it a duty for the debtor to disclose to the creditor or to his personal representatives the fact of the indebtedness or its amount, nor to disclose all the information concerning a debt when he has told a part. Sankey *v.* McElevey, 19.

Mere concealment of a cause of action by a debtor from his creditor or the personal representatives of his creditor is not a fraud and does not toll the operation of the Statute of Limitations upon the debt, unless concealment be coupled with misrepresentation or positive fraud, or unless a confidential relation exist between the parties which makes it the duty of the debtor to speak. Ib.

A conveyance of land in fraud of creditors of the grantor vests in the grantee a good title as to the grantor and all persons except those defrauded. Lien creditors of the grantor at the date of such conveyance, and other creditors who know of, assent to, and recommend such conveyance are not defrauded thereby. Zuver *v.* Clark, 36.

A sheriff's sale of the land under a judgment obtained by a defrauded creditor subsequent to the fraudulent conveyance passes the debtor's title subject to prior liens unaffected by the fraudulent conveyance. The purchaser at such sheriff's sale must however pursue his legal remedy, impeach the conveyance and show a valid title as against the grantee; he cannot treat such conveyance as a nullity. Ib.

A party against whom a conveyance is not fraudulent cannot impeach the conveyance although fraudulent as to other persons. Ib.

Right of creditor of husband to levy on real estate purchased by wife on credit. See HUSBAND AND WIFE. Lochman *v.* Brobst, 134. See ASSIGNMENT FOR BENEFIT OF CREDITORS.

DECEDENTS' ESTATES. Where the interest of a decedent is permitted to remain in a firm in which he was a partner it draws six per cent. interest in the absence of evidence as to the profits. (O. C.) Pickens's Estate, 407.

Where an estate not exceeding $300 is claimed by the widow, under the Act of June 4, 1883, letters testamentary or of administration need not be issued. (O. C.) Welsh's Estate, 175.

When the widow is *non compos mentis*, application for her exemption can be made through her committee. (O. C.) Garrett's Estate, 310.

An application for the allowance of the exemption by an executor and guardian, who has sold the testator's effects without taking any inventory, when the

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DECEDENTS' ESTATES—*Continued.*
rights of creditors may have intervened, is too late, but he is answerable as guardian to the minors for any loss which his neglect has caused them. (O. C.) Schada's Estate, 360.

What evidence is sufficient to support a claim by a widow for funds of her own deposited in her husband's name in bank. (O. C.) Monestier's Estate, 392.

Although a widow's statutory dower is in the nature of a rent charge, yet it is not a rent charge, and a release of a part of the land bound does not operate as a release of the whole. Jones's Appeal, 313.

The division by the tenant of the fee of land bound by a dower interest, though the widow expressly assent thereto, will not work an apportionment of her dower. Ib.

And when she seeks to recover only a proportionate share of her land out of the land not released, her release does not operate to the injury of those owning the remaining portions, and their liability will not be changed. Ib.

The expenditure by an executor of $400 in the purchase and improvement of a burial lot for a decedent whose estate is solvent will not be the basis of a surcharge, when made with the consent of a majority of the distributees. (O. C.) Monestier's Estate, 392.

Under existing legislation, the method by which the collateral inheritance tax upon a life estate is to be ascertained is left to the discretion of the Register of Wills. (O. C.) Goldstein's Estate, 176.

In most counties the practice has been to appraise by the Carlisle tables. Ib.

The lien of a continuing covenant made by a decedent can only be held against real estate by bringing suit thereon within five years from the date of his death, or by filing a copy of the covenant within the period. Hunt's Appeal, 377.

A. died leaving a wife and son. By his will he devised his real estate to his wife. The real estate was incumbered by a judgment against A. and by debts of A., which upon his death, became liens against it. Subsequently, the wife died also indebted. The real estate being sold under order of Court for payment of her debts; *held*, that the son was entitled to claim the $300 exemption out of the proceeds, in priority to the claims of his mother's creditors, but that his father's creditors must be satisfied in full before he could claim such exemption. Wanger's Appeal, 429.

The giving of a power of appointment to a tenant for life does not charge the estate with his debts. The English rule has not been adopted in this country. (O. C.) King's Estate, 77. Swaby's Appeal, 553.

In the absence of a direction to the contrary, a power of sale continues to the survivor of three executors. An obscure will construed not to contain a direction to the contrary. (C. P.) Lippincott *v.* Philadelphia Trust Co., 125.

Where an administrator keeps an account in bank in his representative capacity, and dies before completing his duties, the administrator *de bonis non* is not entitled to claim from the bank the amount of the deposit. He must, in order to recover this, demand it from and sue the representatives of the original administrator. Slaymaker *v.* Farmers' Nat. Bank, 349.

Where a bank pays over the amount of such deposit to the administrator *de bonis non*, this will constitute no defence in an action against the bank by the executor of the original administrator. Ib.

The rights and duties of administrators *de bonis non* explained and commented on. Ib.

A printed diary with figures and symbols marked down in the blanks cannot be received in evidence as

DECEDENTS' ESTATES—*Continued.*
a book of original entry to support a physician's claim against a decedent's estate. (O. C.) German's Estate, 192.

A covenant guaranteeing the payment of interest on a mortgage is a continuing covenant, which may be enforced against a decedent's estate. Hunt's Appeal, 377.

Where no demand is made by a sister of a brother for the payment of board for a period of twenty years, a presumption arises that there was no payment to be made, and a claim against the estate of the brother upon his decease will be dismissed. (O. C.) Pickens's Estate, 407.

Where a claimant has rendered menial service to the decedent and no demand for payment for a long period of time, the law presumes payment. (O. C.) Patrick Kelly's Estate, 423.

The rights of creditors cannot be affected by an agreement between the administrator and a purchaser of decedent's real estate made after sale. (O. C.) Fish's Estate, 566.

An administrator is entitled to claim credit for counsel fees expended in prosecuting a claim of the estate, even though the suit prove unsuccessful, and the bringing of the action was disapproved by a portion of the distributees. (O. C.) Ketler's Estate, 76.

Where a trustee has paid over income as collected for a term of years without charging commissions, and has declared his purpose of making no such charge, the right to commissions will be regarded as waived. (O. C.) McCawley's Estate, 260.

An action on the case will not lie by a creditor against an executrix of a decedent for a failure to exercise promptly a discretionary power to sell real estate given by will, whereby injury accrues to the plaintiff. Erie Dime Savings Bank *v.* Vincent, 320.

The fact that the whole residuary estate in such case is given to the executrix does not vary or enlarge her liability. Ib.

The Orphans' Court has full jurisdiction and sole authority to hold the executrix of a decedent to account for the performance of a testamentary trust vested in her to sell real estate. Ib.

The Orphans' Court has no jurisdiction upon the application of an adult heir to make an order directing an executor to mortgage for the payment of debts, such order to mortgage can only be made upon the petition of minors or creditors. (O. C.) Storey's Estate, 406.

A power to an executor to bargain, sell, convey, and absolutely dispose of real estate includes a power to mortgage, and survives to an administrator *de bonis non c. t. a.* (C. P.) Wurflein *v.* Haines, 76.

Under what circumstances an executor is personally liable on account of contract made with auctioneer on behalf of the estate. (C. P.) Freeman *v.* Brunswick, 327.

What sufficient evidence of insolvency to justify the dismissal of an executor under the Act of May 1, 1861. (O. C.) Silberman's Estate, 259.

When an executor disposes of his testator's assets in payment of an individual debt, the purchaser has notice of the misapplication, becomes a participant in the breach of trust, and is liable for loss thereby occasioned to creditors or legatees. Linton's Appeal, 450.

Such liability may be enforced in a suit in equity brought by a co-executor, who had not participated in the fraud, and had not been guilty of laches. Ib.

An attachment against a party in his own name will bind funds held by him as administrator of an

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DECEDENTS' ESTATES—*Continued.*
estate in which the defendant has an interest. (C. P.) Baltz *v.* Livingston, 143.

Jurisdiction of Orphans' Court upon questions of distribution. (O. C.) Fitler's Estate, 62.

Pending the determination of an issue *devisavit vel non*, the Court will not decree a partial distribution even of assets the distribution of which is not dependent upon the result of the issue. (O. C.). Neal's Estate, 258.

When the personalty is insufficient to pay the legacies charged on land, a *pro rata* distribution should be made, and then resort be had to the land. (O. C.) Kohler's Estate, 258.

Application to withhold from distribution a portion of the fund to cover a claim upon which suit has been brought, must be made before confirmation of the adjudication. (O. C.) Fitzpatrick's Estate, 472.

In setting apart a fund for the protection of annuities, the Court will make it sufficiently large to cover all possible depreciation in the value of securities. (O. C.) Mullen's Estate, 144.

Presumption of payment of legacy from lapse of time. (O. C.) Hobson's Estate, 48.

Apportionment of income upon death of life tenant. See APPORTIONMENT. (O. C.) Truefitt's Estate, 242.

See INTESTATE LAW. ORPHANS' COURT. WILLS.

DECEIT. While an unfulfilled promise will not sustain an action for deceit, still, if the promise include a misrepresentation of the then existing facts, the action will lie. (C. P.) Wilkinson *v.* Starr, 359.

DECLARATION, of agent, when not admissible against principal. See EVIDENCE. Johnston *v.* Building Asso., 247.

DEED. The deed of a lunatic is void, without reference to the adequacy of the price paid, or the grantee's knowledge of the lunacy of the grantor. (C. P.) Bowman *v.* Van Baum, 185.

The degree of lunacy or insanity which will make a grantor's deed void, requires that there shall be a genuine want of soundness of judgment. Ib.

An inquisition finding lunacy for a preceding period of five years without lucid intervals, is *prima facie* evidence even against a grantee four years prior to the finding. It is, however, only *prima facie*, and may be rebutted. Ib.

Construction of an inartificial deed to a married woman conveying land to her, "her heirs and assigns . . . as the separate estate of the said B.": *held* to create an estate in fee simple and not a sole and separate use in equity. Richardson *v.* Aiken, 491.

Wherever words in a conveyance are relied upon as creating a condition subsequent so as to create a base or determinate fee, they must not only be such as would of themselves create a condition, but must be so connected with the grant as to qualify or restrain it. First Methodist Church *v.* Old Columbia Co., 229.

Construction of a deed containing covenant not to build within a certain distance of the line. Yeaton's Appeal, 401.

Liability of grantee of legal title for payment of taxes. King *v.* Building Association, 448.

The grantor in a deed absolute on its face (made prior to the Act of June 8, 1881), may in an action of ejectment, show by parol evidence an agreement substantially contemporaneous with the deed, whereby such deed is in equity a mortgage. Such parol evidence must, however, be clear, explicit, and unequivocal, and in all respects such as would move a

DEED—*Continued.*
Chancellor to decree a reconveyance. Nicolls *v.* McDonald, 181.

Resulting trust as between parent and child. See RESULTING TRUST. Wheeler *v.* Kidder, 330. See VENDOR AND VENDEE.

DEFEASANCE, proof of, by parol. See DEED. Nicolls *v.* McDonald, 181.

DEVISE. See WILL.

DISCOVERY. See EQUITY. Thistle *v.* Lippincott, 139.

In aid of an execution. See EXECUTION. Commonwealth *v.* Baker, 75.

DISTRESS. See LANDLORD AND TENANT.

DISTRICT-ATTORNEY. The district-attorney is possessed of all the powers of a deputy-attorney-general, and may issue a *quo warranto* to test the rights of persons claiming to act as a school board. Gilroy *v.* Commonwealth, 428.

DIVORCE. See HUSBAND AND WIFE.

DOWER. See HUSBAND AND WIFE.

DURESS. A threat to turn off the water from a house is such duress as to entitle the owner to show that the claim paid was not well founded, and that the payment was involuntary. (C. P.) Lawrence *v.* City, 421.

ECCLESIASTICAL LAW. Vestry election. See CHURCH. Neilson's Appeal, 414.

EJECTMENT. Where a party instituted proceedings under the Act of June 11, 1879, to compel another to bring an action of ejectment within ninety days, or be forever debarred from such action, the ninety days must be taken to run from the time the rule is made absolute, and not from the time the proceedings are instituted. Herron *v.* Fetterman, 480.

The Court is not in such case deprived of the discretion to fix the time for the hearing of the rule, and when the entry of judgment is postponed by a delay in the hearing, and before a decision on the rule, an action of ejectment is actually instituted, the rule will be discharged. Ib.

In ejectment by purchaser at sheriff's sale of the title of a fraudulent grantor, parol evidence is admissible to show that an indorsement on the writ of fi. fa. under which the sheriff's sale was had, waiving inquisition, was a forgery by reason whereof the sheriff's sale under the fi. fa. was void, and the plaintiff acquired no title whatever. Zuver *v.* Clark, 36.

Under what circumstances a judgment entered by confession upon warrant contained in a lease will be opened. (C. P.) Huber *v.* Grossman, 157.

Where as to part of a property in dispute, ejectment would be an adequate remedy, yet if the title to the balance could only be settled by bill in equity, the plaintiff will not be compelled to divide his claim, and the entire subject matter will be adjudicated in equity. Socher's Appeal, 381.

A parol sale of specific land for a sum certain, followed by possession in pursuance thereof, and the making of valuable improvements, will create such an equitable interest as will be bound by the lien of a judgment against the vendee. The sheriff's vendee of this equitable title, is entitled to all the rights of the judgment debtor including the right to recover possession. Hutchison *v.* Kerr, 39.

Upon the trial of an equitable ejectment in which a deed is asserted to be a mortgage, the evidence in support of this claim must be clear, explicit, and unequivocal. Nicolls *v.* McDonald, 181.

ELECTION LAW. After a petition in a contested election proceeding has been filed, the petition-

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ELECTION LAW—*Continued.*
ers will not be permitted to withdraw their signatures. (Q. S.) *In re* Election of John L. Grim, 303.

A vacancy occurring in the office of school controller in a city of the third class, is to be filled by the Board of Controllers until the next municipal election, when the voters of the ward are to elect a controller to serve until the expiration of the term in which the vacancy occurred. Commonwealth *v.* Evans, 8.

In case of an election for Common Councils, where no proclamation has been made by the sheriff, the Judges will merely compute the votes, and certify the number received by the highest candidate, but will not issue a certificate of election which might be construed as deciding that there was a vacancy to be filled. (C. P.) *In re* F. F. Brightly, 208. *In re* Dambly, 209.

Cumulative voting. See CONSTITUTIONAL LAW.

Election of church vestry. See CHURCH. Neilson's Appeal, 414.

See CORPORATION.

EMINENT DOMAIN. See CONSTITUTIONAL LAW.

EQUITABLE EJECTMENT. See EJECTMENT.

EQUITABLE TITLE. Lien of judgment on. See JUDGMENT. Hutchison *v.* Kerr, 39.

EQUITY. The rule that equity will not relieve against an executed contract does not apply in case of fraud or mistake. (C. P.) Brady *v.* Standard Loan Association, 419.

A bill in equity will lie against a trustee of realty limited to the use of his wife for life, and after her death to the use of her surviving children, who has continued to hold and enjoy the profits of the realty after his wife's death, on the supposition that he was entitled thereto as tenant by the curtesy. (C. P.) Fidelity Co. *v.* Norris, 225.

A mistaken and honest payment by the trustee of an infant's share to one whom the trustee believed to be the owner thereof, is no defence to a claim by the infant. Ib.

Upon a bill in equity filed by assignees for creditors, it is the duty of a court of equity to pursue an insolvent's interest in a trust fund, restrain its improper conversion, control its investment, and generally to prevent any maladministration of the trust. Martha Smith's Appeal, 285.

A court of equity will not retain property of a foreign insolvent for the payment of creditors in this State; nor will the fact that a statute of limitation of the State of insolvent's domicile runs after three years, and has been pleaded in bar of the claim of a creditor of this State, raise any equity in such creditor to avoid the rule. Ib.

Where as to part of the property in dispute, an ejectment would be an adequate remedy, yet if the title to the balance could only be settled by bill in equity, the plaintiff will not be compelled to divide his claim, and the entire subject-matter will be adjudicated in equity. Socher's Appeal, 381.

Jurisdiction in equity to settle a disputed election for vestrymen. Neilson's Appeal, 414.

Jurisdiction in matters of account. (C. P.) Thistle *v.* Lippincott, 139.

A bill in equity is the proper remedy for enforcing payment of unpaid subscriptions to the capital stock of a corporation organized under the Act of April 29, 1874. Bunn's Appeal, 193.

A post-nuptial settlement between husband and wife may, if unobjectionable, be enforced by the machinery of a court of equity. Burkholder's Appeal, 234.

EQUITY—*Continued.*
What must appear upon the face of a bill, where discovery is sought in aid of a suit at law. (C. P.) Thistle *v.* Lippincott, 139.

Discovery in aid of an execution. See EXECUTION. Commonwealth *v.* Baker, 75.

Injunction. Where there is an attempt on the part of school directors to levy and collect a building tax in one year for the purpose of using a portion so collected to pay a deficit in the general fund for the preceding year, a court of equity will enjoin the collection of so much of the tax levied for building purposes as is not needed therefor. Delano Land Co. *v.* Conners, 155.

A principal cannot enjoin his creditor from proceeding against the surety merely because he himself has a good defence. (C. P.) Riegel *v.* Riegel, 303.

Ex parte injunctions will be granted only in cases of emergency to preserve the *status quo.* (C. P.) McCall *v.* Barrie, 419.

After bill filed and notice given, a defendant proceeds at his peril with the act complained of. Ib.

A preliminary injunction shall be taken to be dissolved unless continued on motion, with notice and hearing within five days, but the injunction may be dissolved within the five days. Ib.

An injunction will not be granted before hearing, when it may do greater injury to the defendant by granting it, than is done to plaintiff by refusing it. Ib.

Injunction when not granted to restrain openings in party wall. Ib.

Injunction when granted to restrain building in violation of covenant. Yeaton's Appeal, 401.

Practice. Amendment of bill to enjoin nuisance by joinder of new parties complainant, when allowed. (C. P.) Harrison *v.* St. Mark's Church, 387.

A demurrer to a bill on the ground of its being uncertain and contradictory must allege the particular sections in which the alleged faults occur. (C. P.) Brady *v.* Building Association, 419.

The equity rule of the conclusiveness of a responsive answer does not apply when the answer is made on information. Socher's Appeal, 381.

Where a party desires to compel the production of books and papers before an examiner, the proper practice is for the examiner to make an interlocutory report upon the application, upon which in a proper case the Court will make an order for their production. (C. P.) Munroe *v.* Building Association, 106.

Under what circumstances corporation books may be opened before an examiner in equity. (C. P.) Munroe *v.* Building Association, 107.

In a proper case the powers of an examiner may be so enlarged as to enable him to pass upon questions of the admission or exclusion of evidence. (C. P.) Bridesburg Manuf. Co. *v.* Lehigh Valley Iron Co., 304.

Under what circumstances a reference will be set aside in equity, and an examiner appointed to conduct the case after the ordinary method. (C. P.) White *v.* Davis, 59.

The appointment or dismissal of a master in partition is not of course, and must be made by an order of court in accordance with the equity rules of the Supreme Court. Under section 73 of these rules such order can be made only upon application entered in the equity docket with due notice to adverse parties or their solicitors. Gibbons's Appeal, 204.

A sale of lands in partition by a master appointed by order of Court granted without notice to adverse parties is voidable, and will be set aside. Ib.

Costs of an examiner and master, in equity, should not be imposed upon the successful defendant, who

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EQUITY—*Continued.*
has not invoked the services of the examiner and master. Yerkes's Appeal, 510. See Costs.

ERRORS AND APPEALS. When the Court below sustains exceptions to the report of a referee appointed under the Act of June 16, 1836, but enters no judgment and files no opinion, an agreement of counsel submitted to the Supreme Court to waive all technical defects as to the sufficiency of the pleadings, in order that the judgment may be reviewed by the Supreme Court, is not sufficient to establish a judgment in the Court below which the Supreme Court can affirm or reverse, and the writ of error was quashed. McGlue *v.* Philadelphia, 399.

The refusal to grant a compulsory nonsuit is not the subject of a writ of error. Easton *v.* Neff, 206.

No writ of error lies to the refusal to enter judgment for want of a sufficient affidavit of defence unless the plaintiff excepts to the refusal. Watson *v.* Supplee, 452.

No writ of error lies to an order permitting a motion for a new trial to be filed *nunc pro tunc* during the term at which the verdict was entered. The limitation of the time for filing a motion for a new trial rests upon a rule of Court, to vary which is within the discretion of the Court ordaining the rule. Lance *v.* Bonnell, 385.

A question as to the amount of costs chargeable against a fund, the proceeds of a sheriff's sale, which has not been raised before the auditor or the Court below, cannot be raised for the first time on appeal to the Supreme Court. Patrick's Appeal, 332.

The Act of April 4, 1877, allowing an appeal from decisions of the Courts in the opening of judgments entered by virtue of a warrant of attorney or on judgment notes does not extend to the case of judgments revived by scire facias, though originally entered as above. Appeal of the First National Bank of Muncy, 493.

In making up a bill of exceptions, all that part of the charge which relates to the specific points excepted to, is entitled to be entered on the bill of exceptions. (C. P.) Yardley *v.* Cuthbertson, 29.

Under the Act of June 8, 1881, the recognizance in error should be sufficient merely to secure payment of all the costs that may be legally taxed against the party who obtains the writ. Quick *v.* Miller, 1.

Certiorari lies to review the record of proceedings taken by the Commonwealth to close the business of an insurance company under the Act of April 4, 1873. Mahoney Life Association *v.* Commonwealth, 370.

ESTOPPEL. Where A., holding the legal title, takes a lease from B., the holder of the equitable title, and then sells and conveys the land in fee simple to C., he is estopped from denying the right of the purchasers from B.'s assignee to recover possession, because the balance of purchase-money due from B. was not tendered before bringing suit. Weaver *v.* Craighead, 116.

ESTOPPEL—*Continued.*
set up as a defence that the bonds were issued in a manner which was a substantial evasion of the Act of Assembly authorizing the issue. Kerr *v.* Corry, 277.

A judgment, although paid in full, may by contract be kept alive to secure a new loan, and parol evidence of such contract is admissible in an action between the parties. While such a contract is void as to subsequent lien creditors of the debtor, he himself is estopped from denying it. Peirce *v.* Black, 295.

Where an insolvent debtor in fraud of his creditors assigns his property to a third person, taking from him judgment notes for the value thereof, and subsequently assigns one of the judgment notes as collateral security to a creditor, who has knowledge of the fraud, the maker of such note cannot set up the fraud as a defence in an action brought against him by the creditor thereon. Winton *v.* Freeman, 324.

See Res Adjudicata.

EVIDENCE. A finding of lunacy by a jury of inquiry, confirmed by the Court, and a subsequent decree of restoration, is conclusive against the former lunatic in an action brought by her against the parties initiating the proceedings. (C. P.) Johnston *v.* Given, 326.

At law the testimony of one witness to establish an oral contract, no matter how flatly contradicted, should be submitted to the jury; and whether there was a contract, and what were its terms, was for the jury to determine. Weaver *v.* Craighead, 116.

An advertisement of the sale of property in a newspaper and by handbills, unknown to the party sought to be affected by it, does not amount to notice, nor is it competent testimony as a make-weight in support of the allegation of fraud. Ib.

Evidence of a custom is not admissible to relieve a defendant from a liability upon a bond, clearly expressing the liability. Juniata Loan Association *v.* Hetzel, 431.

Waiver of an express provision in a policy of fire insurance cannot be proved by parol testimony, showing that the general custom among insurance companies and brokers is otherwise than as stated in the provision, when there is another clause in the policy providing that there shall be no waiver, except by the authority of the company, expressed in writing. (U. S. C. C.) Peoria Sugar Refinery *v.* Ins. Co., 503.

In the absence of the original draft or plan employed by the grantor, its place may be supplied by other evidence from which the jury are to determine the location of the disputed street or alley. Transue *v.* Sell, 397.

The construction of written instruments is always for the Court, except when they cannot be understood without reference to extrinsic facts, and then the jury are to judge of the whole together. Foster *v.* Berg, 215.

In an action by a physician against a decedent's estate, a printed diary with figures and symbols

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EVIDENCE—*Continued.*

Declarations by the secretary of a corporation as to the amount due on a mortgage held by it, are not admissible in evidence in a suit on the mortgage, unless it be shown that the secretary had authority to bind the corporation by such admissions. Johnston *v.* Elizabeth Loan Association, 247.

The relationship of an agent cannot be established by his own declarations. Creighton *v.* Boudinot. 556.

Production of books and papers before an examiner in equity, how compelled. See EQUITY. (C. P.) Munroe *v.* Building Association, 106, 107.

What evidence not admissible in mitigation of damages in an action brought against a coal-mining company for polluting a running stream. See DAMAGES. Sanderson *v.* Coal Co., 81.

Scope of evidence in action of libel. See LIBEL. Bruce *v.* Reed, 161.

Parol, when not admissible to vary writing. In an action upon a life insurance policy, statements made by the defendant's agents as to the meaning of the policy on other occasions are inadmissible. Smith *v.* Insurance Co., 129.

A clause in the prospectus of an insurance company offering thirty days' grace in the payment of premiums is ineffectual to contradict the terms of the policy. Ib.

Parol evidence is admissible to vary the effect of a writing only when a chancellor upon bill filed would reform the instrument. Ib.

While a deed absolute on its face may be shown by parol to be a mortgage (if made prior to June 8, 1881). the evidence must be clear, explicit, and unequivocal, and such as would move a Chancellor to decree a reconveyance. Nicolls *v.* McDonald, 181.

A judgment, although paid in full, may by contract be kept alive to secure a new loan, and parol evidence of such contract is admissible in an action between the parties. Peirce *v.* Black, 295.

In an action against a surety on a bond which is also secured by the mortgage of the principal debtor, parol evidence is admissible to prove a contract that the bond should not be resorted to until the mortgage security was exhausted, and that the latter had been lost through the carelessness of the plaintiff. Juniata Loan Association *v.* Hetzel, 431.

Where a writing is signed by the parties to a contract, it is presumed to embody their final determination, absorbing all preliminary negotiations, and parol testimony of one of the parties to change a written contract, if denied by the other, must be corroborated by another witness, or the equivalent of another, before a court of equity will attempt to reform it, or set it aside. North and West Branch R. R. Co. *v.* Swank, 444.

Competency of witnesses. In an action against an executor upon an instrument of writing alleged to have been executed by the decedent (prior to the Act of April 15, 1869), the execution of the paper cannot be proved by proof of the handwriting of a deceased subscribing witness thereto, who at the time of the attestation was a party interested therein. Mackrell *v.* Wolff, 249.

In such case the subscribing witness if living would be incompetent to prove the execution of the instrument. The action being against an executor, the Act of 1869 has no application. Ib.

Upon a criminal trial evidence may be admitted of any one of a system of crimes that are mutually dependent, to show that the defendant belonged to an organization banded together for the purpose of committing crime, but some connection must be shown to exist between the offences. Swan *v.* Commonwealth, 67.

EVIDENCE—*Continued.*

Where a witness is incompetent as to some matters, and competent as to others, the objection must point to the matters as to which he is incompetent. Zuver *v.* Clark, 36.

A party defendant in a bill praying for a partnership account may be called as a witness for complainant, although one of the co-defendants is dead, and the executors substituted of record at the time the witness is called. Caldwell's Appeal, 145.

Such witness is within the letter of the Act of 1865, and the fact that he was presumably a friendly witness for complainant goes to his credit, and not to his competency. Ib.

The Act of April 15, 1869, which abolished all objection to the competency of witnesses on the ground of policy of the law, except in cases of actions by or against executors and administrators, etc., was an enabling statute, and rendered no witness incompetent who was competent at the time of its passage. Ib.

An attorney is a competent witness on behalf of his client, even though interested in the result of the litigation by a contract for a contingent fee. Perry *v.* Dicken, 245.

EXAMINER'S FEES. See EQUITY. Yerkes's Appeal, 510.

EXECUTION. The defendant must be warned by *scire facias* before an execution can issue on a judgment over five years old. (C. P.) Marx *v.* Goldsmith, 173. Harmony Building Asso. *v.* Berger, 499.

The fact that during that period executions have been issued is immaterial. (C. P.) Comstock *v.* Kilchenstein, 388. *Contra* (C. P.) Todd *v.* Lowe, 550.

The interest of a defendant in a patent cannot be taken in execution under a fi. fa. (C. P.) Harrington *v.* Cambridge, 456.

Where one wrongfully prevents the sheriff from actually taking manual possession of a piece of personal property in his custody which the sheriff nevertheless includes in his return of goods levied upon and proceeds to sell, and the party is present at the sale and makes no objection, the levy and the title of the purchaser from the sheriff are clearly good as against him. Stuckert *v.* Keller, 479.

Such person having himself a judgment against the owner of the property cannot by issuing execution thereon against such property, and buying it in at the sale acquire a title superior to that of the former purchaser. Ib.

Where in an action of covenant sur ground-rent deed judgment has been recovered against the original covenantor, a terre-tenant may subsequently obtain leave to enter security for stay of execution. Ellis *v.* Cadwallader, 400, affirming C. P., 12.

Exemption, waiver of, effect of, as to claims of other creditors when exemption is waived as to one. (O. C.) Fitler's Estate, 62.

Where a defendant in an execution made a claim for exemption before the return day of the writ under which a levy was made, but owing to delay on the part of the sheriff, no appraisement was made until the morning of the day of sale, the defendant's right of exemption was not thereby defeated. Coleman's Appeal, 71.

In such a case, the defendant is not relegated to a suit against the sheriff, but may claim the $300 out of the proceeds of the land sold. Ib.

Where property levied on is at first claimed by the wife who afterwards files a disclaimer, the husband's right to exemption is not thereby barred. (C. P.) Allemong *v.* Passmore, 124.

Other Matters. Where an attachment execution is laid after a levy by the sheriff, the practice is to

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EXECUTION—*Continued.*
allow the sheriff to sell and rule the money into Court. (C. P.) Brooks *v.* Salin, 390.

Bill of discovery in aid of an execution filed under the Act of June 16, 1836, must comply with all the provisions of that Act, and show a failure of the remedy at law. (C. P.) Commonwealth *v.* Baker, 75.

A plaintiff is entitled to cross-examine a claimant who offers his own bond upon an interpleader. (C. P.) Landell *v.* Hager, 173.

The proceeds arising from the sale upon execution of property of an insolvent corporation not essential to the exercise of its franchises, goes to the execution creditor, and is not to be distributed among any of the other creditors. Fairmount Coal and Iron Co.'s Appeal, 214.

Whether any of the franchises of the corporation could be sold on execution, and the proceeds applied on that execution to the exclusion of other creditors not decided. Ib.

A municipal lien under the Act of April 2, 1870 (the Penn Avenue Act), is not divested by a judicial sale, and is not payable out of the fund realized thereby. Bryant's Appeal, 167.

If under the Act of March 29, 1832, a charge in lieu of dower is made on land, and a son who on the death of the widow would be entitled, under the Act, to a share in the principal so charged, accepts in the partition proceedings, the same land as part of his share of his father's estate, such acceptance will merge his right on the death of the widow, to a share of the principal charged on said land in lieu of dower, and on judgment being obtained against him, and the land sold, the purchaser at sheriff's sale is not liable for the principal charged on the land, in an action brought against him by the administrator of the son. Steckel *v.* Koons, 137.

Sheriff's sale of real estate, when set aside for misdescription of property and inadequacy of price. (C. P.) Trust Co. *v.* Herr, 390.

After acknowledgment of the sheriff's deed, the title of the purchaser will not be affected by the fact that the judgment was prematurely entered. (C. P.) Lea *v.* Union Transfer Co., 512.

A sheriff's sale of land under a judgment obtained by a defrauded creditor subsequent to the fraudulent conveyance passes the debtor's title, subsequent to prior liens, unaffected by the fraudulent conveyance. The purchaser at such sale must, however, pursue his legal remedy, impeach the conveyance, and show a valid title as against the grantee; he cannot treat such conveyance as a nullity. Zuver *v.* Clark, 36.

In ejectment by a purchaser at sheriff's sale, parol evidence is admissible to show that the defendant's signature to a waiver of inquisition upon a fi. fa. is a forgery. Ib.

In procedings by a sheriff's vendee, to recover possession under the Act of 1836, a third party claiming title having made affidavit and entered into the prescribed recognizance, is not bound to file a transcript but only to appear and plead to proceedings instituted by the plaintiff. (C. P.) Wanger *v.* Graham, 343.

Where the fund produced by a sale of real estate is insufficient to pay prior liens, the plaintiff in the writ on which the land is sold shall receive out of the proceeds the costs incurred in order to effect the sale only, and not those incurred prior to its execution. Bryant's Appeal, 167.

Where upon execution real estate is sold in parcels for separate and distinct sums, the costs on the writ are to be divided into as many equal parts as there

EXECUTION—*Continued.*
are separate and distinct parcels sold, and one portion thereof charged to the fund realized from each. Ib.

Where a mortgagee assigns part of the mortgage debt, and the proceeds of the property bound thereby at a sale under the mortgage are insufficient to pay the claims of both the assignor and the assignee, the fund will be divided between them *pro rata.* Patrick's Appeal, 332.

All exceptions to the amount of costs paid out of fund realized from a sheriff's sale, must be taken before the Auditor, or in the Court below. The question cannot be raised for the first time on appeal to the Supreme Court. Ib.

Wages. Labor bestowed by a contractor, employing carpenters, millwrights, and blacksmiths, in making repairs upon an old rolling mill, is not entitled to the preference given by the Act of April 9, 1872, to wages in the distribution of the sheriff's sale of the property. Llewellyn's Appeal, 69.

A claim for wages under the Act of April 9, 1872, is not limited to wages earned before the levy, but includes wages earned up to the day of sale. (C. P.) Matsinger *v.* Covenant Publishing Co., 90.

A laborer claiming $200 wages out of the proceeds of an execution under the Act of April 9, 1872, may appropriate payments for wages made to him within six months preceding the sale to wages due him prior to the six months. Wagner's Appeal, 104.

At the time of a sheriff's sale of personalty, the defendant in the execution was indebted to a laborer for wages earned prior to the six months immediately preceding the sale, in the sum of $355, and in the further sum of $525, for wages earned during the six months. The laborer had been paid during the six months weekly sums for wages, aggregating $426.94. The laborer claimed $200 from the fund: *held,* that in the absence of a specific appropriation of the sums so paid during the six months, the claimant was entitled to apply them to the earliest indebtedness, including wages due prior to the six months, and to recover the full amount of $200, if so much remained due on account of wages earned within the six months. Ib.

Farmers are not employers, under the Act of April 9, 1872, and the supplement of June 13, 1883, within the purview of the Acts, whose laborers are entitled to priority for wages earned within six months, in the distribution of proceeds of an execution against personalty. (C. P.) Jacobs *v.* Woods, 237.

The supplement of 1883 does not enlarge the class of employers from whom wages may become due, prescribed in the Act of 1872. Nor does said supplement change the kinds of business in which the preferred wages may be earned. Ib. *Contra* (C. P.), Thompson *v.* Wingert, 483.

The business of a drug store is within the Act. (C. P.) Thompson *v.* Wingert, 483.

Notice of claim by employé, when sufficient. Ib.

Attachment execution. Where a pension draft is placed in the hands of a bank for collection, and the bank allows a cash credit, the pension is no longer *in transitu,* and is the subject of an attachment. (C. P.) McCalla *v.* Brennan, 513.

Unpaid subscriptions to the capital stock of a corporation which has become insolvent may be levied upon under writs of attachment execution, although no assessment has been made by the board of directors. (U. S. C. C.) *In re* Glen Iron Works, 514.

The corporation having been declared bankrupt, upon proceedings instituted subsequently to the service upon stockholders of such writs of attachment

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EXECUTION—*Continued.*
execution, and the unpaid capital having been awarded to the assignee without prejudice to the rights of the attaching creditors and with leave to intervene: *held*, upon the intervention of such creditors claiming the amounts of their judgments, that the same was liable to the lien of the attachments, and should be awarded to the attaching creditors. Ib.

In case of an insolvent corporation, unpaid instalments of subscription to capital stock cannot be held under an attachment execution by a judgment creditor of the corporation. Bunn's Appeal, 193.

An attachment will not lie against a warden of the Eastern Penitentiary for moneys of a prisoner in his official possession. (C. P.) Davies *v.* Gallagher, 159.

Adjustment of rights of attaching creditors in Orphans' Court. (O. C.) Fitler's Estate, 62.

The attachment of a debt does not prevent judgment in a proceeding on the debt attached by the defendant against the garnishee. (C. P.) Ireland *v.* Stockham, 126.

An attachment against a garnishee in his own name will bind funds held by him as administrator of an estate in which the defendant has an interest. (C. P.) Baltz Co. *v.* Livingston, 143.

An attachment issued against garnishees as executors of Bunting cannot be amended so as to be against executors of Clark where intervening rights would be affected by such amendment. (O. C.) Bunting's Estate, 487.

Interrogatories as to what money the defendant may have in the garnishee's hands in his wife's name should be answered. The garnishee is a mere stakeholder, and should make full disclosure. (C. P.) Palmer *v.* Allen, 211.

Admissions of garnishee holding property, when not sufficient to justify judgment against garnishee for money. (C. P.) Wilson *v.* Morrow, 89.

See TAX SALES.

EXECUTORS AND ADMINISTRATORS. See DECEDENTS' ESTATES.

EXEMPTION. See DECEDENTS' ESTATES. EXECUTION.

From taxation. See TAXES AND TAXATION.

FAMILY SETTLEMENT. Consideration for. See CONTRACT. Burkholder's Appeal, 234. Wilen's Appeal, 539.

FEES, of examiner, by whom payable. See EQUITY. Yerkes's Appeal, 510.

Of counsel, administrator, when entitled to credit for. See DECEDENTS' ESTATES. (O. C.) Ketler's Estate, 76.

FEE-SIMPLE, what words will create. See DEED. First Methodist Church *v.* Ground Company, 229. Richardson *v.* Aiken, 491.

FEE-TAIL. See WILLS. Lawrence *v.* Lawrence, 460.

FEME-SOLE-TRADER. See HUSBAND AND WIFE.

FIRE-ESCAPES, whose duty to erect. See LANDLORD AND TENANT. Schott *v.* Harvey, 263.

FIXTURES, when the subject of a distress. See LANDLORD AND TENANT. Furbush *v.* Chappell, 347.

FOREIGN ATTACHMENT, does not lie against an absconding debtor. (C. P.) Scott *v.* Hilgert, 305.

The burden of proving non-residence of the defendant is on the attaching creditor. On a motion to dissolve the Court will not grant a feigned issue to test the place of residence. Ib.

FOREIGN ATTACHMENT—*Continued.*
A declaration in the common counts with a bill of particulars in foreign attachment may be amended by filing special counts. (C. P.) Sims *v.* Stribler, 29.

Justices of the peace have no power to issue attachments against non-resident debtors, where the plaintiff's claim exceeds $100. (C. P.) Ross *v.* Miller, 253.

Review of the Acts of Assembly conferring power on justices of the peace to issue writs of attachment. Ib.

FORFEITURE OF POLICY. See INSURANCE, LIFE. Smith *v.* National Life Ins. Co., 129.

FORMER RECOVERY. See RES ADJUDICATA.

FRAUD. When an insolvent debtor in fraud of his creditors assigns his property to a third person, taking from him judgment notes for the value thereof, and subsequently assigns one of such judgment notes as collateral security to a creditor who has knowledge of the fraud, the maker of such note cannot set up the fraud as a defence in an action brought against him by the creditor thereon. Winton *v.* Freeman, 324.

What not a fraudulent concealment, as between debtor and creditor. See DEBTOR AND CREDITOR. Sankey *v.* McElevey, 19.

FRAUDS, STATUTE OF. A parol promise to indemnify one, if he will go security for a third person, is within the Statute of Frauds. (C. P.) Nugent *v.* Wolfe, 290.

One partner cannot bind his copartners jointly with himself to pay the debt of another. Shaaber *v.* Bushong, 352.

A promise to pay a note out of money belonging to the maker in the hands of the promissor when the note falls due, and if that fund be insufficient, that the promissor would individually pay the same, is a promise to pay the debt of another within the Statute of Frauds. Ib.

A mortgage is not a conveyance of land within the Statute of Frauds (C. P.) Gross *v.* Reinhard, 224.

Where title to land is claimed under a parol contract of sale, the evidence of such contract, and of performance thereunder, must be definite and unequivocal, in order to take the case out of the Statute of Frauds. Lund *v.* Brown, 489.

An express trust, and not a trust *ex maleficio*, is within the Act of April 22, 1856. Salter *v.* Bird, 152.

What circumstances construed to constitute an express trust. Ib.

A parol sale of specific land for a sum certain, followed by possession in pursuance thereof, and the making of valuable improvements will create such an equitable interest as will be bound by the lien of a judgment against the vendee. The sheriff's vendee of this equitable title is entitled to all the rights of the judgment debtor, including the right to recover possession. Hutchison *v.* Kerr, 39.

An agreement by an agent for sale of land, not authorized in writing to make the same, is invalid. (C. P.) Heinicke *v.* Krouse, 106.

FRAUDULENT CONVEYANCE, who cannot set aside. See DEBTOR AND CREDITOR. Zuver *v.* Clark, 36.

FUNERAL EXPENSES, not necessaries. See HUSBAND AND WIFE. (O. C.) Wistar's Estate, 45.

GIFT, what not sufficient evidence of as between husband and wife. See HUSBAND AND WIFE. McDermott's Appeal, 425.

GROUND-RENT. See LANDLORD AND TENANT.

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GUARANTY. A contract to make good a certain debt in case the principal debtor fail to pay the same after due and sufficient notice is a contract of guaranty and not of surety. (C. P.) Continental Brewing Co v. Bonner, 437.

What averments will entitle the plaintiff to judgment for want of a sufficient affidavit of defence in an action against the guarantor of a corporation bond. (C. P.) Pennypacker v. Camden, etc., R. R. Co., 158.

See FRAUDS, STATUTE OF.

GUARDIAN AND WARD. A guardian *ad litem* should not be appointed without notice to minors or next of kin. (O. C.) Graham's Estate, 31.

Right of guardian to maintain an action in his own name to recover rents belonging to the estate of the ward wrongfully withheld by the party collecting the same. (C. P.) Fidelity Co. v. Norris, 225.

Under what circumstances the knowledge of an individual will be imputed to him in his capacity of guardian. Hamilton's Appeal, 217.

A guardian who makes a settlement with his ward immediately upon his coming of age does so at his own peril, and a ward is entitled to an account from such guardian even after settlement made. (O. C.) McMahon's Estate, 311.

HEIRS, Meaning of word. See INTESTATE LAW. (O. C.) Ryan's Estate, 79.

HUSBAND AND WIFE. The earnings of a wife belong to her husband save in those exceptional cases specified by Acts of Assembly. Such earnings do not therefore belong to the wife, unless the husband has made a gift of them to her. McDermott's Appeal, 425.

What not sufficient evidence of gift of earnings by husband to wife. Ib.

Under the Act of April 11, 1848, no exemption is given the husband from liability for his wife's torts other than that if a judgment is obtained against him for such torts execution shall first be had against her property. Quick v. Miller, 1.

In an action against husband and wife for slander uttered by the wife, the narr. omitted to aver the absence of the husband at the time the words were uttered. The plea was justification, and a verdict was had for the plaintiff. The judgment being arrested as to the husband by the Court below: *held*, that the verdict cured the omission. Ib.

Where a husband acts as agent for his wife (not a feme sole trader) in purchasing goods to carry on a trade conducted by her, he will be held responsible for the same. (C. P.) Teller v. Anathan, 191.

A post-nuptial settlement between husband and wife may, if unobjectionable, be enforced by the machinery of a court of equity. Burkholder's Appeal, 234.

If a husband's conduct is such that his wife is justified in leaving him, she has the right to remain absent, and her agreement to return is a sufficient consideration to support a post-nuptial contract entered into by her with him. Ib.

A sale by an assignee in bankruptcy does not divest the dower estate of the bankrupt's wife. (S. C. U. S.) Porter v. Lazear, 261.

Although a widow's statutory dower is in the nature of a rent-charge, yet it is not a rent-charge, and the strict and harsh incident thereof, to wit, that a release of a part of the land bound operates as a release of the whole, will not be applied to a dower interest. Jones's Appeal, 313.

The division by the tenant of the fee of land bound

HUSBAND AND WIFE—*Continued.*

by a dower interest, though the widow expressly assent thereto, will not work an apportionment of her dower. Ib.

Hence, when she seeks to recover only a proportionate share out of the land not released, her release does not operate to the injury of those owning the remaining portions, and their liability will not be changed. Ib.

Effect of partition proceedings upon a dower interest. Steckel v. Koons, 137.

When a wife owning the house she lives in, refuses a husband entrance, he has no remedy except divorce. (Q. S.) Commonwealth v. Springer, 26.

A husband will be required to give security to keep the peace when the wife testifies that she is afraid of bodily injury in case he succeeds in effecting a threatened entry to her house, from which she has excluded him. Ib.

Right of married woman to admission to the bar. (C. P.) *In re* Mrs. Kilgore, 30, 255.

A married woman cannot bind herself by bond and warrant of attorney except for the purchase-money of land bought by her. Needham v. Woollens, 525.

In order to charge a married woman for work done, it must appear that the work was necessary for the improvement of her separate estate. Upon a case stated, unless it appear by the record that the work procured to be done was necessary for the preservation or improvement of her separate real estate a judgment against a married woman is erroneous, and will not support an execution. Ib.

Funeral expenses of the mother of a married woman are not necessaries for the support and maintenance of her family for which she can be held liable under the Act of 1848. (C. P.) Bair v. Robinson, 44.

A married woman may bind herself to pay for the services of an attorney who prepares a will disposing of her separate estate. (C. P.) Stevenson v. Anderson, 89.

Where a husband wilfully abandons his wife, and she having been declared a feme sole trader, sells real estate which she acquired during coverture, the husband's right as tenant by the curtesy is gone. Moninger v. Ritner, 99.

The feme sole trader Act of 1855 allowing a married woman to convey real estate is constitutional. Ib.

Under the Act of April 3, 1872, securing to a married woman her separate earnings, a married woman is liable for goods sold to her in the course of her business upon her individual credit. (C. P.) Baily v. King, 306.

And she may be sued without joining her husband. (C. P.) Elkins v. Bremer, 422.

Where a married woman having a separate estate purchases land on credit, she is not entitled to hold the same as against her husband's creditors without affirmatively establishing the fact that the land was sold to her on the credit of her separate estate. Lochman v. Brobst, 134.

The mere fact in such case that she has a separate estate does not suffice to show that the land was sold to her on the credit thereof. Ib.

Separate Use Trust. See TRUSTS. Neale's Appeal, 179.

Divorce. A subpœna in divorce should be refused where the respondent has never been a citizen or resident of the State, and is not personally within the jurisdiction. (C. P.) Lokes v. Lokes, 306.

Both husband and wife may prosecute contemporaneous proceedings in divorce. (C. P.) Zieger v. Zieger, 122.

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HUSBAND AND WIFE—*Continued.*

Alimony, *pendente lite*, will not be granted where a wife has a separate estate. (C. P.) Garrettson *v.* Garrettson, 566.

INFANT. See GUARDIAN AND WARD.

Construction of contract of railroad company for services of minor as apprentice. See CONTRACT. Penna. R. R. Co. *v.* Bost, 84.

INJUNCTION. See EQUITY.

INSANITY. See CRIMES, LUNACY.

INSURANCE. Jurisdiction of the Common Pleas of Dauphin County over the affairs of insurance corporations. See CORPORATIONS. Mahoney Association *v.* Commonwealth, 370.

Fire. Waiver of an express provision in a policy of fire insurance cannot be proved by parol testimony, showing that the general custom among insurance companies and brokers is otherwise than as stated in the provision, when there is another clause in the policy providing that there shall be no waiver, except by the authority of the company expressed in writing. (U. S. C. C.) Peoria Sugar Refinery *v.* Susquehanna Mutual Ins. Co., 503.

But such waiver can be proved by parol testimony, showing the course of business of the company which issued the policy in its dealings with the broker who procured the policy. Ib.

Under what circumstances a payment of a premium to an insurance broker will not be equivalent to a payment to the company. Ib.

The Mercer County Mutual Fire Insurance Company has power under its charter to enact a by-law delegating to agents other than its board of directors, power to compromise and settle disputed claims by and against it. Mercer County Ins. Co. *v.* Stranahan, 495.

Duty of bailee to insure. See BAILMENT. Heaton *v.* Knowles, 74.

Life. Where the assignee of a policy of life insurance took the assignment, knowing that the policy had been taken out for speculative purposes by persons having no insurable interest in the life of the assured, and brought suit to recover the money paid as consideration for the assignment on the ground that it was fraudulent: *held*, that he was a party to the fraud, and could not recover. Blattenberger *v.* Holman, 283.

In a mutual insurance company, the policy constitutes the agreement between the parties, and a by-law in force at the date of the policy, limiting the right of action to six months after loss occurred, is not a bar to a member's suit upon his policy brought after that period, unless such by-law is made part of the policy. Mutual Life Association *v.* Kayser, 86.

Where a policy of life insurance provided that the company would, if requested, "after the payment of premium for two full years, issue a paid-up policy" for a specified amount, but was subject to the usual covenant by the assured to pay the premiums on the day they fell due, and to the stipulation that in case of the violation of any of the conditions the policy would be void: *held*, that a request for the issue of a paid-up policy must be made while the original policy is in full life, and cannot be made after the latter has been forfeited for non-payment of premiums. Smith *v.* National Life Ins. Co., 129.

In such case, testimony as to the statements made by the company's agents on other occasions as to the meaning of such policies is inadmissible. Ib.

A clause in the prospectus of an insurance company offering thirty days' grace in the payment of premiums is ineffectual to contradict the terms of the policy. Ib.

INSURANCE—*Continued.*

An insurance company which is in the habit of sending notices to its assured of the time when the premiums are due is not obliged to continue to do so, and the neglect of the assured to pay at the proper time is at his own peril. Ib.

Even if the assured was misled by the company's failure to send the customary notices, such failure will not serve to excuse two years' neglect on his part to pay the premiums falling due. Ib.

Accident Insurance. Ambiguous words in a policy of insurance will be held to have the meaning most favorable to the insured, the presumption being that he took the policy on this construction, and the company could have avoided the difficulty by being more specific. Burkhard *v.* Travellers' Ins. Co., 33.

Under what circumstances an alighting by a passenger from a railway train on to a bridge, through a hole in which he fell, is not a "voluntary exposure" to danger within the meaning of the policy, nor a breach of condition forbidding walking or being on a railway bridge or road-bed. Ib.

INTEREST. Interest upon unpaid legacy improperly withheld by an executor, when recoverable from such executor. (O. C.) Hobson's Estate, 48.

Interest upon judgment payable out of the proceeds of a judicial sale is not to be computed to a later date than the confirmation of the sale. Wanger's Appea., 429.

Where the capital of a deceased partner is permitted to remain in the business, it presumptively carries six per cent. interest. (O. C.) Pickens's Estate, 407.

Where there is an appeal from the award of a railroad jury, interest will only be allowed from the time of the determination or withdrawal of the appeal. (C. P.) Ross *v.* Railroad Co., 143.

Action for interest on bond, when maintainable before maturity of principal. See BOND. Montgomery County *v.* Francis, 179.

Apportionment of interest on corporate and municipal loans as between life-tenant and remainderman. See APPORTIONMENT. (O. C.) Truefitt's Estate, 242.

INTERNAL REVENUE. See TAXES.

INTERPLEADER. Severance of issues in, when allowed. (C. P.) Gray *v.* Bradley, 92. See EXECUTION.

INTESTATE LAW. Meaning of word "heirs." Right of a widow to take as an heir of her deceased husband. (O. C.) Ryan's Estate, 79.

ISSUE, when a word of purchase. See WILL. (C. P.) Carroll *v.* Burns, 272. [Affirmed by the Supreme Court, but a reargument has since been ordered.]

ISSUE DEVISAVIT VEL NON. See WILL.

JUDGMENT. The parties to a judgment may, by agreement *inter sese*, change the purposes for which it is held. Peirce *v.* Black, 295.

A judgment, although paid in full, may by contract be kept alive to secure a new loan, and parol evidence of such contract is admissible in an action between the parties. Ib.

While such a contract is void as to subsequent lien creditors, the judgment debtor is estopped from denying it. Ib.

A judgment entered and indexed in the name of a firm without any designation of the individuals composing the firm, will be postponed to the claim of a subsequent lien creditor without notice, whose judgment is properly indexed. Hamilton's Appeal, 217.

Such defective entry may be remedied as to subsequent lien creditors by actual personal notice to them of the judgment. Ib.

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JUDGMENT—*Continued.*

Where a partner gave a judgment note in the name of the firm for money borrowed by the firm, on which judgment was entered and indexed in the firm name only, and subsequently he confessed judgment in the name of the firm to himself as guardian of several minors, the latter judgment being properly indexed: *held*, that he as guardian had such actual notice of the first judgment as would remedy its defective entry, and entitle it to be paid in priority of the judgment confessed to him as guardian. Ib.

The defendant must be warned by sci. fa. before an execution can issue on a judgment over five years old. (C. P.) Marx *v.* Goldsmith, 173; Harmony Building Asso. *v.* Berger, 499.

The fact that other executions have issued within the five years is immaterial. (C. P.) Comstock *v.* Kilchenstein, 388. *Contra* (C. P.) Todd *v.* Lowe, 550.

A judgment is a lien on an equitable title to lands depending upon a parol contract, and a purchaser at sheriff's sale of such equity is entitled to the same specific performance as the judgment debtor. Hutchison *v.* Kerr, 39.

The Supreme Court having opened a judgment in ejectment entered upon a warrant of attorney, accompanying a lease, on the ground that there was not sufficient evidence of breach of condition; upon an application subsequently made to strike off the judgment: *held*, that the rule must be discharged, and the record placed in a position to have the question of breach adjudicated. (C. P.) Huber *v.* Grossman, 157.

Judgment having been entered upon a judgment-note more than ten years after date, without complying with a rule of Court requiring a special application to the Court accompanied by an affidavit for leave to enter judgment in such case, it is within the discretion of the Court on application of the defendant to permit such judgment to be opened so that the Statute of Limitations may be pleaded. Herman *v.* Rinker, 541.

A partner cannot confess a judgment which will bind the individual property of a non-joining partner, but on such judgment execution may go against the partner confessing and the firm assets. (C. P.) Simpson *v.* King, 44.

Judgment-notes given by the general partners of a special partnership, as individuals, for moneys loaned to the special partner, which moneys went into the firm as capital, when entered up may be made the foundation of an execution against partnership assets. (C. P.) Coffin *v.* Gruber, 140. [Since reversed. Coffin & Hurlburt's Appeal, Jan. T. 1884, No. 267.]

Where on an application to open a revived judgment, the testimony taken upon the rule shows a defence going to the merits of the original judgment, it is within the discretion of the Court below to open the original judgment so as to reach the whole case and let the defendant into a defence. First Nat. Bank of Muncy's Appeal, 493.

The Act of April 4, 1877, allowing an appeal from decisions of the Courts in the opening of judgments entered by virtue of a warrant of attorney, or on judgment-notes, does not extend to the case of judgments revived by scire facias, though originally entered as above. Ib.

The Common Pleas have power to permit a motion for a new trial to be filed *nunc pro tunc*, and open a judgment within the term at which the verdict was entered. Lance *v.* Bonnell, 385.

Whenever upon a motion to open a judgment entered on warrant of attorney, facts appear to be in dispute upon which a jury ought to pass, the judgment will be opened. (C. P.) Mullen *v.* Mageoch, 127.

When judgment entered by warrant of attorney on a bond is opened, it is usual to go to trial on the merits without narr. or plea. If it is important to have the issue defined, a feigned issue may be framed, or a formal narr. and plea filed. (C. P.) Philadelphia *v.* McCuen, 453.

The Court will not entertain a rule to strike off a judgment where the ground upon which the rule is based has been considered and passed upon by the Supreme Court, on a writ of error, brought on account of the refusal of the Court below to open the judgment. (C. P.) McCormack *v.* Spackman, 257.

Under what circumstances one judgment will be set off against another. (C. P.) Gunn *v.* Dickey, 274.

Against married woman when void. See HUSBAND AND WIFE. (C. P.) Needham *v.* Woollens, 525.

See JUSTICE OF THE PEACE.

JUDICIAL SALE. See EXECUTION.

JURISDICTION. Of Common Pleas of Dauphin County over corporations. See COURTS.

Over distribution of decedents' estates. See ORPHANS' COURTS. (O. C.) Fitler's Estate, 62.

In Divorce proceedings. See HUSBAND AND WIFE.

See COURTS.

JUSTICE OF THE PEACE. In proceedings upon a transcript of a judgment to another county for purposes of execution, the effect of the non-residence of the defendant is to dispense with necessity for service. (C. P.) Bartman *v.* Eusminger, 530.

A justice of the peace has no power to issue attachments against non-resident debtors where the plaintiff's claim exceeds one hundred dollars. (C. P.) Ross *v.* Miller, 253.

An attorney may be surety upon an appeal from the judgment of a justice. (C. P.) Gardy *v.* Moffit, 438.

Upon an appeal by the plaintiff from a judgment of a justice, judgment cannot be entered in the Common Pleas against the defendant for want of an affidavit of defence, unless the defendant be warned by process, or voluntarily enter an appearance. (C. P.) Hermance *v.* Skinner, 512.

An appeal from a justice of the peace, which has not been taken in accordance with the law, may be perfected later, and even after the time for appealing has elapsed, where no injury will thereby be done to the other party's rights. Womelsdorf *v.* Heifner, 24.

The defendant will be allowed to file an appeal *nunc pro tunc*, when he has been misled by the conduct of the magistrate as to the time of filing. (C. P.) Dobson *v.* Fell, 456.

Upon an appeal from a justice, if the plaintiff desires to treat the transcript as a narr. he must signify his election within a year from the taking of the appeal, otherwise a non pros. may be entered. (C. P.) Henderson *v.* Miller, 422.

LAND. Title of purchaser at sheriff's sale. See EXECUTION. (C. P.) Lea *v.* Transfer Co., 512.

Notice of adverse title by possession. See VENDOR AND VENDEE. Rowe *v.* Ream, 293.

Dower in land. See HUSBAND AND WIFE.

See DEED. EJECTMENT. FRAUDS, STATUTE OF. TAXES. VENDOR AND VENDEE.

LANDLORD AND TENANT. A covenant in a case which is merely executory, is merged in a

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LANDLORD AND TENANT—*Continued.*
new covenant made in pursuance of the former, although its terms are different. (C. P.) Lea *v.* Love, 75.

There is no implied contract on the part of a landlord that premises are fit for the purposes for which they are rented, or that they are tenantable, or shall continue so. (C. P.) Schleppi *v.* Gindela, 31.

A tenant from year to year is not bound to give notice of his intention to quit at the end of the current year. (C. P.) Brown *v.* Brightly, 497.

A request by a landlord of a tenant for the delivery of the keys, followed by an acceptance of them will constitute a surrender of the term. (C. P.) Reany *v.* Fannessy, 91.

The seizure of property necessary to complete a distress need not be an actual seizure of the particular goods. It is sufficient for the landlord to give notice of his claim for rent, and to declare that the goods which he names shall not be removed from the premises till the rent is paid. Furbush *v.* Chappell, 347.

A fixture slightly attached to the freehold which the tenant may remove at his pleasure during the term, and which may be removed without destroying its character or injuring it, is distrainable. Ib.

A spinning mule, fastened to the floor of a mill with wooden screws, so as to run like bolts, is such a fixture. Ib.

An assignee of an unexpired term, who moves out without the lessor's consent, is only liable for rent up to the time that the premises were re-rented, and, therefore, cannot be held for difference of rent paid by the new tenant, and that called for by the original lease. (O. C.) Muller's Estate, 308.

Contract of suretyship, when it runs with the land, and may be sued on by assignee of reversion. (C. P.) Taylor *v.* Kennelly, 124.

A clause in a lease that the lessee shall "pay all taxes, water-rents, and assessments upon the premises," includes a charge for paving and curbing the streets in front of the leased premises, ordered by the municipality. Griffen *v.* Phœnix Pottery Co., 266.

A landlord is not liable for a nuisance on the demised premises resulting from the manner of use, and not from their nature or construction. (C. P.) Fow *v.* Roberts, 307.

The "owner" of premises within the meaning of the Act of June 11, 1879, relating to fire escapes, is the person in actual possession thereof. Schott *v.* Harvey, 263.

Construction of mining lease. See MINES AND MINING. Sanderson *v.* Scranton, 409.

Ground-rent. Where judgment has been obtained against the original covenantor in an action of covenant upon a ground-rent, a terre-tenant is entitled to intervene, and enter security for stay of execution. Ellis *v.* Cadwallader, 400.

A purchaser at an Orphans' Court sale of land subject to a mortgage, and also to a prior ground-rent, takes subject to the arrears of ground-rent due at the decedent's death, although he was the covenantor. (O. C.) Lewis's Estate, 499.

No order of Court is necessary to enable trustees to extinguish a redeemable ground-rent. (C. P.) Bouvier's Estate, 535.

LEGACY. When the personal estate is insufficient to pay in full pecuniary legacies which are charged upon land, a *pro rata* distribution should be made, and resort had to the land for the balance. (O. C.) Kohler's Estate, 258.

Ademption of legacies. See WILL. (O. C.) Monestier's Estate, 392.

LIBEL. Where the proprietors of a newspaper give to an agent charge and control of an editorial column, limiting him only by his discretion, and reserving no supervision, they are liable in an action on the case for libel, for injuries resulting from an act of his, incident to, and in the scope of his employment, whether the wrong resulted from mere negligence, or from wanton recklessness. Bruce *v.* Reed, 161.

The fact that the defendants had no personal knowledge of the publication, and afterwards did what was reasonable to make amends, does not relieve them from liability to punitive damages. Ib.

A defendant wrote to the prosecutor's attorney, in answer to a letter threatening suit, denying that he was indebted to prosecutor, and saying that the prosecutor bought the horse concerning which the demand was made "to cheat somebody with:" held that this was a privileged communication, and that an indictment for libel based thereon should be quashed. (Q. S.) Commonwealth *v.* Pavitt, 27.

LICENSE. See LIQUOR AND LICENSE.

LIEN, upon stock by corporation for debt due by shareholder. See CORPORATION. Merchants' Bank *v.* Shouse, 133.

By real estate broker upon title deeds. (C. P.) Arthur *v.* Sylvester, 417.

Of debts of decedent. See DECEDENTS' ESTATES. Hunt's Appeal, 377. See MECHANICS' LIENS. MUNICIPAL LIENS.

LIFE ESTATE, collateral inheritance tax on. See DECEDENTS' ESTATES. (O. C.) Goldstein's Estate, 176.

LIMITATIONS, STATUTE OF. The claim of an attorney for professional services rendered in an action pending at the death of the client, becomes due at such time, and consequently the Statute of Limitations begins to run from that date. Campbell *v.* Maple's Administrator, 329.

The statute does not operate as a bar to proceedings in the Orphans' Court for the distribution of a decedent's estate. This is not so in actions at law. In the latter case, it acts on the remedy and takes away the right of action, unless suit is brought within the time limited by the statute; but it does not extinguish the debt, nor affect the trust created for its payment as long as the trust subsists. Ib.

A coupon is incidental to and forms part of a bond, and therefore suit upon it is not barred until twenty years after maturity. (C. P.) Helmbold *v.* D. H. and W. R. R. Co. 128.

Mere concealment of a cause of action by a debtor from his creditor, or the personal representatives of his creditor, is not a fraud, and does not toll the operation of the Statute of Limitations upon the debt, unless concealment be coupled with misrepresentation or positive fraud, or unless a confidential relation exists between the parties which makes it the duty of the debtor to speak. Sankey *v.* McElevey, 19.

Items of credit indorsed upon a promissory note are not a part thereof, and do not require to be denied in an affidavit of defence setting up the Statute of Limitations. (C. P.) Schaecterlein *v.* Knabe, 404.

A running account with a surviving partner of a dissolved firm who has the collection of the partnership assets, is not an account with the firm, and consequently cannot toll the running of the Statute of Limitations against a partnership claim. Stewart's Appeal, 442.

A fortiori are the above observations true where the items in the account relied upon to toll the statute are not charged against the firm, but against the individual surviving partner. Ib.

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LIMITATIONS, STATUTE OF—*Continued.*

Construction of a clause in an insurance policy limiting time of suit. Mutual Accident Co. *v.* Kayser, 86.

The Act of April 22, 1856, providing that the probate of a will devising real estate shall be conclusive as to such realty, unless appealed from within five years, affects the title to the lands and is not merely a limitation of the remedy. Cochran *v.* Young, 345.

The register in admitting the will to probate acts judicially, and his judgment cannot be impeached in a collateral proceeding; after five years the probate is conclusive upon all parties, whether infants femes covert, or persons *non compotes mentis.* Ib.

The subsequent production and probate of a will later in date does not affect the conclusiveness of the decree on the will first proved. Ib.

Mere different and disconnected acts of trespass extending over parts of several years are clearly insufficient to establish any right to obstruct an alley under the Statutes of Limitation, or to bar the public character which has been stamped on the land by its dedication to public use as an alley. Transue *v.* Sell, 397.

An entry upon land is not adverse which is made under a license to lay water pipes to springs thereon, and to change the effect of this entry, and make the holding adverse, it is not enough to drive stakes around the springs to keep cattle off, but the tenant must keep up the fences, and prevent the land from being turned into common. Lund *v.* Brown, 489.

Payment of taxes assessed upon real estate without the requisite possession cannot make title under the statute. Ib.

Under what circumstances a judgment will be opened to give the defendant an opportunity to plead the Statute of Limitations. Herman *v.* Rinker, 541.

LIMITED PARTNERSHIP. See PARTNERSHIP.

LIQUOR LICENSE. A distiller of whiskey, having a license under the law of this Commonwealth, is at liberty to sell the whiskey manufactured by him at any place within the same county where the manufactory is established. Because he sells such liquor in a different township of the same county from that in which his manufactory is located he is not liable to be indicted for selling liquor without a license. Britton *v.* Commonwealth, 368.

The effect of a statutory local prohibition against the sale of liquor upon a distiller's license, not passed upon. Ib.

LIS PENDENS. Plea of, where not sustainable. (C. P.) Huston *v.* Clark, 418.

LUNACY. The deed of a lunatic is void without reference to the adequacy of the price paid, or the grantee's knowledge of the lunacy of the grantor. (C. P.) Bowman *v.* Van Baum, 185.

The degree of lunacy or insanity which will make a grantor's deed void, requires that there shall be a genuine want of soundness of judgment. Ib.

An inquisition finding lunacy for a preceding period of five years without lucid intervals, is *prima facie* evidence even against a grantee four years prior to the finding. It is, however, only *prima facie*, and may be rebutted. Ib.

The members of the inquest are competent witnesses as to the state of mind of the alleged lunatic, so far as they have personal knowledge on the subject, but they cannot be allowed to impeach the regularity of the finding. Ib.

The Act of April 20, 1869, relating to the admission of lunatics into asylums does not supply or modify the provisions of the Act of June 13, 1836, so far as

LUNACY—*Continued.*

it relates to the disposition and control of their estates. Halderman's Appeal, 101.

Upon the trial of a traverse of an inquisition in lunacy, the issue is whether the traverser's mind is so deranged as to render him unable to conduct himself with safety to himself and others, and to manage his own affairs. (C. P.) Commonwealth *v.* Meredith, 188.

The Act of 13 June, 1836, is precautionary, and embraces in its design cases of lunacy in which acts of madness have not been committed, but where there is reasonable ground to fear that the lunatic will do violence to himself or others, or squander his property. Ib.

A fixed belief in things which are contrary to universal experience and known natural laws is a delusion, and as such evidence of insanity. Ib.

Where the tendency of a delusion is shown to be dangerous the question for the jury is, whether there is such imminent danger as to require the control of the lunatic. Ib.

Where there has been a finding of lunacy by an inquisition, and the lunatic having been subsequently cured, is restored by a decree into the enjoyment of her rights, she is estopped from denying her former lunacy in an action of trespass in the case brought by her against those procuring the finding. (C. P.) Johnston *v.* Given, 326.

A commission will not be appointed to examine the mental condition of a convicted murderer. See CRIMES. *Ex parte* Briggs, 341. *Ex parte* McGinnis, 221.

MAGISTRATE. See JUSTICE OF THE PEACE.

MALICIOUS MISCHIEF. See CRIMES.

MALICIOUS PROSECUTION. In an action for malicious prosecution the plaintiff must prove affirmatively both malice and want of probable cause. Sutton *v.* Anderson, 4.

Where the plaintiff's own testimony shows clearly that there was a probable cause for the prosecution, the Court should so instruct the jury. Ib.

What sufficient to justify an arrest for larceny. Ib.

MANDAMUS. Where the charter of a railway company gives a clear right to lay a track upon a street of the city, the Board of Surveys is bound to furnish a plan; and this right will be enforced by mandamus. (C. P.) Commonwealth *v.* Smedley, 402.

Jurisdiction of the Common Pleas of Dauphin County over mandamus against Sinking Fund Commissioners. (C. P.) Commonwealth *v.* Sinking Fund Commissioners, 222.

A mandamus will lie against a railroad company to compel reconstruction of turnpike appropriated for railroad purposes. Pittsburgh, etc., R. R. Co. *v.* Commonwealth, 177.

When allowed to restore expelled member of a beneficial society. (C. P.) Sweeney *v.* Beneficial Society, 466, 486.

Against city commissioners to compel awarding of contract. (C. P.) Commonwealth *v.* Douglass, 453, 454, 455.

To compel county commissioners to pay damages for sheep. See COUNTY. Wetherill *v.* Delaware County, 42.

MARRIAGE. See HUSBAND AND WIFE.

MARRIED WOMEN. See HUSBAND AND WIFE. Will of. See WILLS.

MASTER AND SERVANT. Where an employé occupies a dual position, and through neglect of duty in one position, an accident occurs to him while serving in the other by which he is injured, the wrong is his, and he cannot recover for injuries sustained by reason thereof. Cooper *v.* Butler, 298.

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MASTER AND SERVANT—*Continued.*

A servant who voluntarily accepts a dangerous employment assumes all the patent risks incident thereto, and his master is not liable for damages in case of an accident occurring from such risk, in the course of such dangerous employment. Marsden *v.* Haigh, 526.

It is not negligence in a master to fail to provide against a patent risk unless he has been requested to do so by his servant or has induced his servant to believe that he would do so. Ib.

In order to sustain an action against a master for the alleged negligence of his servant, the actual existence of the relation must be established. (C. P.) McCullough *v.* Hemingway, 14.

Where the owner of a property refused to allow the servants of a third party to carry down through his store some heavy bags of paper, which the said party had purchased from him, and which were stored in the upper part of the building, but told them they could throw them out of the window; the fact of such instruction does not create the relation of master and servant so as to render him liable for the negligent manner in which the work was done, resulting in the injury of a passenger in the street below. McCullough *v.* Shoneman, 395.

Liability of publisher of newspaper for libel of his agent. See LIBEL. Bruce *v.* Reed, 161.

Liability of master of vessel for trespass of subordinate officer. (C. P.) Wedman *v.* Kendall, 157.

MEADOW COMPANY. See TAXES. (C. P.) Kingsessing Co. *v.* Farrel, 240.

MECHANICS' LIEN. A scire facias cannot issue to revive the lien of a mechanics' claim. It can only issue to levy the claim and must be duly prosecuted within five years, otherwise the lien of the claim will be lost. (C. P.) Collins *v.* Schock, 485.

Where the equitable owner in possession of land causes improvements to be erected thereon, without the co-operation of the legal owner, a mechanics' lien binds no other or greater estate than that of the equitable owner. Weaver *v.* Lutz, 251.

The Court refused to strike off a claim filed for work, etc., in the erection and construction of a new building, including the demolition and removal of the old. (C. P.) Pennock *v.* Brown, 43.

What does not amount to a contract not to file a lien. Ib.

MERGER of covenants. See LANDLORD AND TENANT. (C. P.) Lea *v.* Love, 75.

Of dower. See HUSBAND AND WIFE. Steckel *v.* Koons, 137.

MINES AND MINING. Measure of damage for polluting mountain stream by drainage from mine. See DAMAGES. Sanderson *v.* Coal Co., 81.

A perpetual agreement to mine and remove each month a minimum number of tons to be paid for at a certain royalty whether mined or not is not a lease, but a sale of the coal in place, even though the agreement provides for distress in case the royalty is not paid. Sanderson *v.* Scranton, 409.

Taxation of coal estate apart from the surface. See TAXES. Sanderson *v.* Scranton, 409.

MINOR. See GUARDIAN AND WARD. INFANT.

MISTAKE, money paid under, when recoverable. See ASSUMPSIT. Meredith *v.* Haines, 364.

MONEY COUNTS. See ASSUMPSIT.

MORTGAGE. A mortgage executed by an assignor to a trustee for creditors, in consideration of an extension of time for the payment of the assignor's debts, being a mere security, cannot be treated as an assignment for the benefit of creditors. Johnson's Appeal, 441.

MORTGAGE—*Continued.*

Where a mortgage is made to one as trustee, the Court of the domicile of the trustee has jurisdiction of the trust. Ib.

A mortgage is not a conveyance of land within the Statute of Frauds. (C. P.) Gross *v.* Reinhard, 224.

Deed shown by parol to be mortgage, character of evidence necessary. Nicolls *v.* McDonald, 181.

Covenant in mortgage to pay taxes how enforceable. (C. P.) Building Asso. *v.* Melsheimer, 344.

Declarations of the secretary of a corporation as to the amount due on a mortgage held by it are not admissible in evidence in a suit on the mortgage, unless it be shown that the secretary had authority to bind the corporation by such admissions. Johnston *v.* Building Asso., 247.

Where there is a dispute as to the amount due on a matured mortgage, the mortgagor may, as a matter of right, under the Act of April 3, 1851, upon petition to the Court of the county where the mortgaged premises are situate, pay into Court the principal and interest claimed by the mortgagee to be due, and the Court will order satisfaction on the record of the mortgage. Pennock *v.* Stewart, 113.

The pendency of a scire facias does not deprive the mortgagor of this right, unless it has been prosecuted to final judgment before presenting the petition. Ib.

Upon such payment proceedings upon the scire facias will be stayed, and the Court will proceed to settle the amount due in the manner provided in the Act of 1851. Ib.

Payment into Court will not be allowed where there is a dispute as to whether the mortgage is due. (C. P.) *In re* Hoffmann, 563.

Where a loan is made on bond and mortgage, and judgment is entered on the bond, the mortgaged property, being primarily liable, must, if the mortgagor so elect, be exhausted before the personal property of the mortgagor can be taken in execution. (C. P.) Borland *v.* Elton, 563.

Where a mortgagee assigns part of the mortgage debt and the proceeds of the property bound at a sale under the mortgage are insufficient to pay the claims of both the assignor and assignee the fund will be divided among them *pro rata.* Patrick's Appeal, 332.

Notice of adverse title. See VENDOR AND VENDEE. Rowe *v.* Ream, 293.

Power to mortgage, when implied from power to sell. See POWERS. Wurfflein *v.* Haines, 76.

Power of conveyancer to receive mortgage money. See PRINCIPAL AND AGENT. (C. P.) Philadelphia Trust Co. *v.* Roberts, 123.

MUNICIPAL CLAIMS. A church edifice used for religious services is not liable for the payment of a municipal claim. Erie *v.* Church, 232.

Construction of lease defining the obligation of a tenant to pay municipal claims. See LANDLORD AND TENANT. Griffen *v.* Phœnix Co., 266.

Defect in service of scire facias upon claim; under what circumstances an appearance for the defendant may be withdrawn. (C. P.) City *v.* Ward, 174.

A municipal lien under the Act of April 2, 1870 (the Penn Avenue Act), is not divested by a judicial sale, and is not payable out of the fund realized thereby. Bryant's Appeal, 167.

Payment of a claim for water pipe under threat of turning off the water is a payment under duress. (C. P.) Lawrence *v.* City, 421.

Where a contractor to whose use a municipal claim for paving is filed is unable to recover upon the same because the property is rural, no right of action there-

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MUNICIPAL CLAIMS—*Continued.*
by arises against the municipality on the part of the contractor for work and labor done. Dickinson *v.* Philadelphia, 367.

MUNICIPAL CORPORATIONS. Municipal coupon bonds payable to bearer are at least *quasi* negotiable—they pass by delivery; the holder may sue in his own name; the transferree for value holds the title of an original obligee; he cannot be affected by equities between the previous holders and the municipality of which he had no notice; neither can he be affected by the default of the officers issuing them, unless such default directly affects their power to make and put them upon the market. Kerr *v.* Corry, 277.

Liability of City of Philadelphia for court stenographers' charges. See COURTS. (C. P.) Wilson *v.* Philadelphia, 74.

A contractor is entitled to recover upon a contract with the city, provided the appropriation has not been exceeded, even though a city department and the city controller have improperly allowed the appropriation to be diverted to an erroneous use. (C. P.) Gate *v.* Philadelphia, 274.

Under what circumstances mandamus will issue against city commissioners to compel the awarding of a contract. (C. P.) Commonwealth *v.* Douglass, 453-4-5.

In an action against a municipality by a foot passenger injured through an alleged defect in a street crossing, it is error to leave to the jury the question whether or not it was necessary to construct the crossing. This is a matter which lies purely in the discretion of the municipal authorities. Easton *v.* Neff, 206.

In such case the only questions for the jury are whether or not the crossing was constructed in a defective or negligent manner, so as to cause the injury in question, and also whether or not the plaintiff was guilty of contributory negligence. Ib.

Where injury has resulted from a defect in a sewer or gas main, notice or knowledge will be assumed when the circumstances are such that the municipal authorities, by the exercise of proper and reasonable diligence, might have known of the defect. Kibele *v.* Philadelphia, 393.

A public municipal corporation can only be sued in the Courts of the county of its *situs*. Potts *v.* Pittsburgh, 38.

A sheriff cannot make service upon a municipal corporation out of his bailiwick. Ib.

A vacancy occurring in the office of school controller in cities of the third class is to be filled by the Board of Controllers until the next municipal election, when the voters are to elect a controller to serve for the unexpired term. Commonwealth *v.* Evans, 8.

Effect of partial assignment of claim against. See ASSIGNMENT. Schroeder's Appeal, 537.

Liability of municipality to contractor for street paving, when claim is uncollectible because against rural property. See MUNICIPAL CLAIMS. Dickinson *v.* Philadelphia, 367.

See RAILROADS.

NECESSARIES. See HUSBAND AND WIFE. Bair *v.* Robinson, 44. Stephenson *v.* Anderson, 89.

NEGLIGENCE. No one is chargeable with negligence who has acted upon his best judgment, or who, not having time for reflection and determination, has failed to act. Such act or such omission may be a mistake, but it is not negligence. Brown *v.* French, 412.

NEGLIGENCE—*Continued.*
When failure to insure is negligence in bailee for hire. (C. P.) Heaton *v.* Knowles, 74.

What is such supine negligence on part of guardian in the investment of funds as will render him liable for their loss. (O. C.) Smith's Estate, 93.

Liability of county for defect in bridge, dependent on statute. Rigony *v.* Schuylkill County, 120.

The fact that a passenger in a street car permits his elbow to rest upon the window does not render him guilty of such contributory negligence as will debar him from maintaining an action against the company by whose negligence the arm is injured. Germantown Pass. R. W. Co. *v.* Brophy, 213.

A sleeping car company is not liable as an innkeeper for the safety of the valuables of passengers while asleep. It is, however, bound to exercise a reasonable and proper degree of care to prevent the valuables of a passenger being stolen from his bed or clothing while he is asleep. Pullman Palace Car Co. *v.* Gardner, 17.

Evidence to the effect that another passenger in the same car was robbed on the same night was held admissible on behalf of the plaintiff to show want of proper care by the company. Ib.

If a person knew that illuminating gas was escaping into his house from a main, and that it might explode, it was his duty to withdraw from the premises or take suitable precautions for his safety. Whether he had such knowledge or not was a question for the jury. Kibele *v.* Philadelphia, 393.

An ordinary man is not bound to know that illuminating gas, when mixed in certain proportions with the common air, is explosive. Ib.

In an action for destruction by fire of the contents of a building, brought by several insurance companies in the name of the insured, whom they have indemnified, evidence is admissible to show that the building owned by a third party was insured in one of the said companies, and that the policy of insurance contained a clause requiring the insured to keep a watchman employed, which requirement was not fulfilled. Kennebec Ice Co. *v.* Wilmington R. R. Co., 554.

Although ice companies have the right to use shavings in their business, yet if they use them in such a careless manner as to render it possible that they should be set on fire by the engine of a neighboring railroad company, they are guilty of contributory negligence, and if the shavings are so set on fire, and the property of the ice company in consequence thereof destroyed, no recovery can be had against the railroad company. Ib.

Negligence of trustee. See TRUSTS AND TRUSTEES. Fahnestock's Appeal, 50.

Liability of municipal corporation for defect in highway. See MUNICIPAL CORPORATION. Easton *v.* Neff, 206.

Who is liable for failure to erect fire escapes. See LANDLORD AND TENANT. Schott *v.* Harvey, 263.

Liability of municipal corporation for defect in sewer. See MUNICIPAL CORPORATIONS. Kibele *v.* Philadelphia, 393.

See MASTER AND SERVANT.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. BONDS.

NOTICE. An advertisement of the sale of property in a newspaper and by handbills, unknown to the party sought to be affected by it, does not amount to notice; nor is it competent testimony as a make weight in support of the allegation of fraud. Weaver *v.* Craighead, 116.

A judgment entered and indexed in the name of a

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NOTICE—*Continued.*
firm without any designation of the individuals composing the firm will be postponed to the claim of a subsequent lien creditor without notice whose judgment is properly indexed. Hamilton's Appeal, 217.

When notice to an individual, will operate as notice to him in his capacity of guardian. Ib.

One who takes from an executor in payment of his individual debt assets earmarked as the property of his testator has notice of the misappropriation and is liable for any loss occasioned thereby. Linton's Appeal, 450.

Effect of adverse possession as notice of title to land. See VENDOR AND VENDEE. Rowe *v.* Ream, 293.

Notice to creditor of a foreign assignment, effect of. See ASSIGNMENT FOR BENEFIT OF CREDITORS. Martha Smith's Appeal, 285.

NUISANCE. Liability of landlord for maintenance of. See LANDLORD AND TENANT. (C. P.) Fow *v.* Roberts, 307.

Obstruction of street occupied by passenger railway. See ROADS. (C. P.) Commonwealth *v.* Donaldson, 528.

ORPHANS' COURT. The Orphans' Court has no jurisdiction to compel a party to elect to take out or renounce the right to letters testamentary. (O. C.) Langton's Estate, 46.

Proper practice when an executor fails to qualify. Ib.

Ju risdiction of to make complete distribution among all claimants, their attaching creditors and assignees. (O. C.) Fitler's Estate, 62.

The Orphans' Court alone has power to hold an executor to account for the performance of a testamentary trust vested in him to sell real estate. Savings Bank *v.* Vincent, 320.

The Orphans' Court has no jurisdiction to make an order upon an executor to mortgage for payment of a decedent's debts except on the petition of a minor or a creditor. Story's Estate, 406.

The Orphans' Court has no power to review the Register's valuation of a life estate for the collateral inheritance tax. (O. C.) Goldstein's Estate, 176.

The Statute of Limitations does not operate as a bar to proceedings in the Orphans' Court for the distribution of a decedent's estate. Campbell *v.* Maple's Administrator, 329.

Wh ere upon partition proceedings in the Orphans' Court. the land is parted into as many purparts of equal value as there are heirs, and the purparts are allotted among the heirs in severalty, no valuation is necessary of the land, as a whole or of the separate purparts. (O C.) Wistar's Estate, 45.

Upon a petition for partition, an allegation in the answer that the premises are held adversely, is not sufficient where the fact is not admitted in the petition. In such case, upon the report of an examiner, the Court will determine whether or not the party should be put to an action of ejectment. (O. C.) Bagwill's Estate, 311.

A purchaser at an Orphans' Court sale of land subject to a mortgage and also to a prior ground-rent takes subject to the arrears of ground-rent due at the time of the decedent's death. (O. C.) Lewis's Estate, 499.

It is sufficient ground for setting aside an Orphans' Court sale that there was a mistake of twenty-five per cent. in the number of acres sold, and also that there was puffing or fictitious bidding at the sale. Schug's Appeal, 49.

The fact that such puffing was not authorized by the

ORPHANS' COURT—*Continued.*
seller is immaterial, he cannot repudiate the fraud and at the same time retain its fruits. Ib.

Costs of settling an estate, when placed upon the accountant. (O. C.) Smith's Estate, 93.

Examiner's fees, by whom payable. See COSTS. Yerkes's Appeal, 510.

Independent applications should not be joined in the same petition. (O. C.) Graham's Estate, 31.

See DECEDENTS' ESTATES. INTESTATE LAW. LEGACY. WILL.

OWNER, meaning of word in fire escape Act. See LANDLORD AND TENANT. Schott *v.* Harvey, 263.

OYER AND TERMINER. See CRIMES.

PARENT AND CHILD. The right of a parent to the personal custody and services of a child is simply incidental to the duty of discipline and direction. A child is not the mere servant of the father, nor is the father bound to work the child for the benefit of his creditors; but may let him go when he will, whether he be solvent or not. Emancipation may be as perfect when they live together as if they were separated. Beaver *v.* Bare, 53.

The right of a parent to the services of minor children is not as such absolute, but his right to their wages is vested, if the labor has been performed without any previous agreement to the contrary. Ib.

The release by a parent of his right to the wages of a minor child executed to such child after a general assignment for the benefit of creditors, is of no validity against such creditors. Ib.

Where a parent purchases real estate and has the deed executed to a child no presumption of a resulting trust in himself arises. Wheeler *v.* Kidder, 330.

PAROL EVIDENCE, when admissible to vary writing. See EVIDENCE.

PARTITION. Appointment and dismissal of master in partition. See EQUITY. Gibbons's Appeal, 204.

A sale of lands in partition by a master appointed by order of Court made without notice to adverse parties is void. Gibbons's Appeal, 204.

A devise to trustees to hold for fifteen years, and then to part and divide is good. The partition will not be accelerated by a clause directing that upon the death of a child his share shall go and be distributed among his appointees by will. (C. P.) Conrow *v.* Conrow, 481.

Upon proceedings in partition in equity, a decree of the Court allotting the several purparts to the parties in interest is sufficient to pass the title without a deed from the Master. (C. P.) Wittmer *v.* Bauer, 304.

Partition in the Orphans' Court. See ORPHANS' COURT. (O. C.) Wistar's Estate, 45. Bagwill's Estate, 311.

PARTNERSHIP. One partner cannot bind his copartners jointly with himself to pay the debt of another. Shaaber *v.* Bushong, 352.

The pledge of an interest in a partnership being a thing intangible can be made without change of possession. Wallace's Appeal, 164.

A judgment entered and indexed in the name of a firm without any designation of the individuals composing the firm will be postponed to the claim of a subsequent creditor without notice whose judgment is properly indexed. Hamilton's Appeal, 217.

A party defendant in a bill praying for a partnership account may be called as a witness for the complainant although one of the co-defendants is dead, and his executors substituted of record at the time the witness is called. Caldwell's Appeal, 145.

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PARTNERSHIP—*Continued.*

The current profits of a partnership are personal property and descend as such, whether the property of the firm be real or personal. Leaf's Appeal, 507.

During the continuance of a partnership agreement all the property of the firm, including real estate acquired with partnership funds and used for partnership purposes must be regarded as personal estate. Ib.

Stipulations in articles of copartnership for the continuance of the partnership after the death of a member are valid and binding, and prevent a dissolution. Ib.

Under such stipulations, the interest of a deceased partner and the profits arising therefrom, are personal property, and descend as such under the intestate laws. Ib.

A running account with a surviving partner of a dissolved firm, who has the collection of the partnership assets, is not an account with the firm, and consequently cannot toll the running of the Statute of Limitations against a partnership claim. Stewart's Appeal, 442.

Where the capital of a deceased partner is left in the business, it carries interest at six per cent. (O. C.) Pickens's Estate, 407.

No commissions will be allowed to an executor, who is also a surviving partner, for services in winding up the estate. Ib.

Costs of settling a partnership account when put on the surviving partner. See Costs. (C. P.) Foulke *v.* Hitzeroth, 241.

A partner has no power, even for a firm debt, to confess a judgment which will bind the individual property of a non-assenting partner. (C. P.) Simpson *v.* King, 44.

Special Partnership. Where a partnership is composed of two general and one special partners, the use of the names of the two general partners, with the addition of "and company" as the firm name, will render the special partner liable as a general for the firm debts. (C. P.) Bank *v.* Gruber, 12; Gibb *v.* Mershon, 89.

Power of general partners to confess judgment in favor of the creditor of the special partner, who loaned the special capital. (C. P.) Coffin *v.* Gruber, 140. [Since reversed; Coffin & Hurlburt's Appeal, Jan. T. '84, 267.]

PARTY WALLS, injunction to prevent placing of openings in. (C. P.) McCall *v.* Barrie, 419.

PASSENGER RAILWAYS. See Common Carriers, Railroads.

PATENT. An interest in cannot be sold under a fi. fa. (C. P.) Harrington *v.* Cambridge, 456.

PAYMENT under duress, what is. See Municipal Claims. (C. P.) Lawrence *v.* City, 421.

PLEADING. Declaration, facts stated by way of inducement. (C. P.) W—— *v.* D——, 239.

When additional counts in foreign attchments may be filed. (C. P.) Sims *v.* Stribler, 29.

A demurrer generally to a declaration is bad if one count be good. (C. P.) Wilkinson *v.* Starr, 359.

A plea of "nil debet" in an action upon a bond is bad. (C. P.) Commonwealth *v.* Russell, 228.

All merely formal defects or omissions in the pleading are cured by verdict, and even though the declaration fail to aver facts necessary to sustain the action, it is to be presumed they were proven at the trial. Quick *v.* Miller, 1.

PLEDGE, possession not necessary when subject matter is intangible, as a partnership interest. Wallace's Appeal, 164.

POSSESSION, of land, effect of as notice of adverse claim. See Vendor and Vendee. Rowe *v.* Ream, 293. See Pledge.

POST-NUPTIAL SETTLEMENT, when sustained in equity. See Husband and Wife. Burkholder's Appeal, 234.

POWER OF APPOINTMENT, effect of on spendthrift trust. See Trusts and Trustees. Swaby's Appeal, 553. (O. C.) King's Estate, 77.

Of surviving executor to sell under power in will. See Decedents' Estates. (C. P.) Lippincott *v.* Phila. Trust Co., 125.

When power to sell includes power to mortgage. See Mortgage. Wurfflein *v.* Haines, 76.

See Conversion.

PRACTICE. The equitable owner of a chose in action can bring an action thereon in the name of the legal plaintiff, who cannot prevent such use of his name. (C. P.) Coffey *v.* White, 108.

Such equitable plaintiff, however, is alone liable for the costs if defeated. Ib.

A municipal corporation cannot be served with process, except in the place of its location, and a sheriff has no power to go beyond his bailiwick to effect such service. Potts *v.* Pittsburgh, 38.

The service of a summons will be set aside when the defendant has been decoyed into the jurisdiction. (C. P.) Wood *v.* Trust Co., 127.

Sufficiency of affidavit of cause of action to sustain a capias for trover and conversion of shares of stock. (C. P.) Craven *v.* Coates, 90.

An affidavit to support a capias for slander must allege expressly what words were spoken. (C. P.) Kasper *v.* Newhouser, 128.

Sufficiency of affidavit for capias for trespass in master of vessel for an assault committed by the mate in his presence. (C. P.) Wedman *v.* Kendall, 157.

A ca. sa. will not lie upon a judgment in an action of assumpsit upon a warranty, although fraud be averred in the narr. (C. P.) Fleming *v.* Maguire, 210.

A capias cannot issue against a witness while he is in attendance at court. (C. P.) Wilson *v.* Byrd, 438.

An appearance entered for a corporation by an attorney employed by the *de facto* officers of a corporation will not be stricken off. (C. P.) Woodward *v.* Church, 240.

In actions upon torts a bill of particulars is a matter of grace, not of right. (C. P.) Glaser *v.* Lewis, 228.

A non pros. will not be entered at the expiration of a year for want of a narr., when a transcript from a magistrate's judgment has been filed. (C. P.) Allison *v.* McFadden, 210.

But the plaintiff must signify his election to treat the transcript as a narr. (C. P.) Henderson *v.* Miller, 422.

Confession of judgment by one partner. See Partnership. (C. P.) Huber *v.* Grossman, 157.

Warrant of attorney to institute action when sufficient. (C. P.) Coffey *v.* White, 108.

Where a rule to plead has been inadvertently filed, it may be withdrawn, even though a plea has been filed, so as to enable judgment for want of an affidavit of defence. (C. P.) Richards *v.* Johnson, 273.

A judgment entered for want of a plea on the same day that a plea is filed, although the judgment be first entered, will be stricken off. (C. P.) Comerford *v.* McKeever, 472.

Where judgment is entered by default for want of a plea, the Court under the Act of May 22, 1722, may

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PRACTICE—*Continued.*
direct that the damages be assessed by the jury at the next term of Court. (C. P.) McHenry *v.* Union Pass. R. W. Co., 404.

It is not too late to apply for security for costs after the case is at issue. (C. P.) Hickok *v.* Park Association, 12.

Severance of issues upon an interpleader, when allowed. (C. P.) Gray *v.* Bradley. 92.

A rule to strike off a judgment will not be entertained where the ground upon which the rule is based has been considered and passed upon by the Supreme Court on a writ of error, brought on account of the refusal of the Court below to open the judgment. (C. P.) McCormack *v.* Spackman, 257.

When the record of a Court of competent jurisdiction shows that a suit has been discontinued, the entry will be presumed by another Court to have been properly made. (C. P.) Huston *v.* Clark, 418.

The refusal to grant a compulsory nonsuit is not the subject of writ of error. Easton *v.* Neff, 206.

Trial and its incidents. When judgment entered by warrant of attorney in a bond is opened, it is usual to go to trial on the merits without narr. or plea. If it is important to have the issue defined, a feigned issue may be framed, or a formal narr. and plea filed. (C. P.) Philadelphia *v* McCuen, 453.

Actions for the recovery of wages for manual labor take precedence on the trial list. (C. P.) Creary *v.* McAnally, 255.

A party cannot under the guise of cross-examination lead out matter constituting his own case, where such matters are not introduced in the examination in chief, or do not go to the bias or interest of the witness. Hughes *v.* Westmoreland Coal Co., 463.

Where the defendant is improperly allowed to cross-examine the plaintiff's witness and educe matter of defence, the testimony so drawn out should be considered as if the witness had been called and examined in chief on the part of the defendant. Under such circumstances, it is error for the Court to order a nonsuit on the ground that the plaintiff's own witness had testified to matters constituting a good defence. Ib.

Where a witness is competent to testify as to some matters and incompetent as to others, the objection must point to the matters to which he is incompetent to testify. Zuver *v.* Clark, 36.

Upon a trial of an issue framed to determine the amount due upon a judgment note, the plaintiff may offer the note in evidence in order to follow it with evidence showing that the Statute of Limitations, which has been pleaded, was tolled. Herman *v.* Rinker, 541.

The testimony of one witness given in the support of an oral contract no matter how flatly contradicted, should be submitted to the jury. They are to judge of the credibility of the witnesses. Weaver *v.* Craighead, 116.

The construction of a written contract in which there is no latent ambiguity is for the Court, and not for the jury. Hughes *v.* Coal Co., 463.

The nominal parties to the record upon an issue *devisavit vel non* cannot consent to a verdict which will bind parties affected, who do not join in the agreement. (C. P.) Hambleton *v.* Mendenhall, 172.

All that part of the charge which relates to the specific points excepted to, should be entered on the bill of exceptions. (C. P.) Yardley *v.* Cuthbertson, 29.

After verdict, there is a presumption that everything was done at the trial which was necessary to support the action, unless the contrary appear on the record. Quick *v.* Miller, 1.

A motion for a new trial may be granted *nunc pro tunc* if application be made at the term in which the verdict was entered. Lance *v.* Bonnell, 385.

An affidavit of a party must not be made before counsel in the cause. (C. P.) Geyn *v.* Clark, 423.

Where an attachment is laid after a levy by the sheriff, the practice is to allow the sheriff to sell and rule the money into Court. (C. P.) Brooks *v.* Salin, 390.

Sheriff's sale, when set aside. (C. P.) Trust Co. *v.* Herr, 390.

Recovery of possession by sheriff's vendee. See EXECUTION. Wanger *v.* Graham, 343.

Time within which exceptions must be filed to auditor's report. (C. P.) *In re* Estate Samuel Croft, 437.

See AFFIDAVIT OF DEFENCE LAW. AMENDMENT. ATTACHMENT. COSTS. CRIMES. EQUITY. ERRORS AND APPEALS. EXECUTION. JUDGMENT. JUSTICE OF PEACE. ORPHANS' COURT. PLEADING.

PRECATORY WORDS in will do not create trust. See WILL. Bowlby *v.* Thunder, 457.

PRESUMPTIONS. Payment of legacy when presumed from lapse of time. (O. C.) Hobson's Estate, 48.

Presumption of regularity of records and official actions after lapse of time. McFate's Appeal, 543.

Presumption of payment of bond after twenty years, how rebutted. See BOND. (O. C.) Griffith's Estate, 486.

PRINCIPAL AND AGENT. Declarations of secretary of a corporation as to amount due on a mortgage are not admissible, unless it be shown that he had authority to bind the corporation by such admissions. Johnston *v.* Building Asso., 247.

The relationship of an agent cannot be established by his own declarations. Creighton *v.* Boudinot, 556.

Power of insurance corporation to delegate to agents the conduct of its business. See INSURANCE. Mercer Co. Ins. Co. *v.* Stranahan, 495.

A conveyancer entrusted with the possession of an executed mortgage by the mortgagor has no implied authority to receive the mortgage money. (C. P.) Philada. Trust Co. *v.* Roberts, 123.

Absence of power to contract for sale of land. See FRAUDS, STATUTE OF Heinicke *v.* Krouse, 106.

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PRINCIPAL AND SURETY. A principal cannot enjoin his creditor from proceeding against the surety merely because he himself has a good defence. (C. P.) Riegel *v.* Riegel, 303.

When a contract of suretyship runs with the land and may be sued on by an assignee of the reversion. (C. P.) Taylor *v.* Kennelly, 124.

Liability of surety for payment of amount due on a building association mortgage. See BUILDING ASSOCIATION. Johnston *v.* Building Asso., 247.

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PUNITIVE DAMAGES. See DAMAGES. Bruce *v.* Reed, 161.

QUO WARRANTO, may issue on the information of a district attorney to test the right of certain persons to exercise the functions of a school board. Gilroy *v.* Commonwealth, 428.

A previous rule to show cause is not necessary; if at any time during the proceedings it appears that the writ was improvidently granted, the Court will refuse to entertain it. Ib.

Jurisdiction of Common Pleas of Dauphin County in proceedings in *quo warranto.* (C. P.) Commonwealth *v.* Penna., Slatington, and N. E. R. R. Co., 60.

RAILROADS. A railroad company is a private corporation, and is embraced within the provisions of Art. XVI. § 4, of the Constitution. Pierce *v.* Commonwealth, 97.

Article on Railway Receivers, 521.

Action on guaranty of railroad bonds, when judgment can be obtained for want of an affidavit of defence. (C. P.) Pennypacker *v.* Camden and Atlantic R. R. Co., 158.

Practice on report of viewers to assess damages, from what time interest will be allowed. (C. P.) Ross *v.* Railroad, 143.

An agreement by a landowner to sell a right of way over his premises for a fixed sum to a railroad company, covers all damages of whatsoever nature suffered by the landowner. North Branch R. W. Co. *v.* Swank, 444.

Under what circumstances a railroad company will be compelled by mandamus to reconstruct a turnpike occupied for its road-bed. Pittsburgh, etc., R. W. Co. *v.* Commonwealth, 177.

Action on the case against railroad for consequential damages suffered by the building of a road, when maintainable. See CONSTITUTIONAL LAW. (C. P.) Patent *v.* R. R. Co., 545.

Taxation of railroads in Pittsburgh. See TAXES. R. R. Co. *v.* Pittsburgh, 268, 333.

Taxation of wages certificates. See TAXES. (U. S. C. C.) P. & R. R. R. Co. *v.* Pollock, 275.

Contract for service of minor as apprentice in shops of Penna. R. R. See CONTRACT. Penna. R. R. Co. *v.* Bost, 84.

Action against for setting fire to an adjacent ice house. See NEGLIGENCE. Ins. Co. *v.* R. R. Co., 554.

Limitation of damages in action against. See CONSTITUTIONAL LAW. Lewis *v.* Hollahan, 505.

Penalty for obstructing street occupied by passenger railway. Commonwealth *v.* Donaldson, 528.

Liability for injury suffered by passenger sitting with his arm on window. See NEGLIGENCE. Germantown Pass. R. W. Co. *v.* Brophy, 213.

Right of passenger railway to proceed by mandamus against board of surveyors to compel them to give a location for the road. (C. P.) Commonwealth *v.* Smedley, 402.

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Trustees have no power to refer a case under the Act of May 14, 1874. (C. P.) Lynch *v.* North, 437.

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Release, of bond of purchaser at tax sale by one of several tenants in common, effect of. See TAX SALES. Petriken *v.* Myton, 71.

REPEAL, of Statutes. See STATUTES.

REPLEVIN, when maintainable for railroad coupon bonds. Gibson *v.* Lenhart, 149.

Where one has a judgment in replevin, and a property bond has been given, his use of the judgment as a set off, and a certificate by the jury of a balance due him, in which judgment is entered, does not so extinguish the replevin judgment as to prevent a recovery on the property bond; the subsequent judgment on the certificate being the measure of liability. Jennings *v.* Hare, 72.

RES ADJUDICATA. The satisfaction of a judgment is a bar to its opening. (C. P.) McCalla *v.* Brennan, 513.

What facts will sustain a plea of former recovery. Alcott *v.* Hugus, 355.

A judgment upon a scire facias upon a mechanic's lien confirms all the averments contained in the claim filed, which thereby become *res adjudicata* against all persons parties to the record, whether as owners or contractors. Weaver *v.* Lutz, 251.

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REVENUE COMMISSIONERS, power of board of. See TAXES AND TAXATION. Commonwealth *v.* Philadelphia, 371.

ROADS, HIGHWAYS, AND BRIDGES. Under the Act of June 13, 1874, an appeal from the assessment of a road jury must be taken within thirty days from the time the jury file their report, and not from the time that the report is confirmed. The fact that exceptions have been filed to the report does not extend the time within which an appeal may be taken. *In re* Road in Nescopeck, 559.

A turnpike road is a public highway, and upon the forfeiture and repeal of the charter of the turnpike company, the public right of way does not revert to the owner of the fee. The road still remains for the public use though discharged of tolls. Pittsburgh R. R. Co. *v.* Commonwealth, 177.

What is an obstruction of a street occupied by a passenger railway which will render the offender liable to the penalty prescribed by the Act of April 8, 1859. (C. P.) Commonwealth *v.* Donaldson, 528.

Sale of lot bounded by street. See VENDOR AND VENDEE. Transue *v.* Sell, 397. See COUNTIES, MUNICIPAL CORPORATIONS, NEGLIGENCE.

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SALE. What is a sufficient acceptance of an offer to sell. (C. P.) Bruggeman *v.* Larzelere, 108. See CONTRACT, VENDOR AND VENDEE.

SCHOOLS. A vacancy occurring in the office of school controller in cities of the third class is to be filled by the Board of Controllers until the next municipal election, when the voters of the ward are to elect a controller to serve until the expiration of the term

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in which the vacancy occurred. Commonwealth *v.* Evans, 8.

A *quo warranto* may issue on the information of the district attorney to test the right of certain persons to exercise the functions of a school board. Gilroy *v.* Commonwealth, 428.

Where by mistake a school board has been organized with too many members, a whole new board cannot be chosen at the ensuing election. The vacancies occurring in the board by resignation, or by the completion of terms of office can alone be filled. Ib.

SECURITY FOR COSTS. See Costs.

SET-OFF. Under what circumstances, one judgment can be set off against another. (C. P.) Gunn *v.* Dickey, 274.

In an action against a mining company for polluting a stream, the fact that they have increased the flow of water is not admissible by way of set-off. Sanderson *v.* Coal Co. 81.

A member of a building association who has borrowed money from the association cannot prove as a set off to an action therefor that the association suspended business subsequently to the loan, and that he suffered pecuniary loss of profit on account of such suspension. Johnston *v.* Building Asso., 247.

In an action of trover against a real estate broker, who had retained the plaintiff's papers under a claim of lien for charges, the defendant cannot defend by using his charges as a set off against the plaintiff's damages. Arthur *v.* Sylvester, 417.

Set-off is not admissible in proceedings to recover meadow assessments by a meadow company. Kingsessing Co. *v.* Farrell, 240.

Set-off in replevin. See Replevin. Jennings *v.* Hare, 72.

SHEEP liability of county for killing. See Counties. Wetherill *v.* Delaware County, 42.

SHERIFF. A sheriff has no power to serve a writ outside his own bailiwick, except when expressly authorized by statute. Potts *v.* Pittsburgh, 38.

Where it is the official duty of a sheriff to board the prisoners in the county jail, the sum secured to him by law as compensation for this service is an emolument within the meaning of the Constitution of Pennsylvania, Art. III. § 13, which cannot be increased or diminished during his term of office. Apple *v.* Crawford County, 322.

Where at the beginning of a sheriff's term of office his compensation for boarding prisoners in the county jail is fixed by law at a certain rate per diem, the law cannot be so altered during the sheriff's term of office as to make his compensation for such service rest in the discretion of a majority of the Judges of the Court of Quarter Sessions. Apple *v.* Crawford County, 322.

Action on sheriff's official bond, when not maintainable for money duly paid to the prothonotary and by him misappropriated. King *v.* Commonwealth, 219.

SHERIFF'S SALES. See Execution.

SHIPS AND SHIPPING. Collision, duty of steamers meeting in a river. (U. S. D. C.) Scots Greys *v.* Santiago de Cuba, 95.

SINKING FUND COMMISSIONERS. Mandamus against when granted. Commonwealth *v.* Sinking Fund Commissioners, 222.

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SLEEPING CAR COMPANY, liability of, for theft. See Negligence. Pullman Car Co. *v.* Gardner, 17.

SPEND-THRIFT TRUSTS. See Trusts.

STATUTES. Implied repeals of Statutes are not favored. Susquehanna Boom Co. *v.* Commonwealth, 65.

A local statute conferring special privileges is not repealed by a subsequent general statute legislating for the whole State, unless the later Act contain express words of repeal, or the provisions of the two Acts are so repugnant as to be irreconcilable, and not capable of exercise together. Harrisburg *v.* Sheck, 280.

STENOGRAPHER, pay of. See Courts. (C. P.) Wilson *v.* Philadelphia, 74.

STOCK, lien upon for debt due the corporation. See Corporation. Merchants' Bank *v.* Shouse, 133.

STOCKHOLDERS, liability of to assessmen for debts. See Corporation. Bunn's Appeal, 193.

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SUBSCRIBING WITNESSES, proof of handwriting of. See Evidence. Mackrell *v.* Wolff, 249.

SUPREME COURT, application to, for appointment of commission to report on condition of prisoner, when refused. *Ex parte* McGinnis, 221.

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TAXES AND TAXATION. The exemption had by houses of public worship from taxation extends to exemption from liability to pay municipal claims. Erie *v.* Church, 232.

Where there is an attempt on the part of school directors to levy and collect a building tax in one year for the purpose of using a portion so collected to pay a deficit in the general fund for the preceding year, a court of equity will enjoin the collection of so much of the tax levied for building purposes as is not needed therefor. Delano Land Co. *v.* Conners, 155.

A tax levied as a building tax must be used in good faith for that purpose alone. Ib.

A steamship company incorporated in Pennsylvania and engaged in the business of transporting freight and passengers between ports of the United States, and between such ports and foreign countries, is liable as to its receipts from ocean freight in the foreign and inter-state trade, to the tax on gross receipts imposed by the Acts of March 20, 1877, and June 7, 1879. Philadelphia and Southern Mail S. S. Co. *v.* Commonwealth, 23.

Those Acts are not in respect to such tax, in contravention of Art. I. § 8, of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States. Ib.

Liability of the Susquehanna Boom Co. to taxation on logs rafted, and, also, upon dividends declared. Susquehanna Boom Co. *v.* Commonwealth, 65.

Under the Act of January 4, 1859, real estate of railroad companies situated in Pittsburgh, though such as is ordinarily appurtenant thereto, and necessary for their operations, is liable to taxation for city purposes. Penna. R. R. Co. *v.* Pittsburgh, 268, 333.

The real estate of a street passenger railway is within the meaning and spirit of an Act making the real estate of "railroads" liable to taxation, though the railroad was not incorporated till after the passage of the Act. Ib.

Where the surface of lands and the minerals in place thereunder have been severed by the agreement

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TAXES AND TAXATION—*Continued.*
or conveyance of the owner and the respective divisions have become vested in different owners, the municipal authorities are bound to levy their taxes accordingly, and each owner can be made responsible only for the tax on his interest. Sanderson *v.* Scranton, 409.

Liability of holder of recorded legal title to pay taxes. King *v.* Building Asso., 448.

Assessors must list and assess the persons and property taxable in their several wards, townships, and districts, and make return of the same to the County Commissioners or Board of Revision of Taxes, whose duty it is to correct errors and supply omissions in the assessments, and return the same to the Board of Revenue Commissioners. (C. P.) Commonwealth *v.* Philadelphia, 371.

It is the duty of the Board to equalize taxation in the various counties and cities of the Commonwealth, by adjusting the valuation on the returns made by the same. Ib.

Powers and duties of the Board of Revenue Commissioners, defined and discussed. Ib.

Assessments by Meadow Company, action upon. (C. P.) Kingsessing Co. *v.* Farrell, 240.

The wages certificates of the Philadelphia and Reading R. R. Co. are not liable to taxation under the U. S. Internal Revenue Act. (U. S. C. C.) P. & R. R. R. Co. *v.* Pollock, 275.

Tax Sales, bond of purchaser to secure purchase money, release of, by tenant in common. Petriken *v.* Myton, 71.

TELEGRAPH COMPANY. Liability for refusal to accept message under the Act of March 29, 1845. (C. P.) Commonwealth *v.* Western Union Co., 535.

TENANTS IN COMMON, right of one of several, to release bond of purchaser. Petriken *v.* Myton, 71.

TERRE-TENANT, right of to stay of execution. See EXECUTION. Ellis *v.* Cadwallader, 12, 400.

TESTAMENTARY CAPACITY. See WILL.

TORTS. Liability of husband for tort of wife. See HUSBAND AND WIFE. Quick *v.* Miller, 1.

TRESPASS ON THE CASE. An action on the case will not lie by a creditor against an executrix of a decedent for a failure on the part of the latter to exercise promptly a discretionary power to sell real estate given her in the will, whereby injury accrues to the plaintiff. Erie Savings Bank *v.* Vincent, 320.

While an unfulfilled promise will not sustain an action for deceit, still, if the promise include a misrepresentation of then existing facts, the action may lie. (C. P.) Wilkinson *v.* Starr, 359.

An action on the case may be maintained for disease produced by an assault on the person. (C. P.) W—— *v.* D——, 239.

Sufficiency of affidavit for capias. See PRACTICE.

TROVER, may be maintained for papers wrongfully detained by the defendant under a claim of lien for charges. Arthur *v.* Sylvester, 417.

Trover will not lie unless there has been a demand and refusal. Taylor *v.* Hanlan, 6.

In trover for a horse, the plaintiff cannot recover for its unskilful medical treatment. Ib.

TRUSTS AND TRUSTEES. That an unincorporated association not a charity is subject to the sole government and control of a superior association does not deprive the Common Pleas of its jurisdiction to compel certain trustees of the subordinate association and removable at its pleasure to transfer the trust

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estate to new trustees duly chosen. (C. P.) Brown *v.* Griffin, 358.

The jurisdiction in equity for the enforcement of a trust is full and complete. George Socher's Appeal, 381. (C. P.) Fidelity Co. *v.* Norris, 225.

Practice upon petition to Common Pleas for appointment of trustees of unincorporated society. (C. P.) *In re* Massasoit Tribe, 92.

Trustees have no power to refer a cause under the Act of May 14, 1874. (C. P.) Lynch *v.* North, 437.

What is sufficient evidence of supine negligence in trustee in making mortgage investments. (O. C.) Smith's Estate, 93.

A reasonable degree of vigilance and care such as a man would exercise over his own affairs, and the exercise of good faith, is the standard of a trustee's duty. Fahnestock's Appeal, 50.

Where a trustee acting in good faith and in the exercise of his discretion, retained securities which came to his hands as assets of the trust estate, the fact that such assets depreciated in value and caused loss to the estate is not cause for surcharge of the trustee, nor will he be on that account deprived of compensation for services and for expenses attending the exercise of the trust. Ib.

Distinction between an express trust and a trust *ex maleficio* discussed, and the principles stated applied. Salter *v.* Bird, 152.

A trust is not created by the use of precatory words. (C. P.) Bowlby *v.* Thunder, 457.

A deed to B., "as the separate estate of B.," *habendum* "to the said B. her heirs and assigns as the separate estate of B." does not create a separate use trust. Richardson *v.* Aiken, 491.

In creating a sole and separate use trust by will, the will speaks from the date of its execution, if the devisee is neither married nor in contemplation of marriage at that time, it is beyond the power of the testator to create the use, and the fact that she was a married woman at the time of the testator's death will not alter the case. Neale's Appeal, 179.

Where there is a provision that a fund with its accumulations shall go to the children of minor grandchildren dying in their minority, the grandchildren are nevertheless entitled to a proper allowance out of the fund, and the rights of subsequent takers are subordinate to this provision, Query, whether such a limitation be void under the Act of 1853. (O. C.) Furness Minors' Estate, 391.

Where duties of active management are imposed on a trustee, the trust is active not passive. (O. C.) Ryan's Estate, 79.

The grant of a power of appointment to the cestui que trust does not subject an estate put in spendthrift trust to his debts. Swaby's Appeal, 553. King's Estate, 77.

A direction in a will to pay the interest of ten thousand dollars to a legatee during her natural life, and after her death to divide the said principal sum of ten thousand dollars equally among her then surviving children, is not a direction to invest that sum for the benefit of such children so as to entitle them to receive the increase in value of the securities purchased by the trustees with the fund awarded them by the Orphans' Court to secure the annuity. Such increase goes to the residuary estate. Middleton's Appeal, 184.

Apportionment of interest between life tenant and remainder-man upon municipal and corporate loans. See APPORTIONMENT. (O. C.) Truefitt's Estate, 242.

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UNDUE INFLUENCE. See WILLS.

UNINCORPORATED SOCIETY. Jurisdictions in equity over. See TRUSTS AND TRUSTEES. (C. P.) Brown *v.* Griffen, 358. *In re* Massasoit Tribe, 92.

Embezzlement by treasurer of. See CRIMES. Commonwealth *v.* Volz, 289.

USURY, in building association mortgage, who is not permitted to allege. See BUILDING ASSOCIATIONS. Johnston *v.* Building Asso., 247.

VENDOR AND VENDEE. On the sale of a lot bounded by a street the title passes to the centre of the street, if the grantor had title to the land covered thereby. Unless he reserved it either expressly or by clear implication. Transue *v.* Sell, 397.

Where one who is the owner of land sells and conveys lots according to a plan which shows them to be on a street or alley, this creates an implied covenant of the existence of the street or alley, and operates as a dedication to public use. The fact that it does not appear on the borough maps or plans is immaterial as between parties claiming under the original owner and affected with knowledge of his plan. Ib.

It is a sufficient ground for setting aside an Orphans' Court sale that there was a mistake of twenty-five per cent. in the number of acres sold, and that there was puffing and fictitious bidding at the sale. Schug's Appeal, 49.

Where a person whose name does not appear in the line of title is in possession of property actually living thereon under claim of title, a mortgagee is put upon notice of the title under which such person claims. Rowe *v.* Ream, 293.

VERDICT, effect of in curing defects in pleadings. See PLEADINGS. Quick *v.* Miller, 1.

WAGERING POLICY. See INSURANCE.

WAGES, priority of in distributing proceeds of sale. See EXECUTION. Llewellyn's Appeal, 69. Jacobs *v.* Woods, 237. Matsinger *v.* Covenant Co., 90.

Precedence of action for on trial list. See PRACTICE. (C. P.) Creary *v.* McAnally, 255.

Right of parent to wages of child. See PARENT AND CHILD. Beaver *v.* Bare, 53.

WAIVER. See INSURANCE.

WARRANT OF ATTORNEY. See PRACTICE

WILL. What not sufficient evidence of testamentary incapacity and undue influence to justify the awarding of an issue *dev. vel non.* (O. C.) Eddy's Estate, 551.

The fact that a testatrix immediately before signing her will was in a condition of great mental excitement is not enough to warrant the granting of an issue. Linton's Appeal, 473.

The fact that the confidential adviser drawing a will is made one of the executors creates no presumption of undue influence or bad faith. Ib.

A married woman's will must be signed by her in the presence of two witnesses, neither of whom must be the husband, and they shall see her sign, or receive an acknowledgment of the genuineness of the signature. Ib.

It is not necessary that the subscribing witnesses should know that the testatrix knew that the paper which she signed was her will, or that she formally published or declared it to be her will in any other way than by signing it and requesting them to witness the genuineness of her signature. Ib.

The Court will not decree a partial distribution while an issue *dev. vel non* is undetermined, even where the same distributees would take under the intestate laws, and an ample fund would remain to

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protect undetermined interests. (O. C.) Neal's Estate, 258.

The Orphans' Court has no power to compel executors named in a will to take out letters testamentary. (O. C.) Langton's Estate, 46.

A verdict cannot be taken by agreement in an issue *dev. vel non* unless all persons interested in the controversy assent thereto. (C. P.) Hambleton *v.* Mendenhall, 172.

Conclusiveness of probate after five years. See LIMITATIONS. Cochran *v.* Young, 345.

An agreement to settle a dispute as to the construction of a will is valid. Wilen's Appeal, 539.

A will in favor of a charity executed February 27, 1883, is good when the testator died March 28, 1883. (O. C.) Rachel Parker's Estate, 566.

As to the validity of a trust for a woman in contemplation of marriage, the will speaks from the date of its execution. Neale's Appeal, 179.

The Act of June 4, 1879, affects only the property devised; it does not create a disposing power in the testator just before his death which he did not possess when he executed the will. Ib.

In a devise to A. for life with the remainder to her lawful issue and the heirs and assigns of such issue, the word "issue" is a word of purchase, and not of limitation, giving A. an estate for life only. (C. P.) Carroll *v.* Burns, 272. [Affirmed by the Supreme Court, but a reargument has since been ordered.]

When a parent or ancestor in designating the object of her bounty speaks of "the children," the more reasonable construction is that children in being, or those likely to be born of an existing marriage, were intended, rather than those who, at some remote and indefinite future time, might possibly be born of a marriage neither existing nor in contemplation. Webb *v.* Hitchins, 434.

A devise made, in 1844, to A. and B. "and their heirs as tenants in common, and not as joint tenants: but if the said A. should die without leaving lawful issue, then and in that case," his moiety to go "to B., his heirs and assigns forever," passes to A. a fee-tail, which may be barred by deed. Lawrence *v.* Lawrence, 460.

A gift of personalty to a wife "for the support and maintenance of herself," with a bequest of certain sums after her death, "should such amounts be remaining," operates as an absolute gift to the wife. (O. C.) Watson's Estate, 309.

An obscure will construed to carry an estate per stirpes, and not per capita. Osburn's Appeal, 299.

Although words of survivorship may be wanting, they will be implied when the intent is clear. (O. C.) Allen's Estate. 439.

Words of desire, recommendation, and confidence are insufficient to create a trust. Bowlby *v.* Thunder, 457.

A will construed to create a vested, not a contingent, remainder. (O. C.) Clark's Estate, 94.

A devise, after a life estate of the income, "to the children of B. born and to be born in equal shares and proportions until the youngest shall be twenty-one," when a division of the principal was to be made among the children then living, and the issue of those deceased: *held,* that the date of the majority of the youngest child fixed the period of distribution. (O. C.) Bonaffon's Estate, 501.

Will construed not to evidence an intention to deprive a surviving executor of the power to sell conferred upon three. Lippincott *v.* Trust Co., 125.

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